that he has stated objections to the balance-sheets, or that he has done anything except to decline to aid the trustees in adjusting the balance-sheets. What do the trustees ask the Court to do? They ask for declarator that the defender is bound to concur with the trustees in bringing to a just and true balance the books of the firm once in every twelve months, and for decerniture against him to concur with the trustees in adjusting the balance-sheets, and to subscribe or otherwise authenticate the same in token of his acquiescence therein. Then there is an alternative conclusion that in the event of the defender appearing and objecting to the said balance-sheets, correct balance-sheets should be adjusted at the sight of the Court. The alternative is, that either the defender is to be ordained to concur in adjusting the existing balance-sheets, or otherwise, throwing these aside, correct balance-sheets are to be made up at the sight of the Court. Apart from the impossibility of finding any sufficient grounds for the interference of the Court at all, I am struck by the novel form of remedy proposed. I am not prepared to pronounce an opinion that circumstances might not occur where a partner is entitled to throw the affairs of the copartnery into Court; but this is not a course which a partner can take in the ordinary course of the partnership with no stronger allegation against his copartner than that he will not help him in adjusting the balance-sheets. By the contract of copartnery there is no obligation on the defender to express his acquiescence in the balance-sheets, and it would be rather a strong thing for the Court to create this obligation against him. I quite agree with the Lord Ordinary. I may say, at the same time, that I am the more easily reconciled to throw the action out of Court from the information we now have that there are other disputes between the parties which have not yet been finally determined. I quite understand the unwillingness of the defender to subscribe balance-sheets while he is objecting to some of the principles on which they are struck. This action would have no practical value if we could have sustained it. But I put my judgment on the same grounds as the Lord Ordinary.

The other Judges concurred.

The Court adhered.

Agent for Pursuers—T. J. Gordon, W.S.

Agents for Defender—Wotherspoon & Mack, S.S.C.

Friday, June 23.

CUNNINGHAM AND OTHERS *v.* EDMISTON AND OTHERS.

Process—Title to Sue—Sepulchre—Property—Contract—Implied Obligation. Where eleven out of thirteen thousand lair holders in a cemetery brought an action of declarator and interdict, &c., against the proprietors of the cemetery, seeking to have certain points determined which affected the rights of the whole body of lair holders, as well as those themselves individually—*held* that they had a right to pursue such action, but that the right to insist was a different thing from the title to sue, and must be judged of on the merits of the case. And, on the merits, it being found that they as individuals had no right to insist in conclusions of such a general nature, as would have put the rights of the whole body upon a perfectly new footing,—*held* that the proper course was to give decree of absolvitor, and not to dismiss the action.

Circumstances in which it was found that lair holders had no absolute right of property in their lairs (the cemetery not being a public parochial one), but only a permanent right of use, which right was a right *ex contractu* though implied merely between them and the proprietors, and its extent to be determined by a consideration of that contract; and farther, that they were not, in terms of that implied contract, entitled to demand, upon all the lairs being disposed of, that the proprietors should denude and transfer the property to trustees for behoof of the lair holders, or give up the management to a committee appointed by them:—

In which, on the other hand, it was held that the proprietors, by the implied contract between them and the lair holders, were bound to dedicate the whole ground to the purposes of cemetery; and though not debarred from profit from interment fees, as well as from the sale of lairs, they were only entitled to fair and reasonable fees, which the Court might interfere to fix, if properly applied to for that purpose.

This was an action of declarator, &c., brought by James Methven Cunningham and others, being thirteen lair holders in the Western Division of the Southern Necropolis, Glasgow, against William Edmiston, the trustees of James Watson, and the trustees of James Galloway.

The conclusions of the action will be more fully disclosed in the note to the Lord Ordinary's interlocutor given below. The general object of it may be shortly stated to have been—to compel the defenders to denude and divest themselves of the property of this Western Division of the Southern Cemetery in favour of trustees, who should thereafter hold for the sole behoof of the lair holders; and to hand over the management to a committee of lair holders, as in the other divisions of the cemetery. Failing this, there were several conclusions intended to regulate the management of the cemetery, the fees for interment, &c., and to prevent the practice of "pit-burial."

In order to understand the rights of parties in this Western-Southern Cemetery, it is necessary shortly to refer to the history of the original Southern Cemetery, and its first or eastern division.

The original Southern Cemetery, extending to seven acres, was projected in 1839 by the late Colin Sharp M'Laws. Two public meetings were held in Gorbals, and thereafter a prospectus was issued embodying the views of the projector, and the resolutions come to at these two meetings. The ground was purchased from William Gilmour, merchant in Glasgow, M'Laws' father-in-law, and a disposition was executed by him in favour of a committee of management appointed by a general meeting of subscribers to the projected cemetery, the said committee to remain in office and not be removable by the subscribers until the price was paid to Mr Gilmour. The prospectus above referred to especially set forth that it was one of the objects of the promoters to prevent and put a stop to the practice of pit-burial. It was farther specially held out and provided in the prospectus that the management of the said Southern Necropolis should be in the hands of the purchasers of the lairs; that the property should be vested in the Magistrates of

Gorbals for the security of all concerned; and that the lair holders should appoint a committee of management, of which the said Magistrates should be *ex officiis* members. Accordingly, after the price had been fully paid to Mr Gilmour, the property of the cemetery was duly vested in the Magistrates of Glasgow, as coming in the place of the Magistrates of the old burgh of Gorbals, and a committee of management was appointed by the lairholders, consisting of the Magistrates and sixteen other members. The cemetery has since remained under the management of the said committee. The lairs were gradually disposed of, payment being taken, in terms of the prospectus, in weekly instalments, any purchaser allowing six weekly instalments to lie over unpaid forfeiting his right to the money paid, and the lair allocated. The sole title of a purchaser or lairholder was a pass-book, shewing the number and price of lair, and the amount of payments made.

