Friday, December 8.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

RUSSELL AND OTHERS *v.* MARQUESS OF BUTE.

Churchyard — Excambion — Powers of Heritors over Churchyard— Whether Heritors have Power to Excamb Solum *of Part of Churchyard— Interdict.*

The heritors of a parish conveyed to one of their number, in exchange for a piece of ground to be added to the churchyard of the parish, "heritably and irredeemably, with the whole right, title, and interest of the heritors therein," a piece of ground in the centre of the churchyard on which stood an old chapel within which interments had taken place within recent times. In a process of interdict at the instance of certain heritors and parishioners who objected to the arrangement, *held* that the conveyance was illegal, and *ultra vires* of the heritors.

Observed that an excambion of a portion of a churchyard, for other more convenient or more extensive ground, with a view to improve the churchyard, may not in all cases be unlawful.

On March 1st 1882 a contract of excambion was entered into between the commissioners for the Marquess of Bute on the one hand, and the other heritors of the parish of Rothesay on the other. The deed proceeded upon the narrative that it had been represented to the Marquess by the heritors that the old parish churchyard of Rothesay with the additions previously made to it had become inadequate for burial purposes, and that an addition thereto had become essential; that the old chapel within the parish churchyard, which had originally formed part of the old abbey of St Mary's, and been until the beginning of last century used as a place of interment for the ancestors of the Marquess, was in a dilapidated condition; that this ruinous condition of the building was a source of regret to him, and that he was anxious to obtain possession of it in order that it might be restored as the resting-place of his ancestors and as an ancient historical building. The contract then narrated that on application being made to him for the additional ground required for burial purposes, he had expressed his willingness to grant it, and suggested that in exchange therefor the heritors "should make over the said chapel to him." Thereafter the Marquess by the succeeding clauses of the deed proceeded to dispone, in favour of himself and the other heritors of the parish, a piece of ground to the south of the existing parish churchyard, while, on the other part, in consideration of that conveyance, the heritors disponed to the Marquess, "his heirs and successors whomsoever, heritably and irredeemably, All and Whole the said chapel, with the *solum* of the ground on which the same is built, and whole parts and pertinents thereof, which chapel adjoins the present parish church of Rothesay, and is bounded on all sides by the old churchyard of said parish, except at the north-west corner of said chapel, at which corner the walls of said chapel and of the present parish church meet, with the whole right, title, and interest of the heritors therein; but it is hereby provided that the said chapel and others shall only be held by the said Marquess upon the same terms as any other mausoleum which has been erected within the said churchyard with the sanction of the heritors, reserving always to the relatives or representatives of persons buried in the said chapel all existing rights of access thereto for the purpose of visiting and repairing the tombs; and also reserving to the parishioners of the parish of Rothesay, and all others, all existing right of access to the said chapel, subject only to the condition that said access shall be under the superintendence of the sexton for the time, who shall be provided by the Marquess of Bute with a duplicate key of the chapel for the purpose; and the said Marquess is hereby empowered to restore the said chapel, and that in such manner as shall seem to him most fit, and to use all manner of means for that purpose, but consistently with the aforesaid limitation."

This was a process of suspension and interdict directed against the Marquess at the instance of certain heritors and parishioners of the parish who were opposed to the arrangement made by the contract above narrated. The prayer of the note was for interdict against the respondent "carrying out and completing" the arrangement for the conveyance to him of the chapel, and to have him or anyone on his behalf interdicted "from occupying, taking possession of, interfering with, or exercising any right of proprietorship in the said chapel or site thereof, under or in virtue of any such conveyance or arrangement; and also from interfering with or obstructing the free access at all times of the complainers and other heritors and parishioners in said parish to the graves and lairs in the said old chapel and burying-ground, and from interfering with or removing gravestones or other monuments in or near the said old chapel."

The complainers set out the various disputes and difficulties which had arisen in the course of the arrangement finally embodied in the contract, and the fact, which was admitted, that there was no consent by the presbytery or kirk-session to the arrangement. They explained that the arrangement embodied in the contract had been carried out by a majority of the heritors. They stated that they did not object to the restoration of the chapel, provided it remained the property of the heritors and subject to their control, but averred that the respondent proposed to use it for religious worship in accordance with the forms of the Roman Catholic Church, and particularly for the saying of masses for the dead, and that the result of the arrangement would be to exclude them and other parishioners from a portion of the parochial buildings, and from the graves within the chapel. They also averred, and the respondent admitted, that from time immemorial the ground inside and around the chapel had been used as part of the parish churchyard, and that tombstones had been erected within the chapel in comparatively recent years.

