

and lecture illustration in greater detail of the more informatory aspects of the materials issued would complete the remainder of the course work.

It should be emphasised that the students undertaking such a course would at the same time be undertaking courses in Legal History and in Constitutional History designed to supply the traditional background needed by a common lawyer. Furthermore, it is believed that the first year should include one common law subject (perhaps Contracts or Criminal Law) in which the students will have to struggle with case-law and in which "spoon-feeding" would be at a minimum.

It is submitted that the design of such a *course* is a separate problem from the design of the introductory *book*, which should precede the course and be used in support of the course throughout.

Professor Hood-Phillips' book, insofar as it attempts to be both the introductory material and the course itself, fails fully to achieve the general aim asserted in this review. It fails because it is trying to be both things at once. Insofar as an attempt to be both things at once can be successful, Professor Hood-Phillips' book is to be applauded. It is, and will continue to be, a considerable aid to those law teachers who have the fascinating but perhaps unenviable task of conducting a first course for law students.

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DEAD BODIES

Recent legislation in two Australian states and a Bill at present before the N.S.W. Parliament¹ have focussed attention on the subject of dead bodies and on the rights, duties and obligations which attach to their disposal.² In South Australia there have been passed two Acts amending the Anatomy Act³ and Tasmania has passed one such Act.⁴

The class of persons in the community which is probably the most closely associated with the subject of dead bodies and their disposal is that of coroners, on whom falls the duty of inquiring into the cause of death in cases where they have reasonable cause to suspect that a person has died either a violent death or an unnatural death or has died a sudden death the cause of which is unknown. However, it is not proposed to deal in detail with the rights and duties of coroners, a matter on which legal practice is fairly well settled,⁵ nor discuss the position of medical practitioners⁶, but to confine the present note

are suggested as material for study.

PART IV.

Chapter XII: What then is law, and what is the Law? This chapter, using materials described in the previous chapters, attempts to introduce the student to some of the general theories about Law at a very elementary level. Some explanation of the Austinian theory, and a brief introduction to some of the criticisms of that theory, seem to be the most appropriate way to introduce this area of thought to English and Australian law students at least.

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¹ Corneal and Tissue Grafting Bill, 1955 (N.S.W.). (Now Act No. 32 of 1955—*General Editor*.)

² Certain references have also recently been made in various newspapers to the alleged unlawful disposal of dead bodies, particularly of the bodies of persons who have died in hospitals.

³ Anatomy Act Amendment Act, 1954 (S. Aust.) No. 12, 1954; Anatomy Act Amendment Act (No. 2) 1954 (S. Aust.) No. 25, 1954.

⁴ Anatomy Act Amendment Act, 1954 (Tas.) No. 26, 1954.

⁵ On the subject of coroners generally and of their specific rights and duties, see *Halsbury's Laws of England* (3 ed.) 460ff.; *Halsbury's Statutes* (2 ed.) 834ff.

⁶ Apart from the direction of a coroner (as to which see n. 5 *supra*) and the provisions of the various Anatomy Acts (as to which see *infra* n. 64) a medical practitioner is not permitted by law to examine the body of a deceased person. (The Anatomy Acts make the receipt of a body for purposes of anatomical examination other than in accordance with the provisions of the Acts, a misdemeanour. See n. 135 *infra*.) Where a medical practi-

to aspects of the law relating to dead bodies which are of more general interest and in respect of which the law is less certain.

Under the English legal system there has always been provision, as there must be under any civilised legal system, that the bodies of persons dying within the territory over which the system operates should be decently interred or otherwise disposed of so as to prevent the creation of a nuisance. It is one of the curiosities of the English system that the persons on whom the duty of disposal falls have never been authoritatively determined, nor has it been established what is the precise nature and scope of the duty. In attempting to determine who shall be the person responsible for the disposal of a body in accordance with the somewhat indistinct principles of disposal laid down under the common law, one is forced to rely on the assistance of cases which are concerned solely with the liability to pay funeral expenses or with the liability for nuisance which arises from an unburied body and on a statute⁷ which while it clearly indicates on whom in the final resort the duty falls, nevertheless by its terms implies that there are other persons subject to the incidence of that duty without specifying who these persons are. However, it is a reasonable inference from the mass of case law on this subject that the following classes of person are under an obligation to bury the body of a deceased person: executor or administrator of a deceased testator or intestate; husband of a deceased wife and possibly wife of a deceased husband; parent of a deceased child and possibly child of a deceased parent; the occupier of the premises on which the body lies; the appropriate local authority, where it appears that no suitable arrangements are being made otherwise.

Authority for the proposition that an executor or administrator is under a duty to bury the body of his testator or intestate is provided by the cases of *Williams v. Williams*⁸ and *Green v. Salmon*⁹. In the former case, Kay, J. commenting on a passage from *Williams on Executors*,¹⁰ "And first he (the executor or administrator) must bury the deceased in a manner suitable to the estate he leaves behind him" says:¹¹ "It means, and I understand the law of the country to be, that *prima facie* the executors are entitled to the possession and are responsible for the burial of a dead body." Further authority is provided by the case of *Green v. Salmon*,¹² an action by an undertaker for funeral expenses against a person other than the executor, the defendant being alleged to have rendered himself liable in contract for the funeral expenses of the deceased. The question in issue in that case was whether one of the residuary legatees of the estate of the deceased was a competent witness for the plaintiff or whether he was disqualified by the interest he had in the result of the case. The basis on which the court decided that such a witness was not disqualified was that the estate was ultimately liable for so much of the cost of the funeral as the executor might reasonably pay and no more, so that the interest of the residuary legatee in the estate was not affected by the result of the action. Thus as early as 1838 it is submitted that the courts clearly recognised the liability of an executor to pay funeral expenses and along with this liability the duty to afford the body of the deceased a decent burial in accordance with his estate.

The liability of a husband for his wife's funeral expenses is recognised at least as early as 1788 in which year it was held in the case of *Jenkins v. Tucker*¹³ that a husband who had gone abroad to Jamaica was liable to recoup

tioner who has attended the deceased in his last illness is not satisfied as to the cause of death he is not entitled to make an examination for the purpose of ascertaining the cause of death (except as set out *supra*) but should refuse to give a certificate of death, following which the machinery of the law, requiring the registrar of deaths to report to the coroner any death in respect of which no medical certificate is given, will normally ensure that such examination is held under the coroner's direction.

⁷ National Assistance Act, 1948 (Eng.) 11 & 12 Geo. 6, c. 29, s. 50

⁸ (1882) 20 Ch. D. 659.

¹⁰ (6 ed. 1867) 906.

¹² (1838) 8 Ad. & E. 349.

⁹ (1838) 8 Ad. & E. 349.

¹¹ (1882) 20 Ch. D. 659, 664.

¹³ (1788) 1 H. Bl. 90.

a third party who voluntarily paid the expenses of the funeral of his wife, who had died in his absence, provided that the funeral was suitable to the rank and fortune of the husband: and this liability attaches notwithstanding that the expense is incurred without the knowledge of the husband. This decision was applied and extended in *Ambrose v. Kerrison*¹⁴ which decides that the husband is liable for the necessary expense of the decent interment of a wife from whom he has been separated, whether the party incurring such expense is an undertaker or a mere volunteer and notwithstanding that the husband was not informed of his wife's death until some time after the funeral. "There was a sufficient consideration to support this action for the funeral expenses though there was neither request nor assent on the part of the defendant; for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing and which common decency required at his hands."¹⁵ The principle laid down in these cases was further confirmed in *Bradshaw v. Beard*:¹⁶

It seems to me to be not at all unreasonable but on the contrary quite reasonable and proper, that the husband should be bound to provide Christian burial for his wife. According to our law, every person is entitled to a place where his bones may be at rest. *Prima facie* every person has a right to be buried in the churchyard of the parish in which he dies. In *R. v. Stewart*¹⁷ it was held by the Court of Queen's Bench that every person dying in this country, and not within certain ecclesiastical prohibitions, is entitled to Christian burial; and where no such prohibition attaches, it seems that every householder in whose house a dead body lies is bound by the common law to inter the body decently; and that, upon this principle, where the body lies in the house of a parish or union, the parish or union must provide for the interment. The law, therefore, has provided not only for the place where the burial is to take place, but also who shall be charged with the performance of the duty. Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty which the laws of nature and society make a moral duty. And upon his default, the law obliges him to recoup the reasonable expenses of the person who performs it for him."¹⁸

Some doubt may have been cast on a husband's liability for the burial of his deceased wife by the decision of the Court of Appeal in *Rees v. Hughes*.¹⁹ In that case a husband was held not to be liable for the funeral expenses of his wife who had died leaving an estate more than sufficient to pay for her funeral, the court deciding that the common law rule which prior to 1884²⁰ imposed such an obligation on the husband was based on the then status of a wife, her limited power to make a will and of the absence of her separate property and had now been abolished by the combined effect of the Married Women's Property Act 1884,²¹ the Law Reform (Married Women and Tortfeasors) Act, 1935²² and the Administration of Estates Act, 1925.²³ But this case, while abolishing the liability of a husband where the wife leaves an estate sufficient to pay her funeral expenses, does not purport to pronounce upon the position where his

¹⁴ (1851) 10 C. B. 777.