In the years 1846 and 1847, Mr M'Laws, who had had a large share in the management of the Southern Cemetery, entered into an agreement with Mr Gilmour for the purchase of a piece of ground of 3¾ acres, lying to the east of the original cemetery, to be formed into an eastern addition to it. The arrangement with regard to this eastern division was, that on the payment of the price and the disposal of the whole lairs, the ground should be handed over by the parties, Gilmour and M'Laws, to the Magistrates and committee of management of the original Southern Cemetery, to be held and managed by them in the same way as the latter. This was communicated to purchasers of lairs, and the original prospectus adopted and referred to. There was this difference, however, with regard to this eastern division, namely, that one-third of the money received for lairs was to be paid to Mr M'Laws "to be appropriated by him for his own private use." The said eastern division is now under the management of the committee of the Southern Cemetery, as set forth and provided for in the said agreement and prospectus.

The demand for lairs increasing, Mr M'Laws determined to arrange for the addition of a western division to the cemetery. He accordingly purchased from the trustees of Mr Jardine of Hallside a piece of ground adjacent to the Southern Cemetry on the west side, consisting of 9 acres. This was in 1851 feudally vested in Mr M'Laws, and became the Western-Southern Cemetery, about which the present action was raised. In the year 1856 M'Laws borrowed from the City of Glasgow Life Assurance Company the sum of £6000 upon bond, in which the above-mentioned James Galloway, James Watson, and William Edmiston were cautioners; and in security for this debt he executed a disposition of the property of this Western-Southern Cemetery to the Assurance Company, receiving from them a back-bond.

M'Laws being sequestrated in 1857, the Assurance Company, with consent of his trustee, proceeded to sell the said Western Cemetery for payment of their debt; and it was purchased by Galloway, Watson, and Edmiston, the cautioners above mentioned. It was ultimately vested in them under an absolute conveyance, but containing the following clause:—"and particularly the lands and others before disponed are so disponed under the burden of all servitudes and other burdens acquired over said subjects and others by prescriptive use or otherwise, and specially under all the servitudes and other burdens created in favour of parties to whom lairs or places of interment may have been sold or disposed of prior to the said 2d day of February last, with all the rights and privileges to which these parties or their successors may be entitled in virtue of the sales or servitudes so created, all of which are by acceptance hereof undertaken by our said disponees and their foresaids." The property of this Western-Southern Cemetery still remains in the persons of Galloway, Watson, and Edmiston, or their trustees, subject to the above-mentioned conditions. It was averred by the pursuers that M'Laws, when he bought this western division, was still in possession of the eastern, and that he purchased it with a similar object, namely, to form an addition to the original cemetery, to come under the same management, and the property to be vested in the same way; and it was contended that by the representations to the public of M'Laws and his successors in the feu-right, the defenders were bound by the original prospectus and scheme of management of the original Southern Cemetery. The pursuers having many complaints against the defenders as vested with the property, and exercising the management of this Western-Southern Cemetery; in particular, with regard to their neglect to lay out the ground, their permitting the practice of pit-burials, their illegal forfeiture of lairs, and refusal to allocate them, and their exacting exorbitant interment fees for the purpose of making a profit to themselves, found themselves obliged to raise this action of declarator, &c.

The pursuers pleaded—"(1) Under the contracts with lairholders to which the defenders were or have become parties, the defenders are bound expressly or by reasonable implication to transfer the feudal title to trustees, and to leave the management of the cemetery to the lairholders; and the pursuers are entitled to decrees to these effects. (2) The defenders are bound by the sales of lairs, whether effected by themselves, or any of them, or their predecessors; and the pursuers are entitled to decree declaring the obligations of the defenders, as concluded for. (3) The defenders are further bound, at their own expense, to lay out the cemetery according to the original design, in so far as not already done. (4) The burials in the spaces intended for flowers and ornamental shrubbery and trees, and the pit-burials practised by the defenders, being contrary to the original design of the cemetery, and the defenders' obligations expressed or reasonably implied, the pursuers are entitled to establish their rights in these respects by declarator, and to have interdict, as concluded for. (5) Any right which the defenders may have of charging rates for interment, is limited to what is necessary for the proper maintenance and working expenses of the cemetery, and is subject to the equitable control of the Court. (6) The pursuers are entitled to have their rights cleared and defined, and to have the defenders' obligations in regard to the said cemetery equitably fixed and regulated by the Court, in terms of the conclusions of the summons; and the defenders, in opposing, should be found liable in the expenses of process."

The defenders pleaded—"(1) The pursuers have no title to sue this action. (2) The action is incompetent, and ought to be dismissed. (3) The averments of the pursuers are irrelevant, and insufficient in law to support any of the conclusions of the action. (4) There being no contract, nor a breach of any contract, between the pursuers and

the defenders on any of the matters embraced in the conclusions, the defenders ought to be assoilzied. (5) The averments of the pursuers being unfounded in fact, the defenders ought to be assoilzied."

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 10th January* 1871. — The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof, productions, and whole process, finds and declares, in reference to the fourth conclusion of the summons, that the defenders are bound to allocate to the pursuer, Henry Dunn, in the Western Southern Cemetery of Glasgow, belonging to the defenders, one lair or place of interment, of the value of at least one guinea, and that in respect of the price paid by the said Henry Dunn in and previous to 1852: Finds and declares that the defenders or their authors were not entitled to forfeit the lair in said cemetery sold to the pursuer, James Anderson, and partially paid for by him, and that without due and reasonable notice to the said James Anderson, and without affording him an opportunity of paying up the balance of price of the said lair. *Quoad ultra* assoilzies the defenders from the whole other conclusions of the action, and decerns, reserving to the pursuers, and to the other lairholders in the said Western Southern Cemetery of Glasgow, all competent action for the purpose of fixing and adjusting the scale and amount of burial or interment fees which the defenders are entitled to demand and levy from lairholders on the occasion of interments being made by lairholders in the lairs respectively held by them, and to the defenders their answers, as accords: Finds the defenders entitled to expenses, but subject to modification, and before answer as to the amount of said modification, remits the account of said expenses to the Auditor of Court to tax and to report."