The chapel was situated in the middle of the old churchyard, one end of it being in immediate juxtaposition with the gable wall of the parish church.

The complainers pleaded—"(1) The respondent having no right or title to the old chapel in question, and the proposed conveyance to him by some of the heritors of the parish being *ultra vires* and illegal, the interdict prayed for ought to be granted. (2) The respondent's threatened proceedings being an invasion of the complainers' rights, ought to be interdicted as craved, with expenses."

The respondent pleaded—"(2) The interdict first and second prayed for should be refused, in respect . . . that the conveyance was in all respects legal and valid. (3) The interdict should be refused *quoad ultra* in respect that any rights of the pursuers are sufficiently protected by the terms of the said conveyance or contract of excambion. (4) *Separatim*, the said interdict ought to be refused, in respect that the averments in support thereof are unfounded in fact, and in respect that the proposed regulation of access is reasonable in the circumstances."

The Lord Ordinary pronounced this interlocutor:—"Finds that the contract of excambion, is *ultra vires* of the heritors in so far as it purports to convey to the respondent the chapel in the parish churchyard of Rothesay described in the condescendence, with the *solum* of the ground on which the same is built, and the whole right, title, and interest of the said heritors therein: Interdicts, prohibits, and discharges the respondent, or anyone on his behalf, from occupying, taking possession of, or interfering with or exercising any right of proprietorship in the said chapel or site thereof under or in virtue of the said contract of excambion: *Quoad ultra* refuses the interdict: Finds the complainers entitled to expenses," &c.

"*Opinion.*—This is an interdict against the completion of a conveyance to the respondent of a chapel in the parish churchyard of Rothesay, and against his taking possession of the subject and exercising any right of property therein in virtue of such conveyance. [*His Lordship here referred to a preliminary plea which was not insisted in by the respondent*].

"I am of opinion that it is not within the power of the heritors to confer upon the Marquis a right of property in the chapel, which they concede to be situated within the parish churchyard, adjoining the parish church, and to have been for time immemorial virtually a part of the churchyard. The heritors are not proprietors of the churchyard in any sense which will enable them to give to others a feudal right of property in the *solum* of the whole or any part of it. They are administrators of the churchyard for parochial purposes. But they hold it as trustees, and the alienation of a part of it appears to me to be a breach of trust. They have undoubtedly very large powers of regulation and control. In the exercise of these powers they may allocate particular portions of the churchyard as places of sepulture to particular heritors; and the heritor in whose favour such a grant has been made may acquire a patrimonial interest in the portion of the burying-ground set apart for him, of which he cannot be arbitrarily deprived. But it would be contrary to all the authorities to hold that either by express grant or use he can acquire a right of property which will enable him to exclude the administration and control of the body of heritors.

"In the case of *Ure* v. *Ramsay* (6 S. 916) the main ground of judgment, as explained in the opinion of Lord Cringletie, is that 'no parishioner can acquire a right of property in the *solum* of the kirkyard.' In the more recent case of *Hill* v. *Wood* (1 Macph. 360) the nature of a heritor's right to a burial-place in the parish churchyard of which he was in exclusive possession was very fully considered. Lord Neaves says—'It is not a right of property; it is certainly not a right to sell; but it is an interest of a strong and high character.' And the Lord Justice-Clerk says—'The right of any heritor to a separate portion of the churchyard of which he is in exclusive possession, though it is not a right of feudal property, nor perhaps a right of property in any strict or technical sense of the term at all, is yet such a right as he is entitled to defend—a right of which he cannot be deprived even by the general body of the heritors administering the affairs of the parish, except on the ground of some absolute necessity, or some such high expediency as in such cases and in many other departments the law considers as equivalent to necessity.' It was maintained for the respondent that the contract of excambion did not really give him a higher right than was recognised and protected in the case of *Hill* v. *Wood*. But I cannot so read the deed. It conveys to the Marquis 'and his heirs and successors whomsoever, heritably and irredeemably, the said chapel, with the *solum* of the ground on which the same is built, with the whole right, title, and interest of the heritors therein.' That is not merely an allocation of a burial-ground in the parish churchyard. It is a conveyance of property; and it is recorded in the Register of Sasines, so that if the conveyance and registration have any effect in law the respondent has been entered as the immediate vassal of the Crown in the subjects in question as a feudal estate. It is an estate of which he could not be deprived in whatever case of necessity. There is nothing to prevent him selling it; and the heritors who have conveyed to him their whole right, title, and interest could not claim to exercise a power of control or regulation by which their disponee should be restrained in the use of his property. I think it clear that a conveyance having these effects is not an act of administration within the power of the heritors, but an alienation, by which, if it were effectual, their right of administration would be extinguished.