¹⁵ *Per* Lord Loughborough, *Jenkins v. Tucker* (1788) 1 H. Bl. 90, 93; 126 E. R. 55, 57, cited with approval and applied in *Ambrose v. Kerrison supra*.

¹⁶ (1862) 12 C. B. N. S. 344.

¹⁷ (1840) 12 Ad. & E. 773.

¹⁸ *Per* Willes, J. in *Bradshaw v. Beard* (1862) 12 C. B. N. S. 344, 348; 142 E. R. 1175, 1177.

¹⁹ (1946) K. B. 517 (C. A.).

²⁰ The year in which the Married Women's Property Act, 1884 (Eng.), 47 & 48 Vic., c. 14, came into effect.

²¹ Married Women's Property Act, 1884 (Eng.).

²² Law Reform (Married Women and Tortfeasors) Act, 1935 (Eng.); 25 & 26 Geo. 5, c. 30

²³ Administration of Estates Act, 1925 (Eng.), 15 & 16 Geo. 5, c. 23.

wife leaves no estate. "The question whether a husband still remains liable to pay his wife's funeral expenses if the wife leaves no estate, or if the wife's estate is insufficient to make this payment, does not arise in the present case, and I do not think that Scott, L.J. has expressed or that Tucker, L.J. intends to express any opinion on it. In these circumstances I propose to follow their example. The question may never come before the court for decision."²⁴ Accordingly it is submitted that there is no reason why it should be assumed that the old common law rule making a husband liable for the burial of his deceased wife has ceased to exist.

The liability of a wife for the burial of the body of her deceased husband is a question which has never been judicially determined. Prior to the Married Women's Property Act, 1884²⁵ there could be no point in bringing an action against a wife in respect of her deceased husband's funeral expenses as she had no separate property at law from which the debt, if any, could be satisfied, and since then the question does not appear to have arisen for determination; nor does there appear to have been any reported case of the indictment of a wife for the nuisance arising from her deceased husband's unburied body. However, the moral obligation of a wife to bury her husband's body can be no less than that of a husband to bury his wife's body and therefore it is submitted that in any case in which the question arose for decision it would now be held that a wife is subject to the incidence of the duty to bury her deceased husband's body.

The third possible class of persons who can, on the authorities, be said to be responsible for the burial of a dead body is the class of parent in respect of the bodies of their children. The authority for this proposition is a negative one, the inference of liability being drawn from the case of *R. v. Vann*²⁶ where it was held that a parent who has not the means of providing for the burial of his child cannot be indicted for a misdemeanour in not providing for its burial even though a nuisance be created by allowing the body to remain unburied and although the Poor Law authorities of the union have offered him money to defray its expenses of burial, by way of loan, as he is not bound under such circumstances to contract a debt.

It is true that a man is bound to give Christian burial to his deceased child, if he has the means of doing so; but he is not liable to be indicted for a nuisance, if he has not the means of providing burial for it. He cannot sell the body, put it into a hole or throw it into the river; but unless he has the means of giving the body Christian burial, he is not liable to be indicted even though a nuisance may be occasioned by leaving the body unburied, for which the parish officer would probably be liable.²⁷

In *Clark v. London General Omnibus Co. Ltd.*,²⁸ Lord Alverstone, C.J. stated his opinion that the enunciation of law in *R. v. Vann*²⁹ was correct and that at common law a parent having the means was under a legal liability to bury the body of his deceased child;³⁰ but Farwell, L.J. suggested that the obligation may be a moral obligation only.³¹ However, in the absence of decided authority on the point it is submitted that the correct rule and that most likely to be applied by the courts should the point arise for decision is that a parent is liable for the funeral expenses of his deceased child and accordingly it is further submitted that such liability implies the incidence of a duty of burial subject to this limitation, that no duty or liability shall lie where the person on whom the duty would otherwise lie has not the means to discharge it.

²⁴ *Per* Morton, L.J., *Rees v. Hughes* (1946) K.B. 517, 527.

²⁵ Married Women's Property Act, 1884 (Eng.).

²⁶ (1851) 2 Den. 325.

²⁷ *Per* Lord Campbell, C.J., *R. v. Vann* (1851) 2 Den. 325, 330.

²⁸ (1906) 2 K.B. 648 (C.A.). ²⁹ (1851) 2 Den. 325.

³⁰ *Clark v. London General Omnibus Co. Ltd.* (1906) 2 K.B. 648, 649.

³¹ *Id.* at 663.

The obligation of a child to bury his deceased parent is one which is not free from doubt, although it appears probable from the decision in *Chapple v. Cooper*³² that no such duty will lie where the child is an infant. In that case an infant widow was held to be bound by her contract for the furnishing of the funeral of her husband who had left no property to be administered. However, the special circumstances of the case were clearly pointed out by Alderson, B. who delivered the judgment of the court: "It may be observed, that as the ground of our decision arises out of the infant's previous contract of marriage it will not follow from it that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative."³³ The court clearly recognises the absence of a power in an infant, except in special circumstances, to contract effectively for funeral expenses, and accordingly, it is submitted, recognises the absence of liability for the burial of his parent or relative, for who can be responsible for the burial if he has not the power to contract for the expenses incidental thereto? But this argument has not force where the child is of full age; and therefore in the absence of decided authority and even of *dicta* directly relevant to the point, it is submitted that an infant of full age would be subject to a legal duty to bury the body of his deceased parent.

Whether or not the liability to bury extends beyond the relationships already discussed is another question on which there apparently exists no authoritative pronouncement. Certainly in those cases³⁴ in which funeral expenses are sought to be recovered from persons other than a husband or parent of the deceased, the action has been based on a contract to pay the expenses of the funeral and it may well be a reasonable inference that no such liability exists in the absence of an express contract. If this view is in fact sound, then it may well be that the law would refuse to recognise a legal obligation to bury in respect of a relative other than a spouse or parent or child although there can be no question of the moral obligation in such circumstances.³⁵

Authority for the liability of the occupier of the premises on which the body lies is provided by the case of *R. v. Stewart and Anor.*³⁶ where a rule for *mandamus* against the overseers of a parish for the burial of the body of a person who had died in hospital was discharged by the court.

We have no doubt therefore that the common law casts on someone the duty of carrying to the grave, decently covered, the dead body of any person dying in a state of such indigence as to have no funds for that purpose. The feelings and the interests of the living require this, and create the duty: but the question is, on whom it falls. . . . It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial: he cannot keep him unburied, nor do anything which prevents Christian burial: he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living.³⁷

In the final resort, however, any civilised legal community must provide that some readily ascertainable person shall be responsible for the decent interment of persons dying within the operation of such system, and such provision is now made by the National Assistance Act, 1948,³⁸ which lays down definite rules for the burial of bodies for whom no suitable arrangements are being made otherwise. Prior to the passage of this Act there appears to have been some doubt whether anyone was in fact responsible for the failure to bury

³² (1884) 13 M. & W. 252.

³³ *Id.* at 260, per Alderson, B.

³⁴ E.g. *Chapple v. Cooper*, *supra*.

³⁵ *Chapple v. Cooper*, *supra* at 260, passage cited.

³⁶ (1840) 12 Ad. & El. 773.

³⁷ Per Lord Denman, C.J., *R. v. Stewart & anor.* *supra*, at 778.