There was appended to this interlocutor the following note, which will more fully explain the circumstances of the case:—

"*Note.*—The Western Southern Necropolis of Glasgow, which is the subject matter of the present action, consists of about 9½ acres of ground, and is now entirely, or almost entirely, occupied by interments which have taken place therein. It contains many thousand lairs; and it appears from the books that there are upwards of 13,000 separate lairholders, each of whom has right to one or more lairs. The feudal title to the ground is vested in the present defenders, but the titles expressly bear that the subjects are conveyed, subject to the rights created in favour of the parties to whom lairs or places of interment may have been sold.

"The pursuers in the present action are eleven persons out of the 13,000 lairholders interested in the ground. . . . .

"Before considering in detail the conclusions of the action, there are one or two preliminary points which may be shortly noticed.

"(1) *First*, It was objected by the defenders that the pursuers, being only eleven out of a body of 13,000 lairholders, had no title to sue or insist in an action like the present; and the defenders pleaded that the action itself was incompetent, and should be dismissed.

"The Lord Ordinary found himself unable to give effect to these pleas; and accordingly, by interlocutor of 3 ! November last, he repelled the first and second pleas in law for the defenders, in so far as insisted in as excluding the action altogether; and before farther answer allowed both parties a proof. It appeared, and still appears to the Lord Ordinary, that if the lairholders in such a cemetery had any rights at all—and that they have rights of some kind can scarcely be denied—then any one or any number of lairholders must be entitled to make these rights effectual by a proper action. The idea that all the lairholders, or even a majority of them, must combine in order to render such an action competent, is out of the question. The only connection between the lairholders is, that they have each of them, individually and separately, purchased similar rights in the same cemetery; but this certainly does not constitute such a joint right as to make it indispensable that all must jointly concur in proceedings for making their rights effectual. They are not in any sense joint or *pro indiviso* proprietors, but, although interested in the same subject, they have each of them a separate and independent right.

"(2) *Second*, But although in the Lord Ordinary's view the right to sue the action cannot be disputed, although the pursuers are only eleven out of 13,000 lairholders, it does not follow that these eleven pursuers may insist in any conclusion affecting the rights of other lairholders who are not parties to the present action. It was no doubt maintained that the present pursuers really represent the great body of lairholders in the Western Southern Cemetery; and evidence was adduced to show that the lairholders convened in public meeting had not only loudly complained of the conduct of the defenders, but had substantially approved of the action which the present pursuers had raised.

"The Lord Ordinary, however, can hardly hold that the present pursuers represent or are entitled to act for and bind the whole body of lairholders. The pursuers do not sue in a representative character, but merely as individual lairholders. They are not even a committee appointed at a general meeting of the lairholders, and there is no minute of any meeting authorising the present action to be raised. . . . . The action must, therefore, be regarded as an action to make good the rights of the eleven individual pursuers, and accordingly none of the other lairholders are cited or called as defenders, or in any way made parties to the action, and none of them will be in any way bound by any decision pronounced therein.

"It is true that a declaratory or other decision regarding the rights of the individual pursuers may indirectly rule the cases of other lairholders who occupy similar positions. But this is a mere accident, and in strictness nothing can be looked at but the rights of the pursuers themselves. This consideration is very material in reference to those large conclusions of the action which affect the right of property in, and the general management of, the whole cemetery. Such conclusions can only be given effect to if it is the right of any single lairholder to insist therein. No weight can be given to the opinions of other lairholders not pursuers, whether these opinions have been expressed at public meetings or otherwise.

"(3) While, however, thus taking a strict and somewhat technical view of the present action, the Lord Ordinary is free to acknowledge that he sympathizes, deeply and entirely, with the object which the pursuers have in view in the present action—that is, to secure the fair, equitable, proper and becoming management of the cemetery.

"Having made these preliminary observations, the Lord Ordinary will next proceed, before dealing with the conclusions, to consider the nature of the right which a person acquires by purchasing one or more lairs in a public cemetery like the Western Southern Cemetery of Glasgow. This question goes more deeply into the whole merits of the present action, and, if rightly determined, will afford the means of solving many of the difficulties with which the case is attended.

"The views of the parties on this question differed very widely. The pursuers contended that each lairholder had an absolute right of property in the lair or lairs purchased by him, with a right of servitude over the remainder of the ground, to the effect that the whole grounds shall be used for purposes of sepulture according to the contract. The defenders, on the other hand, maintained that no right of property was conferred on the lairholders, nor any right of servitude, either legal or conventional. They urged that the contract between the proprietor of the ground and the lairholder was a mere personal contract, giving the lairholder no real right whatever, but merely conferring upon him a personal privilege to inter his dead in the spaces designated or allocated to him, and that under condition of his paying, on the occasion of each interment, fair and reasonable interment fees.

"There is a broad distinction between a public parochial burying-ground, whether attached to the parish church or in some other situation, and a cemetery which, although in one sense public, is established by private parties for their own profit and emolument. Parochial burying-grounds are regulated partly by statute and partly by common law, the statutes being 1503, cap. 83, 1563, cap. 76, 1579, cap. 70, 1597, cap. 232, and the recent Act of 1855 (18 and 19 Vict. cap. 68).

