LORD YOUNG—I am of the same opinion. I think there was here prior deliberate and ostentatious publication, and that the patent cannot be sustained.

I join in the regret expressed by your Lordship that the parties did not see their way to settle the case for their own sakes as they were urged to do by the Court.

LORD RUTHERFURD CLARK—I agree.

LORD TRAYNER—I give no opinion as I was not present at the hearing.

The Court adhered.

Counsel for Pursuers and Appellants—H. Johnston—Salvesen. Agent — Alexander Morison, S.S.C.

Counsel for Defenders and Respondents — Dickson — Ure. Agents — Martin & M'Glashan, S.S.C.

Thursday, May 28.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

STEEL *v.* KIRK SESSION OF ST CUTHBERT'S.

Church — Churchyard — Extension of Church—Interdict.

The kirk-session of a parish having resolved to enlarge the parish church, selected plans for that purpose, which were approved by the heritors and presbytery. These plans involved an encroachment upon a part of the common burying-ground of the parish, which had been in frequent use for purposes of burial until sixteen years previously, when it was closed by order of the Sheriff.

In an action at the instance of a heritor against the kirk-session to prevent the proposed encroachment, it was proved that human remains interred in the ground upon which it was proposed to build were from the nature of the soil resolved into bones and dust in about eight years; that the egresses of the church were unsafe, the ventilation very defective, the air space per sitter insufficient, and that there was no vestry; that the only satisfactory remedy for these defects lay in an extension of the church, and that the necessary ground for the extension could only be obtained in the proposed direction.

Held (1) that it was competent for a kirk-sesion with consent of the heritors and presbytery to encroach on part of the parish churchyard for the extension of the church, provided a sufficient case of expediency were established; (2) that the kind of expediency necessary to justify such encroachment would vary according to circumstances; and (3) that a sufficient case of expediency had in the present case been established.

Opinion by the Lord President that a person who succeeds to the estate of a heritor by purchase does not thereby acquire any right in the ground assigned as a burying place to that heritor and his family.

The Kirk-Session of St Cuthbert's Parish Church, Edinburgh, resolved to alter and enlarge the church, and selected plans for that purpose, which were approved by the Presbytery. The church was situated within the old parochial churchyard, and the scheme of reconstruction involved an encroachment on part of the old burying-ground.

The present action was raised by James Steel, a heritor, against the kirk-session to have it found and declared that the defenders were not entitled (1) to build over the burying-grounds of the parish or any portion of them, (2) to encroach upon and destroy or change the original and natural use and purpose of said burying-grounds, and (3) to open up or remove any of the soil or earth of the graves of said burying-grounds, or of the remains of bodies interred therein. These conclusions were followed by conclusions for interdict.

The pursuer's main grounds of action were that the scheme of reconstruction proposed by the defenders involved an unlawful encroachment on a portion of the old common burying-ground of the parish, which had been dedicated for centuries to the purposes of sepulture; had been in use until 1874 when it had been closed by order of the Sheriff as a nuisance under the Public Health Act 1867, and was crowded with human remains; that the proposed scheme also involved an interference with the tomb belonging to the family or estate of Dean now the pursuer's property; that no sufficient necessity for the proposed encroachment had arisen; and that the decision of the heritors' meeting which decided in favour of the proposed scheme was inept, in respect that several heritors had been improperly refused liberty to vote at said meeting, and that this refusal had affected the decision of the meeting.

The defenders maintained that a sufficient case of necessity or at any rate strong expediency had arisen to justify the proposed encroachment.

The Lord Ordinary before answer allowed parties a proof of their averments, and the pursuers having reclaimed, the First Division adhered to the Lord Ordinary's interlocutor.