"It is said, however, that the conveyance is qualified by a condition which so restricts the right of property as to prevent the chapel being applied to any other purposes than those proper to a churchyard, because it is provided 'that the said chapel and others shall only be held by the said Marquis upon the same terms as any other mausoleum which has been erected within the said churchyard with the sanction of the heritors.' But it was admitted at the bar that there is no other mausoleum within the churchyard held upon terms to which this claim is intended to refer. The conclusion goes far to deprive the words of significance, and the counsel for the respondent could not undertake to define the uses to which the condition would limit him in the exercise of his right of property.

"I think it very doubtful whether the restriction would be effectual to prevent the chapel being applied by the respondent himself, or by his

successors, to purposes to which the heritors as a body, or any individual heritor, would be entitled to object if it still remained a part of the churchyard.

"The cases of *Richmond* v. *Fife*, 6 D. 701, and *Wright* v. *Lady Elphinstone*, 8 R. 1025 (19 Scot. Law Rep. 1), are illustrations of such purposes. It was argued that these cases are inapplicable, because the persons who were there prohibited from applying buildings within a parish churchyard, and forming part of it, to other than parochial purposes, held no title from the heritors by which their action could be supported. If this were a complaint against particular uses of a chapel or a mausoleum held under a title of property admittedly valid the distinction would be just. But it follows that the grant of such a title by the heritors implies a surrender of the rights and duties of administration with which they are entrusted for the benefit of the parishioners. And accordingly the remedy sought by the complainers is not against particular uses of the chapel under the title in question, but against the title itself, and the exercise of any right of property by virtue of it. The complaint is no doubt supported by averments that Lord Bute intends to convert the chapel into a church for the performance of 'rites and ceremonies in conformity with the rules and practices of the Church of Rome.' But that is a mere illustration of the purposes to which he may apply the building if it becomes his private property. I do not think it necessary to consider how far the complainers would be entitled to object to the performance of such services in the churchyard. For the only question which appears to me to be raised for decision is, whether the proposed alienation of a portion of the churchyard by a conveyance of the *solum* is illegal and *ultra vires* of the heritors? Whether they may or may not give the respondent an exclusive right to the use and possession of the chapel as a family burial-ground, or permit him on that footing to restore it in the manner proposed, or to convert it into what is called a mausoleum, and what are the religious services which a heritor who does not happen to be a member of the Established Church may perform within a mausoleum or family burying-ground in a parish churchyard, are questions which do not appear to me to arise for decision in this process, and as to which I express no opinion. [*His Lordship here dealt with the preliminary plea not insisted in by the respondent, as mentioned above*].

"Besides an interdict against the exercise of any proprietary right under the conveyance, the complainers ask interdict also against interference with access to the graves in the chapel, and the removal of gravestones or monuments. If these are mentioned merely as acts which might be done by a private proprietor in the exercise of his right, it seems to me unnecessary to specify them, since the respondent will be precluded by an interdict in terms of the previous branch of the prayer from exercising any proprietary right in the chapel. But, as expressed in the prayer, the second branch of the interdict sought stands entirely separate from and independent of the first. No ground, however, is stated for apprehending any improper interference either with the access or the tombs if the title should not be sustained. There appears to me, therefore, to be no sufficient ground for an interdict in these terms."