³⁸ National Assistance Act, 1948 (Eng.) *supra*.

a deceased who died without appointing executors and without relations, under the roof of a person who did not have the means to bury him. In such circumstances Lord Campbell suggests³⁹ that the parish authorities are liable by statute⁴⁰ to bury the bodies of persons dying within the parish and to charge the cost of burial to the parish. Conflicting authority is provided by *R. v Stewart and Anor.*,⁴¹ which seems to establish conclusively that the parish authorities are not liable for the burial of a person dying within the parish unless such person dies in the house of a parish or union. Whatever may have been the position previously, however, it is now quite clear that there is an obligation to dispose of the bodies not only of the poor and destitute but also of any person found dead within the area administered by the authority, including the bodies of persons found drowned,⁴² which obligation falls on every local authority, i.e. the borough or urban or rural district council or metropolitan borough council, provided that it appears to such authority that no suitable arrangements are being made otherwise.⁴³

Even with the classes of persons who are at common law under a duty to bury the body of a deceased person reasonably clearly established, however, there are still considerable difficulties in determining on whom, in any particular case, the duty falls. Clearly the appropriate local authority is in the last resort bound to discharge the duty, but the very words of the Act imposing this liability imply that there are other people who would normally be expected to make arrangements for the disposal of the body, that is, the type of liability envisaged by the Act is a secondary liability intended to arise only when the primary liability implied but not defined by the Act is not or cannot be discharged. But the law as to the person on whom the paramount duty of burial falls is not clear. If a married woman dies in her father's house, for example, does the liability fall on her executors, on her husband, or on her father either in his capacity of parent or as the occupier of the premises on which the body lies? At first glance one would expect the primary liability to fall on the executor, as it is from the estate assets in his hands that the person who initially bears the cost of the funeral will ultimately recoup himself. But such a solution is not free from difficulties, for it may well be that the executor appointed by a will will renounce his appointment after the death of the deceased but during the inevitable period of delay which precedes the grant of probate, and, further, in the case of a person who dies intestate, who but the court is to say what person or persons are entitled to a grant of administration: in either case the necessary delay attendant upon the final determination of the person on whom the duty lies would defeat the object of the rule, which surely must be to ensure the prompt burial of the body.

Accordingly it would appear to be most difficult, if not impossible, to establish precisely on whom in any particular case the duty to bury lies. The difficulty is not made any easier by the absence of authority directly on the point, but in such absence of authority can be seen the possibility of a practical, if not theoretical, solution to the problem, namely that common decency requires the immediate interment of the body of a deceased person, which interment is normally effected by some relative or close friend without regard to the legal problems involved. The problem of who should discharge the duty is one which does not arise until after the question of burial has been dealt with and until the question of liability for the payment of the funeral expenses is considered. But whatever be the order of priority between the various cate-

³⁹ *R. v Vann* (1851) 2 Den. 325, 330.

⁴⁰ 7 & 8 Vic., c. 101, s. 31.

⁴¹ (1840) 12 Ad. & E. 773.

⁴² Previously rural police constables, and in London, the overseers of the parish were liable for the burial of persons found drowned. 4 *Halsbury's Laws of England* (3 ed. 1953) 95.

⁴³ National Assistance Act, 1948 (Eng.) *supra*, s. 50.

gories, it is submitted that the law does clearly recognise a liability to dispose of the body of a deceased person incident on executors, husbands, parents, occupiers and, in the final resort, local authorities.

The next problem of legal interest which arises for consideration in relation to dead bodies is the problem of who, if anyone, is entitled to possession of a body. The basic principle of the law in this regard is that "there can be no property in the dead body of a human being".⁴⁴ This principle is based on the case of *R. v. Sharpe*,⁴⁵ a decision to the effect that it is a misdemeanour to remove without lawful authority a corpse from a grave in a burying ground belonging to a congregation of Protestant dissenters, and that it is no defence to such a charge that the motive of the person removing the body was pious and laudable. The defendant in that case was one of a congregation of Protestant dissenters, and his mother along with some of his relatives had been buried in the congregational burial ground. On the death of his father the defendant had represented to the person entrusted with the key to the burial ground that he wished to open his mother's grave for the purpose of burying his father in the same grave. On this pretext he obtained access to his mother's grave and caused her coffin together with her corpse to be removed towards the burial ground where he proposed to inter her with his father. The jury found as matters of fact that the removal was without the knowledge or consent of the trustees or congregation, that the guardian was induced to part with the keys by the pretext of the defendant and that the defendant was actuated solely by motives of affection and religious duty and did not intend any disrespect to his mother's corpse. On the facts the Court of Crown Cases Reserved⁴⁶ upheld the conviction for unlawfully digging up and taking away the body of a deceased person out of a grave. Erle, J. delivered the judgment of the Court in the following words:

Neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanour if the motive for the act deserved approbation. A purpose of anatomical science would fall within this category. Neither does our law recognise the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law as contradistinguished from ecclesiastical protection to consecrated ground depends upon this form of indictment: and there is no authority for saying that relationship will justify the taking of a corpse away from the grave where it has been buried. We have been unwilling to affirm the conviction on account of our respect for the motives of the defendant, but we have felt it our duty to do so rather than lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters.⁴⁷

This decision is approved and applied in *Williams v. Williams*,⁴⁸ a case in which a testator had directed the plaintiff to cremate his body and had directed his executors to repay to her the expense of so doing. The body having been buried in unconsecrated ground, the plaintiff obtained a licence from the Secretary of State to remove the body by representing that she intended to bury it in consecrated ground and thereafter caused the body to be burnt in Italy. This action was brought against the executors to recover the costs of carrying out the testator's directions. One of the grounds⁴⁹ on which Kay, J. dismissed the action was that

⁴⁴ *Per* Kay, J. in *Williams v. Williams* (1882) 20 Ch. D. 659, 663.

⁴⁵ (1856-1857) Dears. & B. 160.

⁴⁶ Consisting of Erle, J., Pollock, C.B., Willes, J., Bramwell, B., and Watson, B.

⁴⁷ *Per* Erle, J., *R. v. Sharpe* (1856-1857) Dears. & B. 160, 162-63.

⁴⁸ (1882) 20 Ch. D. 659.

⁴⁹ Others were that the removal of the body was illegal and that the act of removal for the purpose of cremation was unconscionable in Equity, being a fraud on the licence obtained from the Secretary of State.

It is quite clearly the law of this country that there can be no property in the dead body of a human being. That was declared to be the law in the case of *R. v. Sharpe*.⁵⁰ . . . That judgment entirely justifies my statement that the law of this country recognises no property in a corpse. . . . It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of.⁵¹

But to this general principle that no property is recognised in a dead body and that a testator cannot by will dispose of his body after death⁵² there are certain limited exceptions. The scope and extent of these exceptions is discussed in the Australian case of *Dodeward v. Spence*,⁵³ a majority judgment of the High Court on appeal from the Supreme Court of New South Wales from which leave to appeal to the Privy Council was refused. The subject-matter of that case was the stillborn corpse of a two-headed child, which had been born some forty years previously, and which the plaintiff sought to recover from the defendant, who had deprived him of it in connection with a prosecution for exhibiting it in public. The decision of the court proceeds on the premise that the plaintiff's possession was not shown to have been unlawful. Griffith, C.J. expressed his view that as the present case was one which had not previously arisen, no help could be obtained from the authorities. He held that while there could be no property at common law in a human body sufficient to support either an action in detinue or an indictment for larceny, nevertheless the continued possession of a body is not necessarily unlawful, particularly if such body be a mummy or a prepared skeleton or part of a collection of anatomical or pathological specimens.⁵⁴

In my opinion there is no law forbidding the possession of a human body, whether born alive or dead, for purposes other than immediate burial. *A fortiori* such possession is not unlawful if the body possessed attributes of such a nature that its preservation may afford valuable or interesting information or instruction. If the requirements of public health or public decency are infringed, quite different considerations arise.⁵⁵

Accordingly the Chief Justice, while expressing no opinion on whether the body the subject of the present case was within the authorities on corpses or on whether the public exhibition of such a body was lawful, held that the plaintiff was entitled to recover possession. Barton, J. reached the same conclusion on the basis that the body was not an ordinary corpse awaiting burial although he expressed views conflicting with those of the Chief Justice on the question of possession of bodies, holding that the only thing to do with a body is to give it decent burial and that it is a misdemeanour to prevent such burial even from laudable motives.⁵⁶ Higgins, J. in a dissenting judgment concurred in the view that there could be no property at common law in a dead body, but held that no skill or labour had been expended on the body in the present case to bring it within the category of objects on which skill and labour had been expended, e.g. mummies. Accordingly, although recognising a right of posses-

⁵⁰ (1856-1857) Dears & B. 160.

⁵¹ *Per* Kay, J., *Williams v. Williams* (1882) 20 Ch. D. 659, 662 ff.

⁵² A testator may by will, or even orally in England and some States of the Commonwealth, give effective directions for the anatomical examination of his body after death, subject to a right of objection in the surviving spouse or known relatives. A person may effectively prevent such examination (as to which see *infra*) and may also prevent the cremation of his body after death. 4 *Halsbury's Laws of England* (3 ed. 1953, 4, 97, 98, 121.)