Proof was thereafter led, the material results of which were as follows—During the twenty years preceding 1874 (when the common burying-ground was closed by order of the Sheriff), a large number of bodies had been interred in the portion of ground over which the defenders proposed to build. The pursuer's calculation, which the Lord Ordinary accepted as fairly accurate, was that the enlarged church would enclose ground in which about 400 bodies had been interred during the twenty years

prior to 1874, and that in sinking the foundations of the new buildings, the remains of about 300 other bodies would be necessarily displaced. On the other hand, it appeared that this part of the common burying-ground had been in 1840, and again in 1858, made up with forced earth to a total depth of 15 to 20 feet, which formed a loose and porous soil, and the evidence of the sextons was to the effect that in soil of this description human remains were resolved into bones and dust in seven or eight years, and that it had been the custom, while the burying-ground remained in use, to reopen graves for fresh interments after a period of seven or eight years. Scientific evidence was also adduced by the defenders to the effect that at the depths of 3 and 5 feet in this soil the air contained no more carbonic acid than was commonly found in ordinary forced earth, the conclusion to be drawn from this fact being that the ground did not now contain any traces of human remains except partially decomposed bones.

With regard to the Dean Tomb, the architect employed to carry out the scheme of reconstruction explained that his plan would not interfere with that tomb any more than the existing structure. The tomb was an arched vault, and at present carried the weight of the outer wall, and under the new plans the only change was that in place of the outer wall of the church one of the pillars of a new gallery would rest on the arch.

The church as it stood had an upper and lower gallery, and was seated for 2071. The defects complained of were these. The seats and passages were too narrow; the floor too low; there was no vestry or retiring room except the session-house; the egress had been condemned by the burgh engineer as unsafe; the ventilation was most defective, and the air-space allowed for each sitter insufficient, being about 113 cubic feet per sitter instead of 150 to 200 cubic feet, which was the proper allowance. The result of the evidence was to show, though some contrary evidence was adduced by the pursuer, that these defects could not satisfactorily be remedied without the area of the church being enlarged, and that the only feasible plan for the enlargement which was necessary was the one proposed, as extension in any other than the proposed direction, namely eastwards, would involve either the pulling down of the steeple or interference with private burying-grounds still in use.

On the question whether the heritors had consented, the evidence was as follows—When the necessity for repairs was apparent, it was at first anticipated that these could be executed at the cost of about £1000, and the heritors at a meeting of 9th April in order to meet that expense assessed the heritors at the rate of 10d. per pound Scots of valued rent. The kirk-session, however, having resolved to make an effort to put the church in a more satisfactory state, proposed a scheme of reconstruction for the heritors' approval. The plan first selected by the heritors involved an encroachment on the old common burying-ground, but it was only proposed to take away 15 inches of the surface of the soil in order to sink a layer of concrete which the architect consulted thought would be a sufficient support for the new walls. These plans were submitted to and approved of by a meeting of heritors on 8th Oct 1889, at which it was agreed to make another contribution of £1000 towards the estimated cost of £17,000, the rest of the expense to be raised by the kirk-session from the congregation, and the heritors accordingly imposed another assessment of 1s. per pound Scots of valued rent. Subsequently the kirk-session were advised that it would be necessary to sink the foundations through the forced earth of the churchyard down to the solid ground, and the plans were accordingly modified to that effect and again submitted to the heritors. They were considered at a meeting of 5th May 1890. At this meeting the chairman intimated that only valued-rent heritors would be entitled to take part in the meeting. The meeting approved of the modified plans. It was not proved that any vote had been rejected, or any real rent heritor deterred from voting by the chairman's action.

On 9th January 1891 the Lord Ordinary (STORMONTH DARLING) assoilzied the defenders.