The respondent reclaimed, and argued—As a matter of fact, the heritors and those interested through them were substantially benefited by this transaction, owing to the large additional burying space thus acquired. The Lord Ordinary based his judgment upon it being *ultra vires* of the heritors to alienate any portion of the churchyard. As a matter of practice there were instances of churchyards having been rendered *inter commercium*, and having had streets and houses built upon them; and Erskine, vol. ii. tit. 1, sec. 8, and tit. 3, sec. 8, dealt with the powers of heritors to excamb churchyards, and the only condition he inserted was that the ground when alienated should be so far reserved until the bodies were decomposed; see also Craig's Jus Feudale, i. 15, 11. As to the practice of excambing churchyards, see Dunlop's Parochial Law, p. 80, sec. 14; Duncan's Parochial Law, 271; *Spence* v. *Hall and Darling*, December 1, 1808, F.C.; *Earl of Mansfield* v. *Wright*, March 17, 1824, 2 Sh. App. 104. The right here asked was analogous to the right to transport kirks and kirkyards, for which see Connell on Parishes, 234 and 235, and cases of *Lithgow* v. *Wilson*, M. 9637; and *Monteith*, 4 Bell's Supp. 261. There was a great difference between sale and excambion, the money obtained by the one might be squandered, whereas by the other an equivalent was obtained. A churchyard, apart from sentiment, was just a piece of parish property held by the heritors for parish purposes. Trustees might not alienate parish property, but might in the course of their administration substitute one piece of ground for another, and in the circumstances of the present case they were entitled to excamb. Graveyards were not more "religious" than churches, yet Dunlop (Parochial Law, 32) and Connell (p. 16) gave a series of examples of excambing churches. No disability arose from the peculiar uses to which churchyards were put to prevent an excambion. See *Octerlony*, June 27, 1823, 2 Sh. 437. In a question as to the powers of the heritors it made no difference that the portion of ground to be excambed lay in the centre of the churchyard—Bell's Dictionary *voce* Churchyards (Watson's ed.); and Duncan's Ecclesiastical Law, 260. Neither kirk-sessions nor presbyteries had anything to do with the regulation of churchyards; the right to deal with them was in the hands of the heritors alone.

Additional authorities—*Robertson* v. *Salmon*, March 1868, 5 Scot. Law Rep. 405; Ecclesiastical Buildings Act 1868 (31 and 32 Vict. c. 96); *Lord Bute* v. *Commissioners of Rothesay*, June 23, 1864, 2 Macph. 1278; *Philloth*, M. 5620; Bankton, ii. 8, 196; Erskine, ii. 10, 61; *Stewart* v. *Glenlyon*, May 20, 1835, 13 Sh. 787.

Argued for complainers—The only thing quite clear about the *solum* of the old chapel was that it was part of the churchyard of Rothesay. The complainers' true title was that of parishioners, and no objection was stated on record to that title. The old church being part of the *solum* of the churchyard could not be excambed—Craig's Jus Feudale, i. 15, 11. Being a public burying-ground, it was religious, and therefore *extra commercium*. The churchyard was both a public and a legal trust, and the heritors were therefore not justified in parting with it. In the present purpose there was either an intention to abandon this trust or to hand it over to Lord Bute. See

the case of *Richmond* v. *Fife's Trustees*, February 16, 1844, 6 D. 701. Were the heritors acting within their powers in granting this excambion? This excambion was not by heritors to heritors at all, but to a new body of trustees altogether; it was the use to which this chapel was to be put that caused the principal objection. The question of the right of the heritors to act as they had done here had never arisen before. The case of *Spence* v. *Darling*, F.C., 1808, was the nearest approach to it; there the church manse and glebe were transported, but the churchyard remained. Though a church and glebe were not *res religiosæ*, a churchyard was—Bankton, i. 3, 12. The heritors' right was one of trust, with a right of administration; here they have not administered, but bargained and given up their trust, by executing the conveyance in question. *Walker* v. *Presbytery of Arbroath*, March 1, 1876, 3 R. 490.

At advising—

Lord President—This is an action at the instance of certain parishioners in the parish of Rothesay, and it prays that the respondent the Marquis of Bute should be interdicted from proceeding to carry out and complete an arrangement for the conveyance to him of all and whole the old chapel in the parish churchyard of Rothesay, commonly called St Mary's Chapel, and that we should also interdict him, or anyone on his behalf, from occupying or taking possession of or exercising any rights of proprietorship in the said chapel or site thereof.