"None of these statutes however, apply to the case of a cemetery established by private parties, and the common law rules regarding parochial burying-grounds seem only applicable to the case of a cemetery in so far as they form part, or may be held to form part, of the contract entered into between the proprietors of the cemetery and those who purchase lairs or the right of interment therein. Indeed, the whole rights, whether of proprietors or of lairholders in a cemetery, may be said, with strict accuracy, to arise *ex contractu*, the one party giving and the other receiving exactly what is bargained for and nothing more.

"But while this is undoubtedly the true legal character of the right—a mere contract right—still, the contract is generally so indefinite, and so much is left to implication, that it is useful to keep in mind the rights and privileges which are recognised to exist in public and parochial burying-grounds, because many of these rights must be held to be implied in the purchase of a lair or burial-place in a cemetery, and the contract right of a lairholder in a cemetery, though it may be broader and different from the right of a heritor or parishioner in an allocated portion of a parochial burying-ground, can scarcely be less than that of such heritor or parishioner.

"With this view the Lord Ordinary may refer to the following cases as throwing light on the nature and legal character of a right of sepulture in any particular piece of a burial-ground:—*Earl of Mansfield* v. *Wright*, 17th March 1824, H.L., 2 Shaw, 101 (old and disused burying-ground of Scone); *Macbean* v. *Young*, 22d January 1859, 21 D., 314 (Elgin burying-ground); *Wilson* v. *Brown*, 30th June 1859, 21 D., 1060 (allocation of lairs in Muckhart burying-ground); *Hill* v. *Wood*, 30th January 1863, 1 M., 360 (Coupar-Angus burying-ground); *Turner* v. *Arbuckle*, 16th February 1869, 7 Macph., 538 (West Churchyard of Greenock).

"Reference may also be made to the English cases of *Gilbert* v. *Buzzard*, 1820, 2 Haggart's Consistorial Reports, 333; *Morland* v. *Richardson*, 10th July 1856, 25 Law Journal, Chancery, 883.

"There is some difficulty in determining in what writings the special contract between the proprietors and lairholders of the Western Southern Cemetery is to be held as embodied. The defenders' title-deeds merely declare that the ground is conveyed to the defenders, subject 'to all the servitudes and other burdens created in favour of parties to whom lairs or places of interment may have been sold or disposed of' by the former proprietors of the ground. This leaves it quite indefinite what the rights are which lairholders have acquired. The original prospectus of the original or Central Southern Cemetery is alleged by the pursuers to be equally applicable to the Western Southern, which they allege is a mere addition to the original ground. A copy of this prospectus is No. 24 of process. The Lord Ordinary will afterwards consider how far this prospectus can be held to be the prospectus of the western ground, but it throws very little light upon the nature of the right which lairholders were to acquire.

"The only written title given to lairholders was a pass-book, of which No. 26 of process, being the pass-book given to the pursuer Mr James Cunningham, may be taken as an example. The pass-book merely mentions the number, size, and price of the lairs, and the payments made by the lairholder. The title bears the following note:—'The subscriber is bound to pay the price of the lair, as specified above, at the rate of sixpence per week, but to have no right of property till the whole price is paid;' and the pass-book is occupied by the entry of the different weekly or termly payments, and by a receipt when the whole price was paid in full.

"In these circumstances, the contract between the proprietors and the lairholders, so far as reduced to writing, is of the vaguest and most general description. It consists at best of the printed prospectus, the pass-books issued to lairholders, and the books of the cemetery, which merely show the numbers and allocation of lairs, the sums paid therefor, and the interments which have taken place therein. What the rights of the respective parties are is left entirely to implication, and to be determined by the nature of the contract itself, and by the analogy of similar rights in parochial burying-grounds.

"The Lord Ordinary is of opinion, *first*, That, under the contract in question, no absolute right of property was conferred upon the lairholders. Such a right would entitle each lairholder to a disposition or conveyance, with appropriate clauses, and capable of infeftment or registration. It seems plain that nothing of this kind was contemplated or intended. The expression 'right of property,' which occurs in the printed title of the pass-books, must be construed according to the contract, and can only mean the exclusive right of sepulture in the allotted ground. It seems to be just such a right of property as may be acquired by an individual heritor or parishioner in an allocated portion of a parish burying-ground, only somewhat larger in character, being perpetual, and

not subject to be affected by the holder or his family leaving the parish, or by a re-allocation of the whole ground becoming necessary, by changes in the population or otherwise.

"*Second*, The right really purchased by a lair-holder seems to be a right to use, in perpetuity, the allocated lair for the sole purpose of sepulture therein. The right depends on contract, and does not flow from the lairholder's right of property. In short, it is a right of use, and not a right of property at all. The use is limited, and the ground can be put to no other purposes than those which are implied in the ordinary exercise of a right of sepulture.

'*Third*, It seems also to be part of the contract, that the whole cemetery in which the allocated lair is situated shall be dedicated exclusively as a burial-ground or place of interment. This is part of the implied obligation which the proprietors of the ground undertake by the very fact of laying out the ground, and selling lairs therein. . . .

"*Fourth*, It appears also to be part of the contract that fair and reasonable fees shall be paid on the occasion of each interment; and, on the other hand, the proprietors of the cemetery, who receive these fees, become bound, in consideration thereof, not only to supply the labour necessary in digging and filling the graves, but also to maintain the whole ground in proper and suitable condition, as one of the public cemeteries of Glasgow. How the interment fees are to be regulated, and what is the precise measure of the obligation to maintain the ground in proper order, will be considered in reference to some of the conclusions of the action.

"Having thus ascertained in their general aspect what are the respective rights and obligations of the pursuers and defenders, it next becomes necessary to consider in detail the special conclusions of the present action. It will be convenient to take these conclusions separately, and in their order.

