

of a contention prior to burial, as to the right between relatives to designate the place of burial, the broad doctrine that the right rests exclusively with the next of kin, can hardly be construed as a judicial exclusion of the right of the widow." In this case it will be observed that the question is directly presented with reference to the duty and right the widow owes and has to and over the body of her dead husband *prior to interment*—that is, before the remains have passed beyond the necessity of human care and attention: It is provided by the Penal Code of this State that, except in cases specially provided for by law, the dead body of a human being lying within this State must be decently buried within a reasonable time after death. The duty must be performed by somebody. It has been held in this country that the primary duty of burying a deceased wife is upon the husband. (*Weld v. Walker*, 130 Mass. 423). And it has been expressly determined that if a husband and wife are living together at the time of the death of the former, the widow's right to the possession of the dead body, for the purposes of preservation and burial, is a right in the widow paramount to that of the next of kin. (*Larson v. Chase*, 47 Min. 307). We think, therefore, as a matter of law upon the facts as they are stated in this complaint, and without reference to the allegation of the plaintiff's duty and right, she may maintain this action, if it may be maintained at all. The foregoing observations are made to meet the possible suggestion that the allegation of the complaint respecting the duty and right referred to is merely one of a conclusion of law, and of course, if it is such, it is not admitted by the demurrer. But construing the words of the complaint with reference to this matter as we think they should be construed, they are equivalent to an allegation that, as a matter of fact, the plaintiff was the person upon whom had devolved the obligation and responsibility of complying with that requirement of the law respecting the interment of human remains, to which reference has been made, and that the demurrer admits that she was such person.

This brings us to the consideration of the other question involved, namely, that concerning the right to maintain an action at all. The ground of objection urged by the appellant is that there can be no such action because there can be no such thing as property in human remains. By the common law and *stricti juris*, the proposition as to property may be maintainable. A