"*Opinion.*—The object of this action is to prevent a proposed reconstruction of the Parish Church of St Cuthbert's, Edinburgh, on the ground that it involves an encroachment on a portion of the churchyard. This reconstruction has been resolved on after full deliberation by the proper authorities, *i.e.*, the heritors and kirk-session, with the approval of the presbytery, as a measure necessary for the health and comfort of the congregation. No appeal can be made to a court of law against such a resolution except on the ground either of interference with private right or of breach of the trust reposed in the heritors and kirk-session as administrators of the church and churchyard for parochial purposes. The pursuer puts his case on both grounds, for he says that the proposed operations will interfere with the 'Dean Tomb,' which is situated under the present church, and which contains the ashes of his predecessors in title in the estate of Dean, and he also says that the reconstructed church will enclose, and its foundations will disturb, a very large number of graves in the portion of the churchyard to the east of the present church, which formerly was part of the common burying-ground of the parish, but was closed by order of the Sheriff in 1874. I am of opinion that the pursuer has not made out his case on either head.

"The question of the 'Dean Tomb' may be disposed of in a sentence. It is the resting-place of the ancient family of Nisbet of Dean, and the pursuer does not say that it has been in use for many years. In argument he disclaimed all intention of using it himself. Nevertheless, he might be entitled to protect it from encroachment

if he could show that the proposed operations were calculated to injure it. But it is an arched vault below the present church, and it at present carries the weight of the outer wall. The architect explains that the only change to be made is, that one of the pillars supporting the new gallery will rest on the haunches of the arch. It seems to me that the pursuer has altogether failed to prove that this slight alteration will to any extent affect its stability.

"His main contention, however, relates to the disturbance of the common burying-ground, and here he appeals to that natural sanctity which the law recognises as attaching to places of sepulture. I speak of course of the public churchyards of Scotland, and not of private cemeteries, which are regulated by the law of contract.

"It seems to me that a distinction must be drawn between churchyards which are still in use and those, like the present, which have been closed by order of the proper authority. With regard to the former, surviving relatives have an interest to see that they are preserved for future interment. With regard to the latter, there is, I think, no higher right than to secure that, in the words of Erskine (ii. 1, 8), 'these, when they are no longer to continue such, should be sequestrated from the ordinary uses of property till the remains of the bodies there interred shall have returned to their original dust.' This may involve a right on the part of representatives of the dead to have the lairs enclosed, and to have free access to visit them at suitable times. Nothing more than this was decided by the cases of *Mansfield* v. *Wright*, March 17, 1824, 2 Sh. App. 104, and *Turner* v. *Arbuckle*, February 16, 1869, 7 Macph. 538.

"In the present case the pursuer does not appear in the character of a representative of any of the dead whose graves he says will be disturbed. Nor has he been able to adduce as witnesses any such representatives, for Mr Crawford and the Rev. A. B. Brown are relatives of a family whose burying place is not to be interfered with except by the temporary removal of a mural tablet, and the corbelling of a few stones over the area of the lair, and the grave of Mr Hutton's relatives is outside the proposed building altogether. Even when a graveyard is still in use the case of *Hill* v. *Wood*, January 30, 1863, 1 Macph. 360, fully recognises that a case of necessity —or of such high expediency as amounts in law to necessity—may be made out for encroaching on a private burying-place against the wishes of those who have a right to it for the purpose of enlarging the parish church. It seems to me that much less is required to justify encroachment for this purpose on ground which has ceased to be used for sepulture, and that a dissentient heritor, asserting no private interest either of a patrimonial or sentimental kind, must, before he can succeed, be able to show that the proposed interference with the disused graves is wanton, without adequate reason, and of a kind to outrage public decency by desecration of the resting-places of the dead. In my view these considerations have a direct relation to one another, for it will require a much stronger case to justify a serious disturbance of graves, involving the re-interment of recognisable human remains, than if the operations are to be conducted in ground where the resolution of the remains into their kindred dust is all but complete.