"(1) The first conclusion is, that the defenders are bound to denude of the whole cemetery, and to convey the same either to the Lord Provost, Magistrates, and Council of Glasgow, or to such persons as may be nominated by the lairholders, or to such persons as may be nominated by the Court, as trustees for behoof of the lairholders in all time coming.

"The object of this conclusion is at once and for ever to divest the defenders of all right or interest in the cemetery of every kind; and if the pursuers could succeed therein, it would supersede almost all the other conclusions of the action and virtually secure to the lairholders both the property and the management of the whole cemetery. The Lord Ordinary is of opinion, however, that this conclusion cannot be maintained.

"At common law there seems no ground for holding that a cemetery company, instituted for purposes of permanent gain, are bound to denude of their whole property as soon as they have disposed of all the lairs therein. Without special contract there is no obligation to do so, and it would require very special circumstances indeed to infer such an obligation. There are numerous cemetery companies in all the large towns in the kingdom, and it would be very startling to hold that as soon as the lairs are disposed of, all these companies must *eo ipso* come to an end, and must denude in favour of such persons as the lairholders or the Court may nominate. But no real distinction can be taken between a public cemetery company and the defenders of the present action, who, although not incorporated are really a company, or at least joint adventurers in the speculation of which the Western-Southern Cemetery was the subject. They purchased the cemetery as private individuals for a considerable sum—£4700. By so doing they became, it is thought, permanent proprietors; and the mere circumstance that by the sale of lairs they have realized more than the price, does not divest them of the property or impose upon them any obligation to denude thereof. There might have been loss, the defenders might not have succeeded in selling any lairs at all, or the prices of lairs might have fallen far short of the sum paid by the defenders; and if there would have been no obligation to denude in such circumstances, it is difficult to see how the mere fact that there were large profits, alters the nature of the defenders' right. . . . .

"At common law, therefore, the first conclusion cannot be supported, and it only remains to inquire whether it can be rested upon special contract. The only foundation for such a plea is the printed prospectus of the original Southern Cemetery, by the 5th article of which it is announced that, 'for the security of all concerned, the property' (that is, the property of the original Southern Cemetery) 'to be vested in the Magistrates of Gorbals for the time being.' This was at once done with the ground of the original Southern Cemetery, under agreements and deeds to which the Magistrates of Gorbals were parties. The Magistrates of Glasgow, in virtue of the Glasgow Municipality Act of 1846, now come in place of the Magistrates of Gorbals.

"But the Western-Southern Cemetery, being the ground now in dispute, is totally different ground from the original Southern Cemetery. The Western-Southern ground was not purchased for ten years after the original Southern ground. The titles are taken in quite different terms, and the ground itself has been always treated as private property; bonds have been granted over it, and it has been sold as such by public roup. In one sense the present defenders are singular successors in the lands, and although the title excepts the rights of lairholders, there is nothing in any of the deeds which in the slightest degree indicates any obligation to denude in favour of the Magistrates of Gorbals, or of any other set of trustees.

"But then it is said that the prospectus of the original Southern Cemetery was used by the canvassers, who went round the neighbourhood inviting parties to purchase lairs in the Western-Southern Cemetery. The only witness who speaks directly to this is the pursuer Mr Cunningham. None of the other witnesses could identify the prospectus as the paper which they saw at the time of their purchase. It seems proved, however, that there was no separate prospectus printed for the Western ground, and there is a strong probability that, in some cases at least, the original prospectus may have been used in reference to the Western ground. None of the canvassers, however, have been adduced as witnesses; and supposing such evidence competent, there is no very satisfactory proof that it was ever said by any authorised party, or at least that it was ever made part of the contract, that the Western ground was to be vested in the Magistrates of Gorbals, or in the Magistrates of Glasgow as coming in their place.

"In these circumstances, the Lord Ordinary has found himself unable to hold that any special con-

tract has been sufficiently proved, whereby the defenders are bound to denude in favour of the Magistrates of Glasgow, or in favour of any other trustees whatever. It is more than doubtful whether such a contract would not require to be in writing, as was the case with the Southern Necropolis, where at the very outset the whole agreement was embodied in a formal minute. But even if parole proof were admissible, or proof of facts and circumstances, it is thought the proof is insufficient to establish such a contract which would bind not the pursuers only, but the other 13,000 lairholders who are no parties to the present action, but whose lairs, notwithstanding, it is proposed to vest in a new set of trustees.

"(2) The second conclusion is, that the defenders are not entitled to continue to manage and administer the cemetery, but that the management and administration shall be transferred to a committee of lairholders, to be elected in manner to be fixed by the Court, and who are to act in conjunction with the new trustees.

"If the Lord Ordinary is right in the view he has taken of the first conclusion, it almost follows that the second conclusion also must be negatived. If the property is to remain with the defenders, the management also must be with them unless some special contract can be established for a separate and independent management. Here, again, the case is just that of a public cemetery company, who, as a matter of speculation, purchase and lay out a cemetery and sell lairs therein. The management remains necessarily with the company, and is or may be one of the sources from which profit is expected. If such a cemetery company cannot be deprived of the property, neither can they be deprived of the management. The present defenders substantially occupy the same position. The difficulty which the pursuers have to meet is enhanced by their demand that the Court shall intervene and regulate the constitution, election, and action of the committee in whom the management is sought to be vested. No doubt, the intervention of the Court is competent where a necessity arises, but the Court will not interpose to make a contract for parties who have not chosen to make one for themselves. As already explained, no special contract for management by a committee of lairholders has been sufficiently established.

"(3) The third conclusion is accessory to the first and second. It concludes for the delivery of a disposition to the new trustees, and of the books and records of the cemetery to the new committee of management. On the grounds already explained this conclusion falls to be negatived.