Now, the application for interdict seems to come rather too late, because it turns out that before that application was made a conveyance had been executed in favour of the Marquis of Bute by the heritors of the parish conveying the chapel to him, and an objection if stated upon that ground would probably have been fatal to the application. But no such objection has been stated. On the contrary, the parties are anxious that under this note of suspension the question between them should be tried. And that question is, whether the heritors were entitled to execute the conveyance of this chapel which they did upon the 1st of March 1882. The deed takes the form of a contract of excambion. The churchyard of Rothesay, it is said, had become too small for the wants of the parish, and the Marquis of Bute was willing to give a portion of ground belonging to him adjacent to the churchyard for the purpose of its enlargement; and, on the other hand, he was desirous of acquiring this chapel of St Mary's. Now, if the heritors, for the purpose of acquiring additional land for the churchyard, had undertaken merely to assign or allocate the portion of the churchyard which forms the site of St Mary's Chapel as a burying-place for the Marquis of Bute, I do not know that any difficulty would have arisen in carrying out that arrangement. But unfortunately that is not the form of the deed before us. On the contrary, while the Marquis of Bute conveys the additional land to be added to the churchyard on the one hand, the heritors, on the other hand, in consideration of the conveyance of that additional land, "do hereby dispone to and in favour of the said Most Noble John Patrick Marquis of Bute, his heirs and successors whomsoever, heritably and irredeemably, all and whole the said chapel, with the *solum* of the ground on which the same is built, and the whole parts and pertinents thereof, which chapel adjoins the present parish church of Rothesay, and is bounded on all sides by the old churchyard of said parish, except at the north-west corner of said chapel, at which corner the walls of said chapel and of the present parish church meet, with the whole right, title, and interest of the heritors therein: But it is hereby provided that the said chapel and others shall only be held by the said Marquis upon the same terms as any other mausoleum which has been erected within the said churchyard with the sanction of the heritors, reserving always to the relatives or representatives of persons buried in the said chapel all existing rights of access thereto for the purpose of visiting and repairing the tombs; and also reserving to the parishioners of the parish of Rothesay and all others all existing right of access to the said chapel, subject only to the condition that said access shall be under the superintendence of the sexton for the time, who shall be provided by the Marquis of Bute with a duplicate key of the chapel for the purpose; and the said Marquis is hereby empowered to restore the said chapel, and that in such manner as shall seem to him most fit, and to use all manner of means for that purpose, but consistently with the aforesaid limitation." Now, the only question before us is, whether the heritors had the power to execute such a conveyance as that—a conveyance in property to the Marquis of Bute, his heirs and successors whomsoever, heritably and irredeemably, of the church and the *solum* upon which it is situated, which is admittedly part of the churchyard of the parish of Rothesay. I am of opinion that the heritors had no power to do so, and for the reasons that have been stated by the Lord Ordinary in his note, all of which I adopt, and think it quite unnecessary to repeat. I only desire to add that I am not to be understood as saying that an excambion or exchange of a portion of a churchyard for other more convenient and more extensive ground with a view of improving the churchyard will in all cases be unlawful. I can quite understand circumstances in which such an excambion might be very properly carried out by the heritors. For example, if there was a portion of the churchyard inconveniently situated for the purpose of burial, and which had not been used for burying for a very long period—say for a century—and additional land elsewhere was offered in exchange for it—by which I mean on the other side of the churchyard—I am by no means prepared to say that the heritors might not lawfully make such an exchange. Or supposing that there was ground embraced within the walls of the churchyard which never had been used for burying purposes, and was not well suited for the purpose, there again an exchange for other and more suitable ground would, I think, be within the power of the heritors. As to the form in which the exchange should be made, that is a matter of very little consequence. One must look to the substance of the thing, and not to the mere form; and it is to the substance of this proceeding that I think the real objection applies. This part of the churchyard, so far from not having been used for burying purposes, has obviously been used for these purposes, and that at a period certainly within the memory of man, and further, there are

tombstones erected within the walls of the chapel indicating that at a still earlier period there was sepulture there. In short, this is the conveyance by the heritors of a portion of the churchyard within the very centre of the churchyard, which seems to create a most anomalous position upon the part of the disponee under this deed. It is very difficult to say whether, after this deed has been executed, this ground remains part of the churchyard or does not. It certainly cannot remain part of the churchyard in this sense, that it no longer belongs to the heritors as trustees and curators for the parish. On the other hand, it is to be left as a place of sepulture, and therefore in that sense it may be said to continue to be part of the churchyard. But the anomaly is equally great whichever of these views may be taken. If it continues a part of the churchyard it cannot lawfully be the private property of anybody, and if it ceases to be a part of the churchyard the anomaly is even greater, for there is thus carved out of the very centre of the churchyard a square portion of ground which is not to be a place of sepulture in the proper sense, and is not to be within the management of the heritors of the parish. On all these views I think it is clear that the proceeding here is a mistaken one altogether. As I have said at the outset, I do not doubt that some arrangement might have been made of a different kind for the purpose of carrying out what seems to have been the object of both parties, but the mode adopted is clearly beyond the power of the heritors.