⁵³ (1908) 6 C.L.R. 406.

⁵⁴ *Id.* at 410-415.

⁵⁵ *Id.* at 413, *per* Griffith, C.J.

⁵⁶ *Id.* at 415-417.

sion in favour of persons wanting the body for the purpose of burial, he held that the plaintiff in the present case was not entitled to possession as he did not require the body for such purpose.⁵⁷ "If we say that he is entitled to get possession he will be entitled to keep possession; for who is there that has title to take it from him? A right to keep possession of a human corpse seems to me to be just the thing which British law and therefore the New South Wales law declines to recognise."⁵⁸ From these judgments it is submitted that the basis on which the case must be regarded as having been decided is that while the law does not normally recognise property in a human body sufficient to support an action in detinue or an indictment for larceny, nevertheless in certain limited circumstances where the body possesses such peculiar attributes as to justify its preservation on scientific or other ground or where a person has by the lawful exercise of work or skill so dealt with a body lawfully in his possession as to differentiate it from a mere corpse awaiting burial, its retention unburied will not be regarded as unlawful and any person in possession of such a body may recover possession thereof from any person who has deprived him of such possession and who can show no better right to retain possession thereof.

Accordingly it is submitted that in the limited category of mummies and bodies of scientific interest the law does recognise an exception to the general principle that there can be no property in a human body.⁵⁹ Furthermore this general principle should not be regarded as implying that there is no right to possession of a dead body, for such a right is a necessary correlative to the duty to dispose of the body and consequently attaches to the persons who are subject to the incidence of that duty.⁶⁰

This right to possession is recognised at least as early as 1841 when in the case of *R. v. Fox and Ors.*⁶¹ it was held that the executors of a person who had died in the lawful custody of a gaoler were entitled to a peremptory *mandamus* to compel such gaoler to deliver up the body of the testator to them notwithstanding that such gaoler purported to retain such body as security for debts alleged to have been owed to him by the deceased. This case is approved and applied in *Williams v. Williams*⁶² in which Kay, J. held, *inter alia*, that although the executors have no property in the body of the testator, they have an absolute right to the possession of the body until such time as it has been properly buried. And this right which is recognised as existing in executors is, it is submitted, a right which arises by virtue of the duty imposed on them to dispose of the body of the deceased. Accordingly it follows that the law recognises a right to possession of a dead body in those persons on whom the duty of disposal of that body falls and that such right may extend to other classes of persons in the special circumstances discussed above.⁶³

Having considered the law, such as it is, relating to persons on whom falls the duty of disposal of the body of a deceased person, and the persons, if any, entitled to the possession of a body, there next arises the question of the methods by which a body can lawfully be disposed of. These would appear to be four in number, viz. burial, cremation, disposal in accordance with the provisions of the Anatomy Act,⁶⁴ and disposal for anatomical examination otherwise than

⁵⁷ *Id.* at 417-424.

⁵⁸ *Id.* at 424, *per* Higgins, J.

⁵⁹ This proposition raises the possibility that a living person whose body could be described as a body of scientific interest (e.g. a person with two hands on the one arm) might be able to dispose of his body effectively by will, for the argument could not be raised that there was no property in the body and that therefore it could not be disposed of by will. If there is sufficient property in a third person to support an indictment for larceny or an action in detinue, could not there be property in the testator to dispose of his body or part of it by will?

⁶⁰ As to the persons falling within this category, *vide supra*.

⁶¹ (1841) 2 Q.B. 246; 114 E.R. 95.

⁶² (1882) 20 Ch. D. 659.

⁶³ I.e. where the preservation of the body is justified on scientific or other grounds.

⁶⁴ Anatomy Act, 1832 (Eng.) 2 & 3 Will. 4, c. 95; Anatomy Act, 1871 (Eng.) 34 & 35

in accordance with the provisions of the Anatomy Act.

The most frequently employed of such methods is that of burial, and in this connection the law provides no fixed place or places in which burial must take place, and burial in any place would appear to be sufficient discharge of the duty to bury provided that the use of the ground did not amount to a nuisance or involve a breach of some statutory prohibition against burial in that particular area.⁶⁵ No ceremony is prescribed for the burial unless it be in consecrated ground.⁶⁶

Burial at sea is an analogous method of disposal to burial on land, but a method in respect of which very few fixed rules can be prescribed. Provided that the burial takes place outside the three-mile limit recognised by English law and provided it is carried out in such a manner that it does not, and is not likely to,⁶⁷ constitute a nuisance to the adjoining littoral state or any subject thereof, it is submitted that the choice of method of burial and the manner of effecting burial in the case of persons dying beyond a state's territorial waters is a matter for the master of the ship on which the death occurs and cannot be regulated by the laws of an adjoining State.⁶⁸

Cremation, provided it was effected in such a manner as not to amount to a nuisance, was not unlawful even before the passing of the Act⁶⁹ by which the practice is now recognised and regulated. Authority for this proposition is the case of *R. v. Price*,⁷⁰ where it was held that to burn a dead body instead of burying it, is not a misdemeanour provided that the manner in which cremation is effected is not such as to amount to a public nuisance and provided that the disposal of the body does not prevent the coroner from holding an inquest thereon which he would otherwise be entitled to hold. In that case a father was indicted for the burning of the body of his five-months-old child, the indictment being dismissed on the ground that no misdemeanour had been proved. The case was regarded by Stephen, J. as being a novel decision on whether the common law recognised the legality of cremation as a method of disposing of a dead body. After reviewing the available authorities relating to the obligation to bury and deciding that they could be of no appreciable assistance to him in the present case, he held that the prosecution had failed to show that the act of cremation constituted a misdemeanour. He held that the argument that the only method of disposal of a body recognised by the law is burial was effectively countered by the provisions of the Anatomy Act,⁷¹ which clearly contemplated the legality of a supply of bodies for anatomical purposes and consequently necessarily recognised other methods than burial for the disposal of bodies. The judge further held that although it is a misdemeanour to dispose of a body so as to prevent the holding of an inquest which ought to be held thereon, nevertheless there was no absolute right vested in a coroner to hold an inquest and accordingly in the absence of any evidence before the court or any allegation in the indictment to show that the coroner had reasonable suspicions sufficient to justify his holding an inquest, the defendant must

Vic., c. 16; Anatomy Act, 1901 (N.S.W.) Act No. 9, 1901; Medical Act of 1939 (Q'land) 3 Geo. 6, No. 10; Anatomy Act, 1884-1954 (S. Aust.) No. 317, 1884—No. 25, 1954; The Anatomy Act, 1869 (Tas.) 33 Vic. No. 23; Medical Act, 1928 (Vic.) No. 3730 (1928); Anatomy Act, 1930-46 (W. Aust.) No. 23, 1930—No. 20, 1946.

⁶⁵ As to burial at sea, see *infra*.

⁶⁶ 4 *Halsbury's Laws of England* (3 ed. 1953) 1.

⁶⁷ E.g. by the washing ashore of a body.

⁶⁸ *Quaere* whether the method of burial can be regulated by the national State of the ship?

⁶⁹ Cremation Act, 1902 (Eng.) 2 Edw. 7, c. 8; Public Health Act, 1902 (N.S.W.) Act No. 30, 1902, ss. 51, 51A and 51B; Necropolis Act, 1902 (N.S.W.) Act No. 20, 1902, s. 8A; Local Government Act, 1919 (N.S.W.) Act No. 41, 1919, ss. 447, 448; Cemeteries Act, 1928 (Vic.) No. 3652 (1928) Part II; Cremation Act of 1913 (Q'land); Cremation Act, 1891-1918 (S. Aust.) No. 520, 1891—No. 1333, 1918; Cremation Act, 1929 (W. Aust.) No. 22, 1929; Cremation Act, 1934 (Tas.); 25 Geo. 5 No. 23.

⁷⁰ (1884) 12 Q.B.D. 247.

⁷¹ Anatomy Act, 1932 (Eng.) *supra* n. 64.

be discharged. The principles of law relating to cremation enunciated in *R. v. Price*⁷² are implicitly accepted in the decision in *R. v. Stephenson and Anor.*,⁷³ a case of an indictment for the disposal of the body of a child to prevent the holding of an inquest. That case is authority for the proposition that it is a misdemeanour to burn or otherwise dispose of a dead body, with intent thereby to prevent the holding upon such a body of an intended coroner's inquest where the inquest is one which the coroner has jurisdiction to hold, that is, where the coroner has a *bona fide* belief in the existence of facts which if true would justify the holding of an inquest, not merely where such facts do actually exist. It is submitted that it is a reasonable inference from the decision in that case that the cremation of a dead body becomes a misdemeanour only in certain circumstances, one of which is the prevention by such cremation of an intended inquest which the coroner has jurisdiction to hold. Accordingly, it would appear that even before the statutory recognition of the practice, cremation was not an illegal method of disposing of a dead body. The place and manner of cremation are now regulated by the Cremation Act⁷⁴ and the regulations made thereunder and it is an offence under the Act to effect any cremation in contravention thereof.