"It is of importance, therefore, to consider what are the defects in the present church which have led the kirk-session to resolve on an expenditure of over £17,000, and the heritors to assess themselves for a contribution of £2000. It may be conceded that the disrepair is not such as to impose on the heritors a legal obligation to rebuild. But the test of what they might be compelled to do cannot, I think, be the test of what they may lawfully do or consent to being done. It has been proved that the church is in various respects inconvenient, insanitary, and even dangerous. The seats and passages are too narrow, the floor is too low, there is no vestry, there is no retiring room of any kind except the session-house, the upper gallery is objectionable on many grounds, the egresses have been condemned by the burgh engineer, the ventilation is most defective, and the air-space available for each sitter is quite insufficient, being something like 113 cubic feet per sitter, whereas it ought to be from 150 to 200 feet. It is out of the question to suggest that the accommodation for the population of so large a parish could properly be curtailed, and if the present number of sittings is to be maintained, and all these defects are to be remedied, it is obvious that a considerable enlargement of the area of the church is absolutely necessary.

"The pursuer hardly ventures to deny this, but he suggests that there are other modes of obtaining the desired improvements without encroaching on the burying ground. In particular, he says that a new site might be obtained, or that the church might be extended on the present site without going beyond the walks which surround it. With regard to the latter suggestion, it is enough to say that on the north there are private lairs still in use which are close to the church, that on the west there is the steeple which bars extension on that side, and that the space occupied by the walks on the south and east is not sufficient, besides being of such configuration as to make it impossible to build an edifice of suitable shape. With regard to the suggestion for a change of site, I cannot assume that the Teind Court would authorise transportation. A strong instance to the contrary is afforded by the case of *Wilson* v. *Ogilvie*, Dec. 16, 1809 (reported in the Supplement to Connell on Parishes, pp. 63-5), where a small majority of the heritors of the parish of Falkirk had resolved that a new church should be erected on a different site, 'chiefly on the ground that, as the new church was to be considerably larger than the old, a number of the graves in the churchyard would be thereby disturbed,' but the change was opposed by the minister

and a minority of the heritors, and the report bears that 'the Court were of opinion that no change should be made on the situation of a church unless upon very strong grounds, and that no sufficient reasons had been shown in this case for making the change. The judges were clear however that proprietors of the graves disturbed must receive full indemnification, and that a clause to this effect should be inserted in the interlocutor.' From this it appears that the lairs to be encroached upon were still in use, and therefore the case is instructive as showing that the conversion, even of going ground from the use of sepulture to the kindred use of forming a site for a new parish church, so far from being unlawful, may be preferable to a change of site where enlargement of the church becomes necessary.

"It remains to be considered what is the character and extent of the encroachment which the proposed operations will involve. The pursuer calculates that about 700 interments made within the twenty years immediately preceding the closing of the common ground will be included within the area of the new building. So far as these are to be affected merely by being enclosed within the wall of the church, it cannot, I think, be said that there is anything to shock the feelings even of the most sensitive. But the pursuer further says that of these 700 interments about 300 will be actually displaced by the necessity which has arisen for carrying the outer walls down to the solid ground through a depth of from 15 to 20 feet of forced earth. I think these calculations may be accepted as fairly accurate. But the important fact is, that not one of these interments took place later than sixteen years ago, and that they all were made under what may be called normal conditions, *i.e.*, in plain deal coffins, placed in earth of a character which is precisely ascertained by the witness Henderson's journal of bores, but which may roughly be described as a sandy clay. That being so, it is plain that the pursuer's allegation in his answer to the defenders's fourth statement to the effect that the new church 'will be planted in a pit of human bodies, mouldering through every stage of decay,' is a mere piece of forensic hyperbole. The answer supplied by the evidence in this case to Hamlet's question, 'How long will a man lie in the earth ere he rot?' is very similar to the answer which was made by the gravedigger in the play. Ferguson, one of the sextons of St Cuthbert's, says, from his own observation, that a body decomposes there in from five to eight years, and Dr Hunter Stewart, who examined the soil, and made some interesting experiments on the air contained in the soil, gives it as his opinion that 'eight to ten years in such a soil as the common ground of St Cuthbert's would result in the complete decomposition and disappearance of the soft parts of the human body.' This opinion is strongly confirmed by his examination of the air, which, at depths of 3 and 5 feet, was found not to contain more carbonic acid than is commonly found in ordinary forced earth. His conclusion therefore is (and in this Professor Crum Brown agrees), that the ground in question does not now contain any traces of burial except pieces of bone, decomposed, but recognisable as bone, and some fragments of the wood of coffins.