"(4) The fourth conclusion is a general declaratory conclusion as to the obligation of the defenders to allocate lairs to all persons who have paid the full price, and as to the incompetency of forfeiting partially paid-up lairs without twenty-one days' notice, or such other notice as the Court may fix.

"There is great difficulty occasioned by the generality of this conclusion in an action raised by eleven individual lairholders simply as such.

"The Lord Ordinary does not feel himself warranted in pronouncing any general decree of declarator in terms of this conclusion. He thinks it not incompetent, however, to restrict the conclusion to the cases of the individual pursuers to whom it is applicable, and he has endeavoured to do so in the preceding interlocutor. It would be unsafe, as well as incompetent, to pronounce in the present action any declarator regarding the rights of persons who are not parties thereto, and the special circumstances of whose cases have not been disclosed.

"(5) The fifth conclusion is to declare that the defenders are bound, at their own expense, to lay out and complete the cemetery according to the plan No. 1 produced with the summons, and to plant trees and ornamental shrubbery at the places shown on the said plan.

"This conclusion can only be supported by special contract sufficiently proved. No such special contract has been sufficiently instructed. It is proved that there never was any separate plan of the cemetery in question. It was laid out without any separate plan having been prepared, the workmen having before them, and using so far as applicable, the plan of the Southern or Central Cemetery. But this was mere matter of convenience, and not of obligation, on the part of the defenders or their predecessors. . . . .

"(6) The sixth and seventh conclusions are declaratory and prohibitory, and have for their object to prevent the defenders (1) from using any part of the cemetery for the sepulture by others than the holders of private lairs, or, as it is sometimes call, the use of any part of the cemetery as common ground, and (2) to prevent the practice of what is called 'pit burial.'

"In the opinion of the Lord Ordinary no sufficient grounds have been established warranting these conclusions.

"*First*, As to the use of 'common ground,' it is established that the use of such ground is universal in all cemeteries, and, if properly managed, is perfectly unobjectionable. The defenders might if they chose have reserved any portion of their ground for permanent use as common ground—that is, for the use of parties who prefer to purchase a right of a single interment rather than to become lairholders in perpetuity. Even in the prospectus of the original or Central Southern Cemetery it was stated that 'a portion of ground will be reserved for the interment of strangers at a cheap rate.' This is a distinct announcement that there was to be 'common ground' in the original Southern Cemetery, and it is proved that both in that cemetery and in the Eastern and Western Cemeteries or Divisions common ground was used and let out for the interment of strangers—that is, of others than lairholders—from the very first. It is true the defenders have found it more profitable to sell or give off lairs in perpetuity than to use the ground as common ground, but their right to do as they please in this respect seems indisputable.

"*Second*, The question of pit burials occupied a very large space in the proof, and has formed throughout a very prominent subject of complaint by the pursuers. If it had been established that the defenders are now conducting interments in such a way as to outrage public decency or to be prejudicial to public health, the Lord Ordinary does not doubt either the title or the interest of the pursuers to stop such practices. On the proof, however, he thinks that the pursuers have not succeeded in making out a sufficient case for the interference of the Court. . . . .

"Under the recent Health of Towns Act it appears that the Sanitary Commissioners have issued regulations for securing proper sanitary arrangements in all the cemeteries of Glasgow; and Mr Guthrie, one of the Sanitary Inspectors, explains

what these regulations are, and depones regarding the cemetery in question that it has been as well kept as the ordinary cemeteries in Glasgow. In reference to the sanitary arrangements, it is thought that these should be enforced in terms of the provisions of the Health of Towns Act. It would appear to be inexpedient, as well as very difficult, to attempt to enforce sanitary arrangements by way of special interdict.

"(8) The last conclusion of the action is, that except from the sale of lairs, the defenders are not entitled to make any profit from the cemetery, and in particular that they are not entitled to make any profit on interment fees, or to levy higher fees than are necessary to provide for the maintenance and working expenses thereof, or than such as may be fixed and determined by the Court.

"The Lord Ordinary has felt great difficulty in dealing with this conclusion. It embraces a demand that the Court shall fix what are proper and reasonable interment fees. On the one hand, it is evident that the defenders cannot have a right to fix arbitrarily, and at their own pleasure, whatever interment fees they choose; for if this were so they might make the charges absolutely prohibitory, and thus prevent the lairholders from exercising the right which they have bought and paid for. On the other hand, it is difficult to hold that the defenders are to be precluded from deriving any profit from the management of the cemetery just because its success has been so great that they have succeeded in disposing of almost the whole lairs.

"Here, again, the cases of ordinary public cemetery companies must be kept in view. The profits of such companies are drawn from two sources—(1st) from the prices of lairs or rights of sepulture sold, and (2d) from the fees of interments. The first source is temporary, and will cease when the whole ground is disposed of as private lairs. The second source is permanent, and will continue so long as the ground is used as a cemetery. The Lord Ordinary is not prepared to affirm that this second source of profit is absolutely and utterly illegal, and that any one or more lairholders have a right at any time to prevent such profit from being levied or received. Unless this can be affirmed the conclusion of the summons in question cannot be given effect to.

"By the implied contract the proprietors of the cemetery, whether consisting of a company or of individuals, bind themselves to the lairholders to do two things—(1) to give the exclusive right of interment respectively in the allocated lairs, and (2) to maintain the cemetery as a cemetery in all time coming. It is admitted that they may legitimately secure a profit on the lairs. Why may they not also secure a profit on the management? By special contract, of course, any stipulation might be made; but in the absence of special contract is there any legal principle which allows a profit in the first case and prohibits it in the second? It is thought that there is not, and if so, the defenders must be assoilzied from the very broad terms of the last conclusion of the action. It is a totally different question if it could be shown that the interment fees charged by the defenders were unreasonable or extortionate, or utterly disproportioned to the services which they undertake to render. In such a case the Court would interfere, and the Lord Ordinary has thought it proper to reserve the pursuers' right to bring any competent action for fixing the interment fees; but he thinks that this cannot be done in the present action unless the principle concluded for is affirmed, that no profit whatever is to result from the fees, and to this principle he cannot, as at present advised, assent.