The third legally recognised method of disposal of a dead body is disposal in accordance with the provisions of the Anatomy Act, and in this connection two separate and distinct sets of circumstances are envisaged by the various Acts in force, namely (a) the granting of permission for an anatomical examination by the person lawfully in possession of the body after death; and (b) a direction being given by a testator for such examination. It is in the field of anatomical examination that the recent legislative enactments in South Australia⁷⁵ and Tasmania⁷⁶ and the proposed New South Wales Act⁷⁷ have their effect. Both South Australia and Tasmania have passed legislation which is substantially derived from the Corneal Grafting Act, 1952 (Eng.)⁷⁸ and South Australia has introduced into the statute law relating to the disposal of bodies after death the novel concept of a testator being able to direct or a person lawfully in possession of his body to permit the removal of tissues other than eyes for therapeutic purposes.⁷⁹

Under English law an executor or other party⁸⁰ lawfully in possession of the body of the deceased, provided he is not an undertaker or other person to whom the body has been entrusted for the purpose only of interment, may permit the body of the deceased to be anatomically examined unless to his knowledge the deceased expressed a desire either in writing at any time or orally in the presence of two witnesses during the illness whereof he died that no such examination should take place, or unless the surviving spouse or any known relative require interment without such examination.⁸¹

Similar provisions relating to permission to carry out anatomical examination have been adopted in New South Wales,⁸² Victoria,⁸³ South Australia,⁸⁴ Tasmania,⁸⁵ and Western Australia⁸⁶. In Queensland, the following provision is made:⁸⁷

⁷² (1884) 12 Q.B.D. 247.

⁷³ (1884) 13 Q.B.D. 331.

⁷⁴ See n. 69 *supra*.

⁷⁵ Anatomy Act Amendment Act, 1954 (S. Aust.)

⁷⁶ Anatomy Act Amendment Act, 1954 (Tas.)

⁷⁷ Corneal & Tissue Grafting Bill, 1955 (N.S.W.).

⁷⁸ Corneal Grafting Act, 1952 (Eng.) 15 & 16 Geo. 6 and 1 Eliz. 2, c. 28.

⁷⁹ Anatomy Amendment Act (No. 2) 1954 (S. Aust.).

⁸⁰ The word used in the Acts passed by the States of the Commonwealth of Australia is "person".

⁸¹ Anatomy Act, 1832 (Eng.), s. 7.

⁸² Anatomy Act, 1901 (N.S.W.), s. 10.

⁸³ Medical Act, 1928 (Vic.), s. 25.

⁸⁴ Anatomy Act, 1884-1954 (S. Aust.), s. 8.

⁸⁵ The Anatomy Act, 1869 (Tas.), s. 3.

⁸⁶ Anatomy Act, 1930-1946 (W. Aust.), s. 9.

⁸⁷ Medical Act of 1939 (Q'land), s. 58.

An executor or other person having lawful possession of the body of a deceased person and not being an undertaker or other person entrusted with the body for the purpose only of interment, who

(i) has advised the nearest surviving relative of the death of the deceased and of his intention to permit a *post mortem* or anatomical examination of the body of the deceased and

(ii) has obtained the consent of the relative so advised to such *post mortem* or, as the case may be, anatomical examination

within the period of twelve hours next succeeding the time at which the deceased died, may permit the body to undergo *post mortem* or

In this section the nearest surviving relative shall, according to the order specified, be one of the following classes of relatives from whom it is possible to obtain a consent as aforesaid within the abovementioned period of twelve hours, namely

(i) surviving husband or wife,

(ii) surviving parent or child,

(iii) one of the next of kin who, if there were no husband, or wife, parent or child surviving, would have been entitled to share in the distribution of the estate of the deceased if he had died intestate.

An executor or other person proposing to permit the examination is given an option:—if he is unable by virtue of the circumstances existing at the death of the deceased to communicate with the surviving spouse and obtain from him a consent within a period of twelve hours, then a consent obtained from a parent or child is sufficient legal justification for granting permission for the body to be anatomically examined. Further, in Queensland an executor can be in no doubt as to what must be done before he can permit an examination: a positive consent must be obtained from at least one person.⁸⁸ And where a surviving spouse authorises an executor to permit such examination, but a parent or child objects thereto, it is submitted that an executor would be justified in permitting the examination to take place. Thus the position in Queensland differs from that in England and the other Australian states where an objection by any one of the persons referred to in the section, viz. the surviving spouse or any known relative, would be sufficient to prevent the executor permitting an examination.

The second type of situation in which the Anatomy Acts envisage an examination being practised on the body of a deceased person is that arising where the deceased had directed during his life that his body after death should be anatomically examined. In this connection the English Act makes the following provision:⁸⁹

If the deceased at any time during his life in writing or verbally in the presence of two witnesses during the illness whereof he died shall direct an anatomical examination to be made or nominates a person authorised by the Act to carry out such examination and such direction or nomination comes to the knowledge of the person having lawful possession of the body that person shall direct in the one case or request and permit in the other an anatomical examination unless the surviving husband or wife or nearest known relative or any one or more of such person's nearest known relatives being of kin in the same degree require interment without such examination.

This provision is adopted in substantially the same form in the statutes passed

⁸⁸ Contrast the position in England and the other Australian States where it is not clear whether an affirmative consent must be obtained (and, if so, from whom) or whether the executor may permit an examination unless some one or more of an indefinite class of persons objects thereto.

⁸⁹ Anatomy Act, 1832 (Eng.), s. 8.

in Victoria,⁹⁰ Tasmania,⁹¹ and Western Australia.⁹² In New South Wales,⁹³ South Australia⁹⁴ and Queensland⁹⁵ no provision is made for an oral direction or nomination, it being provided that any direction or nomination shall be in writing attested by two or more witnesses. In Queensland it is also provided that the class of persons who may prevent the examination being carried out is limited to the surviving spouse, parent or child of the deceased.⁹⁶

In 1952 there was passed in England an Act which introduced into the law relating to the disposal of dead bodies a new concept. This was the Corneal Grafting Act⁹⁷ which provided for the use of the eyes of a deceased person for therapeutic purposes after his death. The Act provides that the person lawfully in possession of the body of a deceased person after his death, not being a person to whom the body was entrusted for the purpose only of its burial or cremation,⁹⁸ may authorise the removal of the eyes from the body for therapeutic purposes if the deceased expressed a request, in writing at any time or orally in the presence of two or more witnesses during his last illness, that his eyes should be so used after death and the person in possession of the body has no reason to believe that the request was subsequently withdrawn.⁹⁹ Such person lawfully in possession of the body may also authorise the removal of the eyes for therapeutic purposes unless he has reason to believe that the deceased had expressed an objection which had not been withdrawn that his eyes should not be so used or unless the surviving spouse or any surviving relative of the deceased objects to the deceased's eyes being so dealt with.¹⁰⁰ The Act further provides that no authority shall be given if the person empowered to give such authority under the Act has reason to believe that an inquest may be required to be held on the body, unless he first obtains the consent of the coroner, which consent may be given on such terms and conditions as the coroner thinks fit.¹⁰¹ The removal of the eyes from a dead body under the Act shall only be carried out by a legally qualified medical practitioner who has satisfied himself by a personal examination of the body that life is extinct.¹⁰² Almost identical provisions are enacted by the first of the recent South Australian Acts,¹⁰³ and somewhat similar provisions are made by the Tasmanian amendment.¹⁰⁴ In Tasmania, however, it is necessary that the person in lawful possession of the body should have satisfied himself that the request has not been withdrawn or that the deceased has expressed no objection to his eyes being put to such use.¹⁰⁵ Furthermore the class of persons who may prevent

⁹⁰ Medical Act, 1928 (Vic.), s. 26.

⁹¹ The Anatomy Act, 1869 (Tas.), s. 4.

⁹² Anatomy Act, 1930-1946 (W. Aust.), s. 10.

⁹³ Anatomy Act, 1901 (N.S.W.), s. 11.

⁹⁴ Anatomy Act, 1884-1954 (S. Aust.), s. 9.