"In these circumstances I think it is impossible to say that the proposed operations will involve anything like desecration of the graveyard, or any outrage on public decency or private sentiment. If the concurrent belief of practical and scientific men should in any particular case turn out to be erroneous, I assume that the defenders will take care that any coffin remaining entire shall be reverently reinterred. I assume the same with reference to the bones which will certainly be discovered. But I do not think it necessary to insert any proviso in the interlocutor to that effect, nor indeed are the the conclusions of the summons appropriate for such a purpose. From these conclusions as they stand I think the defenders are entitled to absolvitor."

The pursuer reclaimed, and argued—A churchyard was held in trust by the heritors for the burial of the dead, and any diversion of the ground to other than the primary uses to which it had been dedicated could only be justified by necessity or high expediency—*Wright* v. *Mansfield*, March 17, 1820, 2 Sh. App. 104; *Ure* v. *Ramsay*, June 5, 1828, 6 S. 916; *M'Bean* v. *Young*, January 22, 1859, 21 D. 314, *per* Lord Curriehill, 319; *Wilson* v. *Ogilvie*, December 16, 1809, Supplement to Connell on Parishes, p. 63; *Hill* v. *Wood*, January 30, 1863, 1 Macph. 360; *Turner* v. *Arbuckle*, February 16, 1869, 7 Macph. 538; *Wright, &c.* v. *Lady Elphinstone*, July 20, 1881, 8 R. 1027; *Russell, &c.* v. *Marquis of Bute*, December 8, 1882, 10 R. 302. The novel feature of the present case was the unparalleled extent to which it was proposed to interfere with human remains. It was impossible to say that in all cases these were resolved into bones and dust, and even assuming that to be fairly certain it would require a very high case of expediency amounting to practical necessity to justify such interference. It was necessary for the defenders to show that the necessities of the case justified the interference, and that they had obtained the consent of the heritors as the trustees of the churchyard. Their case failed on both points. In the first place, the defects in the church were not a sufficient expediency, and they could be remedied without encroaching on the burying ground. In the second place, the whole body of owners of heritable property in the parish were liable to assessment, and were the trustees of the churchyard, and not the restricted body of valued rent heritors—Rankine's Land Ownership, 641; *Highland Railway Company* v. *Heritors of Kinclaven*, June 15, 1870, 8 Macph. 858; *Scottish North-Eastern Railway Company* v. *Garner*, January 29, 1864, 2 Macph. 537; *Boswell* v. *Hamilton*, June 15, 1857, 15 S. 1148. But the defenders had not obtained the consent of the whole body of

heritors, for the meeting of 5th May which finally approved of the places for the reconstruction of the church was a meeting at which valued-rent heritors only were allowed to vote.

The defenders argued—The diversion of a churchyard or a part of a churchyard to other than its original use was an act within the power of the heritors of a parish, provided a case of necessity or sufficient expediency were established. The kind of expediency necessary to establish would vary according to the circumstances of each case. In the present case the ground upon which it was proposed to encroach was no longer used for its primary purpose of burial, and it was proved that the bodies there interred were, as far as could be known, resolved into dust, and that no interference with any private burying-grounds was contemplated. The expediency necessary to justify the proposed encroachment needed not therefore to be of a high order. A very sufficient case had been made out, for the safety, health, and comfort of the ministers and congregation of the church demanded the extension of the church, and the necessary ground could only be obtained in the proposed direction. It was untrue that the necessary consent of the heritors had not been obtained. In the first place, the plans were really approved at the heritors' meeting of 8th October 1889, and it did not appear that there had been exclusion of real rent heritors at that meeting. Besides, no real-rent heritor had come forward to object that he had tendered a vote at the meeting of 5th May 1890 which had been excluded, or that he had made an offer to bear his proportion of the assessment and had been refused. Further, this was a landward parish, though the church was now surrounded by the new town, and the chairman at the meeting of 5th May had been right in saying that the valued-rent heritors were the only parties entitled to deal with the question of the reconstruction of the church—Connell's Parochial Law, App. 17. It was quite true that in a number of cases the point had been raised whether *intra parochiam* real or valued rent was to be adopted as the basis of assessment. The rule established was that if the valued-rent heritors objected to bearing the whole assessment, and satisfied the Court that that mode of assessment was unjust to them, it would on their suit be altered. The trust must always be in the body subject to assessment, and here the assessment had been laid on the valued-rent heritors—Ecclesiastical Buildings Act 1868 (31 and 32 Vict. cap. 96, sec. 23). The pursuer's case therefore failed on all grounds.