Lord Deas—This question relates to a piece of ground in the very centre of the churchyard of the parish of Rothesay; the effect of the transaction in its terms is to convey that piece of ground heritably and irredeemably to the Marquis of Bute—to convey it as his absolute property—in exchange for another piece of 1 acre 3 roods 34 poles. There is no doubt as to that being the terms and the effect of the contract of excambion. The heritors make a very good bargain, as they certainly seem to have done, in getting a much larger piece of ground to form part of the churchyard than they had before. But the question we have to deal with is not the advantageous or disadvantageous terms of the bargain or of the excambion, but the question we have to deal with is whether this is a lawful transaction. There is no doubt at all upon the facts, that although upon the *solum* of this ground there seems to have been at one time a chapel which is now in ruins, the piece of ground itself was, and always has been, a part of the churchyard, and remains a part of the churchyard at this hour, and it was the part of the churchyard in which ancestors of the noble Marquis have been buried, as is shown by the monuments erected over their graves—but a part of the churchyard in which there is just as little doubt that other parties were entitled to be buried and were buried, to whom monuments have also been raised. The question then is, whether this part of the churchyard can be disposed in absolute property to the Marquis to do what he thinks proper with it,—to turn it to any purpose which he may desire; for the only qualification put by the deed upon his right to do with it what he thinks proper is that it says it is to be applied to the purposes of a mausoleum. I confess I do not know very well what that means in the particular circumstances. There is said to be one other burying ground that is called a mausoleum, and I suppose the argument must be that he is restricted to apply it to the same sort of purposes as that other piece of ground. But that is a restriction upon his right which, I confess, to my mind conveys no specific restriction known to the law at all. I do not know that we have any instance of mausoleums, except those which are the exclusive property of the persons to whom the ground belongs. Certainly it does not appear to be a restriction upon the right of the noble Marquis that could prevent him under this deed from applying the ground to any purpose whatever that he thinks proper, and to which he can apply any portion of his property. I suppose I may say without any doubt that we have no instance of a piece of ground in any parish churchyard in Scotland being the property of an individual subject only to a vague restriction of this kind. I do not see anything in that restriction that would prevent the Marquis from doing anything with this piece of ground that he might think proper; and these words about a mausoleum impose no restriction, because there is no restriction whatever as to the uses to which he could apply it. We have no instance of a piece of ground in a parish churchyard in Scotland in that position that an individual might apply it to any purpose which he thinks proper. Such a thing never seems to have been attempted in the whole period of the history of our law; and I am very clearly of opinion with your Lordship and with the Lord Ordinary that that certainly cannot be done if anybody has a lawful interest to object. It is objected to here by a number of parishioners, and I think the parishioners have a title to object. Every parishioner has a right to claim burial in a portion of the churchyard, and if all the rest of the churchyard were occupied by recent graves and recent tombstones, I see nothing to prevent any parishioner when a member of his family dies,—and if there were no other convenient place in which the burial could take place,—from claiming the right that that member of his family shall be buried in this particular ground. Upon the whole matter, I concur in the observation of your Lordship that the Lord Ordinary has dealt quite according to law with this question; and I concur in the general view of the law which he has very distinctly stated.

Lord Mure—I am of the same opinion. The general rule is that a churchyard or churchyards are *extra commercium*, in the ordinary sense of that expression. That is, I think, pretty well settled in several of the cases which have been referred to in the course of this discussion; and it is also, I think, equally well settled that a portion of a churchyard may be allocated to a particular heritor by the body of heritors as his family burying-ground. In the present instance there can be no doubt that the ground which is here proposed to be excambed is part of the old churchyard of the parish. That is plain from the plan which has been laid before us, and it has manifestly been used as a place of burial within the last forty years. That being so, the only question, as it appears to me, for consideration is whether this excambion is to be looked upon as a deed of allocation of an additional piece of ground

to Lord Bute, to be used as a mausoleum, subject to the same uses as the mausoleum which at present belongs to the family in the same churchyard, or whether, on the other hand, it is an out-and-out excambion or sale of the ground to him. I am of opinion with your Lordships that it is substantially a disposition heritably and irredeemably to the respondent of the ground in dispute; and I think this was *ultra vires* of the heritors, and that the interlocutor of the Lord Ordinary should be adhered to. There are certain reservations in the deed following upon the disposition as to the uses, and certain restrictions in regard to the use, but I see no restriction put upon any one but the Marquis of Bute. There is none put upon his heirs and successors; and in that respect there is no limitation that I can see that can take it out of the category of an heritable and irredeemable disposition to Lord Bute of the ground in question. On that ground I am of opinion that the Lord Ordinary's interlocutor is well founded.