⁹⁵ Medical Act of 1939 (Q'land), s. 59.

⁹⁶ *Ibid.*

⁹⁷ Corneal Grafting Act, 1952 (Eng.), 15 & 16 Geo. 6 and 1 Eliz. 2, c. 28.

⁹⁸ *Id.*, s. 1 (5). An interesting point is the addition of the words "or cremation" which do not appear in the corresponding provisions relating to anatomical examination in the Anatomy Act, 1832 (Eng.) nor in the Anatomy Act, 1901 (N.S.W.), the Anatomy Act, 1884-1954 (S. Aust.), the Medical Act of 1939 (Q'land) or the Anatomy Medical Act, 1928 (Vic.), Anatomy Act, 1930-1946 (W. Aust.), Anatomy Act Amendment Act, 1954 (S. Aust.), and Anatomy Act Amendment Act, 1954 (Tas.). This means that in Tasmania and South Australia the persons who are debarred from permitting corneal grafting are persons to whom a body has been entrusted for the purpose only of its interment or cremation; whereas the persons debarred from permitting anatomical examination are those to whom the body had been entrusted for the purpose only of its interment. It is also noteworthy that under the Corneal and Tissue Grafting Bill, 1955 at present (October, 1955) before the N.S.W. Parliament, the persons who would be debarred from permitting corneal grafting are persons to whom a body has been entrusted for the purpose only of its interment, cremation or embalmment.

⁹⁹ Corneal Grafting Act, 1952 (Eng.), s. 1 (6).

¹⁰⁰ *Id.*, s. 1 (2).

¹⁰¹ *Id.*, s. 1 (4).

¹⁰² *Id.*, s. 1 (3).

¹⁰³ Anatomy Amendment Act, 1954 (S. Aust.).

¹⁰⁴ Anatomy Act Amendment Act, 1954 (Tas.).

¹⁰⁵ In England and South Australia, the relevant provision is "unless he (the executor)

such use is limited to the surviving spouse, and the persons who may perform the actual removal are limited to

- (i) an ophthalmic surgeon on the staff of a public hospital;
- (ii) a legally qualified medical practitioner who is a member of the body known as the Ophthalmological Society of Australia;
- (iii) an approved medical practitioner, who must satisfy the Minister¹⁰⁶ that he has practised ophthalmology for at least five years and who is declared by the Minister to be an approved medical practitioner for the purposes of the Act.¹⁰⁷

South Australia has recently introduced into this field a new principle relative to the disposal of bodies, a principle which however is no more than a logical extension from the principle introduced by the Corneal Grafting Act.¹⁰⁸ This principle is the statutory validation¹⁰⁹ of the removal of tissue other than eyes, the provisions in respect of which are *mutatis mutandis* identical with those applicable to the removal of eyes, but subject to a reservation that where the deceased has expressed a request that any specific tissue of his body be used for therapeutic purposes that request shall not be deemed to permit authority to be given for removal of any other tissue.

Special provisions are in force in three States, namely Victoria, Western Australia and South Australia,¹¹⁰ authorising the Minister administering the Act¹¹¹ to license the medical officers of public institutions such as hospitals and gaols to permit the bodies of persons dying in such institutions to undergo anatomical examination on the same terms as an executor or other person lawfully in possession of the body may permit such examination in these States. In the same connection England, South Australia and Tasmania have included a provision in their respective Acts relating to corneal grafting that in the case of a body lying in a hospital, an authority for the use of the eyes in accordance with the Act may be given on behalf of the person having the control and management of the hospital by any officer or person designated in that behalf by the first mentioned person.¹¹²

In Western Australia there is a provision¹¹³ that before a body is permitted to be examined in accordance with the provisions of the Act, whether the examination be pursuant to permission given by an executor or other person lawfully in possession of the body of the deceased or to a direction made by the deceased or to permission given by a public institution,¹¹⁴ the attention of the surviving spouse or any known relative shall be directed to the relevant section of the Act and his consent thereto obtained in writing. Victoria has a similar provisions¹¹⁵ applicable only to permission given by or on behalf of a public institution, a provision which also requires that a copy of the relevant section of the Act shall be posted in a conspicuous place in any such public institution except hospitals for the insane.

One other unusual provision to be found among the legislation in force in

has reason to believe that the request was subsequently withdrawn or that the deceased had expressed an objection during his lifetime to his eyes being so used after his death."

¹⁰⁶ The Act does not indicate the Minister to whom reference is here made, but presumably "Minister" is intended to refer to the Minister of Health.

¹⁰⁷ Anatomy Act Amendment Act, 1954 (Tas.), s. 8.

¹⁰⁸ Corneal Grafting Act, 1952 (Eng.).

¹⁰⁹ Anatomy Act Amendment Act (No. 2), 1954 (S. Aust.). This principle is also embodied in the bill at present before the N.S.W. Parliament.

¹¹⁰ Medical Act, 1928 (Vic.), s. 24; Anatomy Act, 1930-1946 (W. Aust.), s. 8; Anatomy Act, 1884-1954 (S. Aust.), s. 10.

¹¹¹ In Victoria, the Minister in whose Department the Act is being administered; in South Australia, the Chief Secretary; in Western Australia, the Minister for Health.

¹¹² Corneal Grafting Act, 1952 (Eng.), s. 1 (6); Anatomy Act Amendment Act, 1954 (S. Aust.), s. 6; Anatomy Act Amendment Act, 1954 (Tas.), s. 6. Such provision is also made by the Bill at present before the N.S.W. Parliament.

¹¹³ Anatomy Act, 1930-1936 (W. Aust.), s. 11.

¹¹⁴ Pursuant to the Anatomy Act, 1930-1946 (W. Aust.), s. 8.

¹¹⁵ Medical Act, 1928 (Vic.), s. 24.

the States of the Commonwealth is that in force in Western Australia¹¹⁶ authorising the dispatch of bodies to approved schools of anatomy outside the state with whom contracts for the supply of bodies have been entered into. The section also provides that delivery to the Commissioner¹¹⁷ under this section is authorised by permission or direction to deliver to a school of anatomy.

From the foregoing detailed discussion of the circumstances in which a body may become the subject of anatomical examination the following points of interest emerge:

1. The cardinal difficulty in interpretation of the Anatomy Acts arises from the attempt to assign a precise meaning to the phrase "or other party lawfully in possession of the body of the deceased not being an undertaker or other person to whom it has been entrusted for the purpose only of burial or cremation" or the very similar phrase thereto which appears in the Acts passed by all States.¹¹⁸

The difficulty here lies in determining who is, in fact, a person lawfully in possession of the body within the meaning of the Acts. This question is a particularly important one with reference to the corneal grafting provisions, for if the eyes of a deceased person are to be used for therapeutic purposes they must be removed from the body within a few hours after death and it is therefore of importance to determine who is in a position to authorise their removal. It is submitted that the probable solution to this difficulty is to be found by regarding the class of persons who are in lawful possession of the body as at least as wide as the class of persons who are under an obligation to bury it and probably wider, since from the terms of the statutes it would appear at least arguable that it was intended that the next of kin of the deceased, being in a position to prevent the anatomical examination of the body, should also be able to permit such examination. There are two decided cases relevant to the question of possession: *Williams v. Williams*,¹¹⁹ where it was held that an executor is in lawful possession of the body of his deceased testator and *R. v. Feist*¹²⁰ where the master of a workhouse, who had committed a fraud on the relatives of persons dying within the workhouse to prevent their requiring the bodies of such persons to be interred without examination, was a person lawfully in possession of the bodies within the meaning of the Act and accordingly was entitled to the protection of the Act notwithstanding such fraud. But the case of the master of a workhouse is one which clearly falls within the classes of persons liable for burial of the body as the occupier of the premises on which the body lies, and accordingly the question of whether the relatives of the deceased are entitled to authorise the anatomical examination of the body is one which is as yet undecided but which it is submitted should be decided in the affirmative because of the intention to be gleaned from the statute and because of the current practice of relatives giving such authorisation, particularly where no will is left by the deceased.

2. It is also interesting to note in this connection that three States, Victoria, Western Australia and South Australia¹²¹ have seen fit to make provision that the appropriate authority in control of a public institution in which a person dies may, subject to the same limitations as apply to an executor, authorise the anatomical examination of his body and that similar provisions are included in the English Corneal Grafting Act¹²² and the Australian Acts modelled on

¹¹⁶ Anatomy Act, 1946 (W. Aust.), No. 20, 1946, s. 3.