At advising—

LORD PRESIDENT—The Lord Ordinary by the interlocutor under review has assoilzied the defenders from the conclusions of the action, and in order to appreciate fully the effect of that judgment we must attend to what the conclusions of the action are. The action concludes that the defenders are not entitled to build over the burying-ground of the city parish of St Cuthbert's, or any part thereof; and second, that they are not entitled to encroach upon and destroy or change the original and natural uses or purposes of the said burying-ground; and third, that they are not entitled to open up or remove any of the soil or earth of the graves of said burying-ground, or of the remains of the bodies which have been interred therein. Now, I am of opinion that the pursuer has not succeeded in establishing any of the propositions which are embraced in the conclusions of declarator. On the contrary, I think he has entirely failed to establish any one of them. The defenders are the kirk-session of the parish of St Cuthbert's and the heritors of the parish; and the pursuer is an individual heritor who challenges the proceedings of the kirk-session upon the grounds embodied in the conclusions to which I have just referred. Now, the position of the kirk-session in regard to the church and burying-ground of any parish in Scotland may be described generally as administrative merely. But the position of the heritors is different. They are the proprietors of the church and of the churchyard. I think that is so important a proposition in regard to the present case that I venture to repeat what I said in the case of the *Duke of Roxburghe*, 3 R. 734—"The legal rights of the heritors in connection with the parish church are, I think, very well settled. I do not think there can be any dispute about what they are. The heritors have the burden, which is imposed by statute, of building and maintaining parish churches, as well as other ecclesiastical buildings, and the buildings which they so build and maintain are in law the property of the heritors. But I need hardly add that they are only property in trust—in trust, that is to say, for the whole body of the parishioners within the parish, and when in the division of the area among the heritors the accommodation in the parish church comes to be appropriated, so much to one heritor and so much to another. I think, in like manner, each individual heritor becomes trustee for those of the parishioners that reside upon his estate. The portion of the area that is assigned to him is not his property in any sense of the word." And I see that Professor Rankine (2nd ed., p. 163) says, in reference to churchyards, that "the rules of law in regard to the property and use of a parish church apply equally to the churchyard, with some modifications which may be traced in the main to the difference beween the occupation had of the two subjects." Now, in the *Duke of Roxburghe's* case there was some division of opinion, but not upon the matter which I am now referring to. And the judgment was also in part reversed, but still that does not affect the proposition in law which I think is established by that case.

Now, the heritors of the parish, in conjunction with the kirk-session—that is, the proprietors of the church and

churchyard along with the existing administrative body—have become satisfied that the church is not in a fit condition for the occupation of the large congregation which resort to it, and they find that the only way in which the evil can be remedied is that a portion of the churchyard shall be built over by an addition to the church. The heritors being proprietors in trust both of the one subject and the other, are entitled to consider and decide, with the approval of the kirk-session and of the presbytery of the bounds, in what way they shall exercise their trust powers, in this sense, that if it is found that it is desirable or highly expedient that one of the trusts should yield to the other—as in the present case, that a portion of the churchyard should be built over in order to increase their accommodation in the church—then I apprehend it is quite within the power of such parties to come to that resolution and act upon it. It is, however, undoubtedly the condition of their doing so that there shall be no legal right debarring them from doing what they propose to do, and in the second place, that there shall be no undue or improper interference with the rights of the parishioners either in the one subject or in the other, and therefore it becomes necessary to consider, as the Lord Ordinary has done, what is the condition of the churchyard, or rather of that portion of it which is proposed to be built over, in order to extend the church and make it more convenient for occupation.