It is not without regret that the Lord Ordinary has thus found himself compelled to negative, with one trifling exception, the whole conclusions of the action. He feels that there was to some extent ground for dissatisfaction and complaint among the lairholders, and the evidence has disclosed a good many cases of very gross mismanagement on the part of the defenders or their authors, or of those whom they intrusted with the administration of the ground. But the remedies sought and concluded for in the present action are not, in the Lord Ordinary's opinion, applicable to the circumstances of the case. The pursuers and the other lairholders have really themselves to blame for the difficulties in which they find themselves placed. The case is an illustration of how loosely and how carelessly parties will contract, even on matters of considerable importance, and with how little inquiry shares or interests are taken in any enterprise which may be publicly advertised or canvassed for. It is not surprising that difficulties should arise when a court of law is called upon not only to construe and enforce obligations, but actually to discover, from the vaguest possible *indicia*, what rights and obligations were really meant to be constituted.

"As the defenders have been substantially successful, expenses have been awarded to them, but subject to modification, not only because in referference to the fourth conclusion a gross and careless violation of right has been proved, but because the defenders and their authors (perhaps even more than the lairholders) are to blame for the vagueness and uncertainty which attended the constitution of the contract."

Against this interlocutor the pursuers reclaimed.

WATSON and R. V. CAMPBELL for them.

Solicitor General (CLARK) and LANCASTER for the respondents.

At advising—

LORD ARDMILLAN—This action relates to the property and the management of the Western Southern Necropolis of Glasgow. It has been raised by 11 persons out of 13,000 persons, each of whom is alleged to have acquired a right of sepulture, and these persons are termed in the proceedings "lair holders."

Looking to the nature of the subject, and of the rights of these lair holders, I concur with the Lord Ordinary in sustaining the title of the pursuers to sue this action. If we were to give effect to the defenders' plea of "no title to sue," and on that ground to dismiss the action, we might be doing or protecting great injustice.

I confess that in some respects I sympathise with the views and feelings of these pursuers, particularly in their desire that the property and the management of this cemetery should be transferred to a public trust for the benefit of all parties interested. I am disposed to think that this transference, if it could be amicably affected, would be a reasonable and satisfactory arrangement; and I think I can perceive in the correspondence before us some indications of a willingness on the part of the defenders to concur in such an arrangement in due time, and in the exercise of their own discretion. But they say—and if there is no legal obligation, they are entitled to say—that they will use

their discretion; and they declare that they will do nothing on compulsion.

We must, therefore, deal with this part of the case as a question of alleged legal right in the pursuers, and of alleged legal obligation enforcible against the defenders. We are called on to declare that these 11 out of 13,000 lair holders have a legal right to compel the defenders now to denude; and that the defenders are under legal obligation to denude at once, when required to do so by the pursuers. I am of opinion that these pursuers have no such legal right, and are not entitled to enforce any such legal obligation, and cannot absolutely compel the defenders to denude on their demand.

The time will probably come when the defenders will recognise the expediency and propriety of committing the management of the cemetery to a body of public trustees. But I do not think that, at the instance of these pursuers, the defenders can now be compelled to denude, and to part with their right of property. That the title is with the defenders is beyond question. It has scarcely been disputed even in argument. The rights of Mr M'Laws had passed to the City of Glasgow Assurance Co. We have then the disposition of 1859 to Watson and Galloway, and then the disposition of 1865 by Watson and Galloway to themselves and Mr Edmiston, and no such right and no such obligation is therein to be found.

There is accordingly nothing in the titles—and, apart from the titles, there is nothing in the law—to support this extreme demand, requiring the defenders to denude of the property. All the lairs are not yet disposed of. Even if they were, the terms of the titles do not support the pursuers' demand. The obligation to denude when required must be found either in the titles to the property, or in some special contract instructed by legal and sufficient evidence. It is plain that in the titles themselves there is no such obligation. Then a contract must be proved; and it is said that such a contract has been instructed, partly by the documents and partly by parole evidence. This point has been earnestly argued by the pursuers. I have given to it an attentive, and I may say a favourable, consideration. But I am not able to perceive any sufficient evidence of a contract or binding obligation to denude. The defenders are proprietors; and an obligation to part with their property must be proved. Their right of property is indeed qualified by a dedication to certain uses and purposes of sepulture, and that qualification they accept. But it is not, in my opinion, qualified by any obligation to denude of the property when required. More particularly, the defenders' right of property is not qualified by any obligation to denude on the requisition of so small a number—not one out of a thousand of the parties interested. Therefore the pursuers cannot succeed in the first conclusion of the action; and from that conclusion the defenders must, in my opinion, be assoilzied.

The second question relates to the management of the cemetery; assuming the property to remain with the defenders, I am of opinion that, at present, and while the property remains with the defenders, there are no legal grounds on which this Court can be called on to deprive them of the management. While the defenders remain proprietors it could only be on most exceptional grounds—it could only be for very strong and urgent reasons—that we could interfere with their management. I can see no grounds or reasons sufficient to support such an interference.

It does indeed appear that, in some respects, the management of this cemetery has been defective, and complaints, not altogether without foundation, have been made. But it does not follow that this action, with its sweeping conclusions for declarator of property, and for entire transference of management, is called for or is appropriate. If there be any case of individual wrong to one or more of these lair holders, the law will give redress; and the only claims on such ground which have been here made by individual pursuers have, I think, been disposed of by the Lord Ordinary favourably to these pursuers. The public laws for sanitary regulations afford additional protection, and any violation of these laws will, on competent application, be repressed by the proper authorities. I do not think that this Court can be called on now, at the instance of these eleven persons, to ordain the defenders at once and absolutely to part with the management of the cemetery, of which they remain the proprietors.