¹¹⁷ "Commissioner" refers to the Commissioner for Health, a subordinate officer to the Minister for Health, who is empowered by the Anatomy Act, 1946 (W. Aust.), s. 3 to make agreements for the dispatch of bodies for purposes of anatomical examination outside the State of Western Australia.

¹¹⁸ See *supra* nn. 80 and 98.

¹¹⁹ (1882) 20 Ch. D. 659.

¹²⁰ (1858) Dears. & B. 590.

¹²¹ See *supra* n. 110.

¹²² Corneal Grafting Act, 1952 (Eng.), s. 1 (6).

it.¹²³ It is submitted that the inclusion of such provisions is superfluous and makes no addition to the law in force prior to the passing of such provision, for a hospital or other authority, like the master of a workhouse, falls clearly within the category of executors or other persons lawfully in possession of the body, the authority being the person on whom falls the duty of disposal of the bodies of persons dying within the institution controlled by that authority.

3. A further point of interest is the radically different provisions relative to permission of and directions for anatomical examination which have been adopted in Queensland, as compared with those in force in England and the other States, provisions which suggest, because of the late passage of the current Queensland Act by comparison with the corresponding acts in some other States,¹²⁴ the possibility that the Anatomy Acts as elsewhere framed suffer from a certain lack of clarity. The negative statement contained in the Acts in force in England and other States that anatomical examination may be permitted unless the surviving husband or wife or any known relative requires interment without such examination is changed into a positive requirement that consent of the deceased's relatives shall be obtained;¹²⁵ and furthermore the class of persons who may prevent such an examination is clearly defined¹²⁶ and limited as opposed to the general class of "any known relatives",¹²⁷ a class which could well include persons not in fact entitled to partake in the deceased's estate on intestacy, e.g. a nephew where there is surviving issue of the deceased. In Queensland it is clear that the consent only of the issue would be necessary in such a case, but in other States it must be a matter of some doubt and uncertainty for an executor whom he should advise of the death and from whom he should obtain consent or at least intimations that they do not object to the body being so examined. Queensland also is the only State which makes no provision that a deceased may by direction during his lifetime prevent such examination. This fact must make an executor's task considerably easier but it can hardly be expected to receive the approval of any person who has a violent dislike of the thought of his body being anatomically examined after his death and who leaves no surviving relatives who may prevent such examination.

In addition to the foregoing provisions limiting and defining the persons by whom and circumstances under which anatomical examination may be permitted or directed to be carried out, there is also considerable supervision by statute¹²⁸ of the circumstances under which the actual examination may be conducted, the following provisions having been more or less uniformly adopted by all Australian States pursuant to the English Act.¹²⁹

1. Anatomy may only be practised by a person holding a licence under the Act.

2. The person practising anatomy must receive the body from a person who had the lawful custody thereof.

3. The person from whom the body was received must have had power under the Act to permit or cause it to be anatomically examined.

4. The person practising must demand and receive with the body a certificate as to the cause of death given by one of the following persons:

a. The legally qualified medical practitioner who attended the deceased in his last illness,

b. A legally qualified medical practitioner who is not concerned with the

¹²³ Anatomy Act Amendment Act, 1954 (S. Aust.), s. 6; Anatomy Act Amendment Act, 1954 (Tas.), s. 6.

¹²⁴ The Queensland Medical Act was passed in 1939, whereas the corresponding Acts in most other States were passed before 1900.

¹²⁵ The Medical Act of 1939 (Q'land), s. 58. A similar provision is also in force in Western Australia (Anatomy Act, 1930-1946 (W. Aust.), s. 11.)

¹²⁶ Medical Act of 1939 (Q'land), s. 58.

¹²⁷ This class being the persons who may prevent such examination in England and in all other States of the Commonwealth.

¹²⁸ See *supra* n. 64.

¹²⁹ Anatomy Act, 1832 (Eng.).

examination.

c. A stipendiary magistrate.

5. Notice of the intended removal must be given at least six hours prior¹³⁰ to the removal to

a. An inspector appointed under the Act for the area, or if there be no inspector within 10 miles to

b. a legally qualified medical practitioner, or

c. the stipendiary magistrate nearest the place of death.

6. The body cannot be removed from the place of death within twenty-four hours of the time of death.¹³¹

7. A return must be furnished within twenty-four hours by the recipient to the appropriate person under 5. above, forwarding the certificate as to the cause of death and showing the day, hour and from whom the body was received and as far as is known the date and place of death, and sex, full name, age and last place of abode of the deceased.

8. The particulars referred to in 7. above are to be entered in a book kept for this purpose by the recipient, which book shall be made available on demand to any inspector appointed under the Act.

9. Before removal the body shall be placed in a decent coffin or shell and shall be removed therein.

10. Provision is to be made before removal by the remover for the decent interment of the body in consecrated ground or in a public burial ground of the appropriate religious faith.

11. Provision to be made by the remover before the removal for a certificate of interment or cremation to be sent to the appropriate person in 5. above within six weeks¹³² after the body is received. Power is given to the principal secretaries of state in England or Governors in the states of the Commonwealth to vary such time.¹³³

12. Anatomy must be carried out so as to avoid unnecessary mutilation of the body and must be conducted in an orderly quiet and decent manner.

13. Anatomy may only be practised at schools recognised in accordance with the Act.

The final possible method of disposal is for the purposes of anatomical examination otherwise than in accordance with the provisions of the Anatomy Act,¹³⁴ and in this connection it is submitted that before the passing of this Act the law recognised as legal the disposal of bodies for the purposes of anatomical examination¹³⁵ subject to certain conditions. These were that provision should be made for the decent interment of the body after the examination, that the body should be given and not sold, that no nuisance should be occasioned by the retention of the body unburied during the period of the examination, and

¹³⁰ In England the time is 24 hours; in Tasmania 12 hours.

¹³¹ In England 48 hours.

¹³² The following variations exist in the time within which such interment shall take place: England, 2 years (Anatomy Act, 1871 (Eng.)); Queensland, 12 months (Medical Act of 1939 (Q'land)); Western Australia, 12 weeks in the case of bodies which are dispatched outside the State pursuant to the Anatomy Act, 1946 (W. Aust.).

¹³³ See *supra* n. 132 as to cases in which such variation has been effected by statute.

¹³⁴ Anatomy Act, 1832 (Eng.).

¹³⁵ Whether this method of disposal is still open to a person lawfully in possession of the body of a deceased person is a matter of some considerable doubt, for it has been made a misdemeanour punishable by three months imprisonment for any person to commit an offence against the provisions of the Anatomy Act. (Anatomy Act, 1832 (Eng.), s. 18; Anatomy Act, 1901 (N.S.W.), s. 18; Medical Act of 1939 (Q'land), s. 66; Anatomy Act, 1884-1954 (S. Aust.), s. 20; The Anatomy Act, 1869 (Tas.), s. 13; Medical Act, 1928 (Vic.), s. 36; Anatomy Act, 1930-1946 (W. Aust.), s. 22 (1). And it is submitted that the receipt of a body other than in accordance with the Act would be such an offence. In Western Australia, but in Western Australia only, the receipt or disposal of a body for purposes of an anatomical examination other than in accordance with the Act is explicitly made an offence, and a person committing this offence is liable to imprisonment with hard labour for two years. In respect of other offences in Western Australia, the penalty is a maximum of three months imprisonment.

that none of the relatives of the deceased should object to such examination. If provision were made for the decent interment of the body after examination, then no argument could be raised that the person responsible for the burial had failed to discharge his obligation. There is no authority for the proposition that burial must be carried out immediately after death, and in fact there are *dicta* to the contrary: "In my opinion there is no law forbidding the possession of a human body, whether born alive or dead, for purposes other than immediate burial. . . . If the requirements of public health or public decency are infringed, quite different considerations arise."¹³⁶ And if no nuisance is created by the examination and if there be no one who is entitled to demand the body for the purposes of its burial from the person carrying out the examination, it follows that disposal of bodies for anatomical examination was recognised by the law prior to 1832.¹³⁷ In this connection it is also noteworthy that the principal causes for indictments in relation to the practice of anatomy were *graverobbing* and the murder of prospective subjects, each of which in themselves constitute a separate misdemeanour quite apart from any relation they may bear to the practice of anatomy.

The existence of this fourth method of disposal is supported by an inference from the preamble to the Anatomy Act and from *dicta* in two early cases, *R. v. Lynn*¹³⁸ and *R. v. Feist*.¹³⁹ The purposes for which the Anatomy Act was expressed to be introduced were the licensing of schools of anatomy and of persons to practise anatomy, the appointment of inspectors to supervise the practice of anatomy and the regulation of the practice of anatomy, from which objects it is submitted that the law clearly recognised the legality of the practice prior to the passing of the Act. This conclusion is supported by the decision in *R. v. Lynn*,¹⁴⁰ which is the authority for the proposition that the taking up of dead bodies, even though for the purpose of dissection, is an indictable offence.