In the first place, it is to be observed that the portion of the churchyard to be built over is no longer in use as a burying-place. It has been shut up by lawful authority, and no more burials can take place there. And it has not been for a great many years lawful to bury the dead in that portion of the churchyard. The ground proposed to be built over no doubt was a part of the public burying-ground of the churchyard for a very long period; and a great amount of human remains were undoubtedly consigned to mother earth in that portion of the churchyard. But it is a very well-established fact, leading to a rule of law, that after a certain period it is estimated that human remains resolve into their original dust, and it is by no means necessary to maintain the ground in which they are buried, intact. Now, in these circumstances it appears to me that the defenders have completely established their defence. They have shown that the churchyard, which belongs in property to the heritors, is no longer required in that portion of it proposed to be built over for the purposes of burial—indeed, that it would be unlawful to continue to bury bodies there. And therefore any legal obstacle to the extension of the church over that ground is entirely removed.

It is perhaps not necessary, but it may be desirable, just in a word to advert to that species of right which a heritor or even a parishioner may have in a portion of the churchyard which has been dedicated to the use of his family, where he has acquired a right by possession, or a grant from the heritors and kirk-session, of a right of sepulture. But it must be observed that there is no question of that kind raised here, or at least raised in such a way that it can be disposed of. Mr Steel, the pursuer, says that he is the successor in title of Nisbet of Dean, and as such has a right of property or some inferior right, in that portion of the churchyard which has been used by the family of Dean. Now it is quite new to me to hear that a successor in title has a right to continue the sepulture of his own family in ground which has been acquired for the burying-place of another family altogether, to whom he has merely succeeded by purchase of land. That is quite unknown, and there is no other case of alleged interference with ground where there is any right of this description claimed by anyone.

Therefore the obstacles which the pursuer has sought to set up against the proposed reconstruction or addition to the parish church seem to me to be entirely removed, and I am of opinion, with the Lord Ordinary, that the defender is entitled to absolvitor.

LORD ADAM—The defenders in this case, the Kirk-Session of St Cuthberts, have at their own hand no right or title to interfere with the burying-ground of the parish, but they say, and I think correctly in point of fact, that they have obtained the consent of the heritors of the parish, and therefore it appears to me that the question in this case is, whether the heritors could be interdicted from carrying out the proposed extension of the church.

Now, I agree with your Lordship that the heritors are the proprietors of the church and the churchyard for parochial purposes. The church, no doubt, is primarily intended for the purpose of worship, and the churchyard for the purpose of sepulture, but it cannot be said that the heritors are under no circumstances entitled to divert the church or the churchyard from the primary purposes for which they are intended. There have been numbers of cases where the churchyard has been appropriated for the extension of the church. The question therefore is one of necessity, desirability or high expediency, and I think the kind of case which must be made out depends on circumstances. I can quite understand that where patrimonial interests, as Lord Neaves called them in the case of *Hill* v. *Wood*, 7 Macph. 375, have been acquired, a strong case of expediency, amounting almost to necessity, must be made out before such rights can be interfered with. Again I can understand that, if the portion of a churchyard which is desired for the purpose of enlarging the church would probably be required for the primary purpose for which it was intended, a strong case would have to be made out for interfering with that primary purpose. I can understand, further, that a strong case would have to be shown, when the ground affected had been in quite

recent times used for purposes of burial, and it was proposed to disturb human remains when it was neither decent or proper that they should be disturbed. There is no case here of any such kind. The ground proposed to be taken for the extension of the church was formerly the common burying-ground of the parish of St Cuthbert's, and there will therefore be no interference with any patrimonial rights. Again, there would never be any further burials in this part of the churchyard in any case, because the common burying-ground was closed by the authority of the Sheriff in the year 1874. Further, the seventeen years which have elapsed since 1874 make it impossible that there should be any interference with the graves where recent interments have taken place, and it was also brought out in the proof that in such places as this human remains return, as the Lord Ordinary says, to their 'kindred dust' in the course of seven or eight years.