Lord Shand—I agree with your Lordships. The argument from the bar was to a considerable extent addressed to the question whether in any circumstances it was lawful for the heritors of a parish to excamb a portion of the existing churchyard for new ground; but it appears to me that it is not necessary in this case to express any final opinion upon that general question. I rather agree with your Lordship in thinking that there may be circumstances—exceptional circumstances no doubt, but there may be circumstances—in which it would be quite competent for heritors so to act, and I take particularly such a case as your Lordship put, of a piece of ground which had been enclosed within the walls of an existing churchyard, and had been dedicated to the purposes of a churchyard, but part of which had not been used. I cannot doubt for my part that if a more convenient portion of ground on another side of the churchyard were acquired in exchange for that, the heritors would be entitled to accept that ground in exchange. In the present case I think it is sufficient that we find the particular and peculiar circumstances to which your Lordships have adverted,—that this piece of ground is in the first place in the centre of the churchyard, and second, that it has been in comparatively recent times used as a place of sepulture; and these two circumstances are of themselves to my mind quite sufficient to exclude the idea that the heritors can dispose of the property. The deed which we have before us is expressed in such terms that if the noble Marquis thought fit a year after acquiring it to dispose of this ground to somebody else, it might be in his power to do so, and I rather agree with my brother Lord Mure in thinking that even if those conditions, such as they are, that are embodied in this deed could be held to be satisfied in regard to all that could be required of Lord Bute so long as the ground was in his possession, they would not attach to his successors. But I am further of opinion that the deed is not satisfactorily expressed in any view, even as in question as to the Marquis' powers, by the use of the most ambiguous expression that the ground is to be held upon the same terms as any other mausoleum which has been erected within the said churchyard with the sanction of the heritors. I therefore agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to.

I think it right to add that I concur with your Lordship in thinking and in hoping that an arrangement may yet be made by which the desirable object of the restoration of this old chapel may be carried out with the consent of all parties. If instead of a title of property such as we have here upon somewhat ambiguous conditions, the heritors had, without objection on the part of the persons who represent those who have been buried within this ground, allocated it as a place of sepulture to the Marquis of Bute and his successors, with a power to restore the chapel and to have such burial service conducted there as may be lawfully used in the parish burial grounds in Scotland, I confess I should have thought that would probably meet with no objection, and would carry out the object which the parties had in view. Unhappily the deed has been taken in different terms, and accordingly we must, I think, sustain the objections taken to it, but if the case had been in that other position, I for my part should have had no difficulty in holding that such an arrangement was quite competent. In such circumstances I should have no difficulty in holding that any right on the part of the parishioners generally to state an objection on the ground that they might in certain circumstances require to resort to the ground in question for a burying-place would be completely met by the fact that a large addition had been made to the existing churchyard, by which the requirements of all parties for burying-places were fully satisfied. In such circumstances I should have no difficulty in holding that any right on the part of the petitioners generally to state an objection on the ground that they might in certain circumstances require to resort to the ground in question for a burying-place would be met completely by the fact that a large addition had been made to the existing churchyard by which the requirements of all parties for burying-places are fully satisfied.

Lord Deas—Upon that matter I desire entirely to reserve my opinion.

The Court adhered.

Counsel for Complainers—Trayner—Taylor Innes. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Respondents—Mackintosh—Pearson—Murray. Agents—J. & F. Anderson, W.S.

Friday, December 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SMITH & CO. *v.* TAYLOR, AND PATERSON, CAMERON, & CO.

Reparation—Law Agent—Agent and Client—Liability of Agent to Third Party Injured.

If an agent acting for a client does diligence without proper warrant, or performs any other wrongful act resulting in injury to a third party, the agent and client are conjunctly and severally liable therefor.