The Court said that common decency required that the practice (of grave-robbing) should be put a stop to. That the offence was cognizable in a Criminal Court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence. . . . But inasmuch as this defendant might have committed the crime merely from ignorance, no person having been before punished in this Court for this offence, they only fined him five marks.¹⁴¹

It is submitted that this case was clearly a novel decision on the legality of disinterment and that the purpose of dissection was considered by the court in amelioration of the offence. If it was not an offence, prior to 1788, to acquire bodies for the purposes of dissection by means of exhumation, then how much less likely it is that the courts would look with disfavour on the provision of bodies for this purpose by methods which were not indecent and *contra bonos mores*. This proposition can, it is submitted, be further supported by some of the *dicta* in *R. v. Feist*,¹⁴² a decision that the master of a workhouse was in lawful possession of the body of a deceased inmate. During the course of the argument, Pollock, C.B. asked the following question:

Is that so (i.e. is it a common law offence to sell a dead body for dissection) in every sense? There is nothing wrong or against the good feelings of society that an examination of a dead body should take place. The offence is the selling it, and withdrawing it from those rites of Christian burial which some people consider very important. . . . So the case of a

¹³⁶ *Dodeward v. Spence* (1908) 6 C.L.R. 406, 413.

¹³⁷ The year in which the Anatomy Act, 1832 (Eng.) was passed.

¹³⁸ (1788) 2 T.R. 733.

¹³⁹ (1858) Dears. & B. 590.

¹⁴⁰ (1788) 2 T.R. 733.

¹⁴¹ *Id.* at 734.

¹⁴² *R. v. Feist* (1858) Dears. & B. 590; 27 L.J. (N.S.) (M.C.) 164.

body which is dissected and cut to pieces and never buried does not apply.¹⁴³ Wightman, J. felt that the question was "whether the defendant, being *prima facie* at common law guilty of the offence of disposing of the dead body in the way he did dispose of it, is nevertheless protected by the Anatomy Act",¹⁴⁴ i.e. his view was that the disposal of a body for anatomical examination other than in accordance with the Anatomy Act was unlawful. Willes, J. expressed his view that "at common law it is an offence to take up a body, even if it be for the laudable object of dissection",¹⁴⁵ a view which it is submitted does not necessarily imply that dissection other than in accordance with the Anatomy Act is illegal, for the extent of the illegality is limited to the taking up, i.e. exhumation, of the body and should not therefore be extended to cases where the body has not been exhumed. Bramwell, B. puts the case for the prosecution at its strongest only by way of hypothesis "assuming that the prisoner would have been guilty of a misdemeanour at common law, the prisoner is protected by the statute",¹⁴⁶ and accordingly cannot be regarded as subscribing to the view that the provision of bodies for anatomical examination was necessarily unlawful. Accordingly it is submitted that it is at least a possible inference from this case and the other authorities cited that prior to the passing of the Anatomy Act the giving of a dead body for the purpose of dissection, provided the requirements referred to above were observed, was not of itself an unlawful method of disposal of the body.

At common law certain offences are recognised in relation to dead bodies, the principal ones being:

(a) The person on whom the duty of burial falls is guilty of a misdemeanour if, having the means, he fails to dispose of the body.¹⁴⁷

(b) It is a misdemeanour to prevent the burial of a body by refusal to deliver it to the executor or person lawfully entitled to possession of it or to bury it otherwise than in accordance with the directions of such person or to detain it as security for a debt owed by the deceased.¹⁴⁸

(c) It is a misdemeanour to dispose of the body so as to prevent the holding of an inquest which the coroner is entitled to hold.¹⁴⁹

(d) It is a misdemeanour to disinter a body without lawful authority¹⁵⁰ or for an undertaker to sell for the purpose of dissection or otherwise a body entrusted to him for the purpose of burial.¹⁵¹ It is no defence to such a charge that there was no want of decency or propriety or that the disinterment was for a pious or laudable motive.¹⁵²

(e) It is a misdemeanour to expose a body on or near a public highway where it may be seen by passers by in such a way as to shock public decency.¹⁵³

(f) It is no offence to burn a body provided

(i) the cremation is effected decently;

(ii) there is no nuisance;

(iii) there is no attempt to conceal the commission or impede the prosecution of any offence or to prevent the holding of any inquest.¹⁵⁴

In addition to the offences recognised at common law, additional statutory offences have been created by such acts as the Cremation Act¹⁵⁵ in relation to

¹⁴³ 27 L.J. (N.S.) (M.C.) 164 at 166.

¹⁴⁴ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁵ *Williams v. Williams* (1882) 20 Ch. D. 659; *R. v. Fox & Ors.* (1841) 2 Q.B. 246.

¹⁴⁹ *R. v. Stephenson & Anor.* (1884) 13 Q.B.D. 331; *R. v. Price* (1884) 12 Q.B.D. 247; *R. v. Davis* (1942) 42 S.R. (N.S.W.) 263.

¹⁵⁰ *R. v. Lynn* (1788) 2 T.R. 733; 100 E.R. 391; *Foster v. Dodd* (1867) L.R. 3 Q.B. 67, per Byles, J. at 77.

¹⁵¹ *R. v. Feist* (1858) Dears. & B. 590; 169 E.R. 1132; 27 L.J. (N.S.) (M.C.) 164; *R. v. Sharpe* (1858) Dears. & B. 160; 169 E.R. 959; *R. v. Cundick* (1822) Dow. & Ry. N.P. 13.

¹⁵² *R. v. Sharpe supra.*

¹⁵³ *R. v. Clark* (1883) 15 Cox C.C. 171.

¹⁵⁴ *R. v. Stephenson & Anor.* (1884) 13 Q.B.D. 331; *R. v. Price* (1884) 12 Q.B.D. 247.

¹⁵⁵ *Supra* n. 69.

cremation in unauthorised places and the making of false declarations in order to permit cremation to take place and the Anatomy Act¹⁵⁶ in relation to the removal of dead bodies for the purpose of and the practice thereon of anatomy.

One question which was of considerable practical importance before the passing of the Anatomy Act¹⁵⁷ and which even today is not without some importance, is that of the disinterment of bodies which have already been buried. Prior to 1832¹⁵⁸ there was only a very limited supply of the bodies necessary for anatomical demonstrations and not a few persons made a worthwhile living during the early years of the nineteenth century from the sale of bodies which they had acquired either by nocturnal expeditions to graveyards or by the discreet and undetected disposal of living persons.¹⁵⁹ The latter category inevitably fell foul of the law by virtue of the very method of acquisition of their merchandise, but in respect of the former category there was no effective legal¹⁶⁰ preventative, apart from the misdemeanour of disinterment without lawful authority, for the common law recognised no property in the body of a deceased person and accordingly there existed no one in whom could be laid the necessary property to support an indictment for larceny.¹⁶¹

Disinterment of a dead body may now legally take place under the following conditions:

- (i) in pursuance to a licence from the Secretary of State.¹⁶²
- (ii) in pursuance of a faculty granted by the Ecclesiastical Court for the removal of bodies from one place of burial to another.¹⁶³
- (iii) by a coroner or his assistants where it has been interred before an inquest has been held and the coroner is entitled to hold an inquest.
- (iv) by the coroner or his assistants acting in pursuance to an order of the Court of Queen's Bench where an insufficient inquest has been held or where the first inquest has been quashed.

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¹⁵⁶ *Supra* n. 64.

¹⁵⁷ *Ibid.*

¹⁵⁸ The year in which the Anatomy Act, 1832 (Eng.) was passed.

¹⁵⁹ As to which see *supra*.

¹⁶⁰ There were, of course, also religious sanctions enforced by the Ecclesiastical Courts in respect of bodies buried in consecrated ground.

¹⁶¹ It was, however, possible, and still is possible, for the crime of larceny to be committed in respect of the shroud in which the deceased is buried, the property in which is laid in him in whom it was immediately prior to the burial. See also *supra* n. 59 as to the possibility of the commission of the crime of larceny in respect of a body with peculiar scientific attributes.

¹⁶² In Australia the Governors-General of the respective States.

¹⁶³ There is no corresponding machinery in Australia, but in cases where the removal of remains from one cemetery to another becomes necessary, special Acts, e.g. Botany Methodist Church Cemetery Act, 1924 (N.S.W.) Act No. 46, 1924, are passed authorising such removal.