I think, therefore, that it is not necessary that any great case of expediency should here be made out, because I cannot see that there can be any great interference with the feelings or rights of anyone. There would indeed have been as much or more interference with the graves in question if the ground had remained a burial ground, as in that case they would ere this have again been used for the purposes of burial.

The question remains, whether a case of expediency or necessity has been made out, and I think enough has been shown with regard to the safety of the congregation in the matter of access, their health in the matter of ventilation, and the necessary conveniences and comforts of a church like this at the present time, to justify what seems to me to be a case of very limited interference with other rights. I think it is also proved that the necessary enlargement of the church cannot be made in any other direction than the proposed one. I accordingly have no hesitation in saying that the Lord Ordinary has come to a right conclusion.

LORD M'LAREN—I concur with your Lordship in the chair, and I have really very little to add. The enlargement of the church is proposed to be made by the kirk-session mainly out of funds provided by the congregation and by public subscripton, but I think the sum of £2000—which was considered to represent truly the sum necessary to put the existing church in proper repair—has been contributed by the heritors. In all that the kirk-session propose to do they have the support of the heritors, and therefore I think the case must be taken, in any question of power, just as if the heritors were themselves coming forward by a resolution of the majority proposing to do this thing. I conceive that the whole administrative title to the church and the churchyard is represented by the heritors and the kirk-session who in this matter are agreed. Then I think that unless we are to say that under no circumstances can a parish church, planted in the middle of a churchyard, be enlarged, it follows that the administrators of the churchyard and the fabric erected upon it must have the discretion of encroaching upon that part of the churchyard which has been appropriated to sepulture, and that is in most cases the whole of the part unoccupied by the fabric of the church. They are the best judges as to the direction in which the enlargement is to proceed, and as to the time of making it, and if they exercise their discretion properly and according to law, they would of course not make an extension which would involve the disturbance of the ground in which interments had recently taken place. Now, it is admitted that if such a thing were proposed—and I do not think it likely that any body of heritors would propose it—the Court might interfere, because the discretion of this public body, if exercised in a manner contrary to law, is open to challenge. But in my opinion no case has in fact been made out for interfering with that discretion. It does not appear to me that any injury has been qualified to anyone, or that there is any disturbance of human remains of a nature or in a degree different from what would necessarily take place if there had been no burial in this ground for a hundred years. I think there are ample precedents to justify the course which the heritors and kirk-session here propose to take, and that they are entirely within their rights.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—Taylor Innes—M'Lennan. Agent—John Pairman, S.S.C.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Ure. Agents—Davidson & Syme, W.S.

Saturday, June 6.

SECOND DIVISION.

[Lord Low, Ordinary.

BUCHAN AND OTHERS *v.* SUMMERS AND OTHERS.

Shipping—Jurisdiction—Summary Mode of Settling Dispute as to Amount of Salvage by Justices of the Peace or the Sheriff—Merchant Shipping Act 1854 (17 *and* 18 *Vict. cap.* 104), *sec.* 460.

The Merchant Shipping Act 1854, by sec. 460, provides that "Whenever any dispute arises . . . between the owners of any ship . . . and the salvors as to the amount of salvage, and the parties to the dispute cannot agree . . . such dispute shall be referred to the arbitration of any two justices of the peace [or in Scotland, by sec. 501, to the sheriff, including the sheriff-substitute] resident . . . at or near the place