The third question is—Shall this Court, while leaving both the property and the management in the hands of the defenders, interpose to regulate the defenders' management to the limited extent of directing a fair and reasonable and suitable table of fees for interment to be framed?

On this point I have had some difficulty. The framing of such a table of fees is not expressly concluded for, and it is not by any means clear that it is within the meaning of the conclusions of this action. I understand your Lordships to be of opinion that it is not.

I am disposed, if possible, to take steps for meeting the pursuers' claim in this respect, and through the medium of a remit or otherwise, obtaining materials for preparation of a suitable table of fees for interment.

But being aware that your Lordships have serious doubts of the competency of doing so under the conclusions of this action, and being indeed doubtful on the point myself, I do not press my suggestion, but merely venture to say that I think an amicable arrangement in regard to interment fees would be very satisfactory.

Looking to the special uses and purposes to which this property was dedicated, I do not think the defenders are entitled to charge whatever rate of fees they like, or to make whatever profit they like out of the fees for interment. But, on the other hand, I think that the defenders are entitled to such a moderate profit as to secure a fair and reasonable margin to protect against casualties or losses. This matter could be easily adjusted if the parties would meet in an amicable way and endeavour to be mutually reasonable.

The fact that this dispute has arisen in regard to the last earthly resting places of humanity—the grave—whither we are all hastening—must suggest the thought that it were wise and appropriate to put away all angry and bitter feelings, and to adjust conflicting interests in a kind and Christian spirit.

Lord Kinloch—I agree with the Lord Ordinary on all the points decided by him; and can scarcely find anything to add to the statements in his able and exhaustive note.

I especially agree with him in his sentiments of sympathy with the lairholders in this cemetery,

who have had considerable cause for discontent. But we must decide the case not on sentimental considerations, but on legal principles. And the sound application of these leads, I think, irresistibly to the conclusions of the Lord Ordinary.

The subject of the action is what is called the Western Division of the Southern Necropolis. The title-deeds produced prove that the ground comprising this cemetery was purchased in 1851 by Mr Colin Sharp M'Laws at the price of £4858, 15s., and purchased as for himself individually; the disposition being granted in favour of him and his heirs and assignees. It is further proved that in 1856 Mr M'Laws borrowed from the City of Glasgow Life Insurance Co., on the security of this ground, a sum of £6000, and granted a disposition of the ground in favour of that company. Mr M'Laws having become bankrupt, and had his estates sequestrated in 1857, this ground was dealt with as part of the sequestrated estates; and, by arrangement between the Insurance Company and the trustee in the sequestration, the ground was exposed to public sale in February 1859; and was bought, at the upset price of £4700, by Messrs James Watson and James Galloway. A disposition was granted by the Insurance Company, with consent of the trustee in the sequestration, in favour of these two gentlemen, "their heirs, assignees, and disponees whomsoever." Messrs Watson & Galloway afterwards conveyed the ground to themselves and Mr William Thomas Edmiston "and the successors and survivors of us and him, and the heir of the last survivor, and our and his assignees and disponees whomsoever," Mr Edmiston is now, as survivor, in the feudal right of the property, the representatives of the other two parties having, it is said, a joint interest in its proceeds.

Bearing reference to these documents, I cannot regard this ground as being anything else, in point of law, than private property in the person of Mr Edmiston and his fellow-holders. It is true that the disposition is granted "under all the servitudes and other burdens created in favour of parties to whom lairs or places of interment may have been sold or disposed of prior to the 2d February last, with all the rights and privileges to which these parties or their successors may be entitled in virtue of the sales or servitude so created." There can be no doubt that each lairholder has firmly secured to him the right of sepulture given him by contract with those administering the ground; which right is not a right of property in a legal sense, but only a right of perpetual use for a specific purpose. But with regard to any further rights, he only possesses them so far as he can show that they are legally created in his favour. With regard to the primary demand by the pursuers that the defenders should make over the cemetery to the Town Council of Glasgow, or such other persons as may be nominated by a committee of management, and that the cemetery should be managed as the lairholders or a committee of their number should direct, I can find no legal foundation on which the demand can be given effect to. The lairholders may have been naturally led to entertain an idea that this would be done by the verbal statements of Mr M'Laws or others, and may have not unreasonably supposed that this western division would be dealt with in the same way as the other two divisions of the Necropolis. But all this is quite ineffectual to create a legal obligation on the defenders, who are singular successors in the ground, who can neither be held bound by these verbal statements, nor by the practice pursued in other cases. It is much to be regretted that express legal documents were not framed securing this very reasonable result. But, on the evidence before me, I cannot find the defenders legally bound to give over this ground, which is *prima facie* their private property, to any other party whatever.

This consideration disposes of the primary conclusions of the summons, and disposes of them against the pursuers.

With regard to those conclusions which touch on the mode in which the cemetery is to be laid out and administered, I do not doubt that by virtue of the contracts made by the lairholders when they took their lairs certain rights accrued to them in these respects. The nature of the case inferred that the cemetery was to be maintained and used as such; and it might reasonably infer that it was to be maintained and used in a particular way, and under particular arrangements. An implied contract to this effect may fairly be considered as passing between the parties selling and buying lairs. But I am of opinion that the pursuers have failed to establish by proof that the things claimed by them were stipulated for. I agree with the Lord Ordinary in thinking that they have not established that any particular plan of laying out the cemetery was made matter of contract; and that therefore their conclusion to have the ground laid out according to a defined plan must fall. I also agree with him in thinking that the use made of "common ground," or what has been called the practice of pit burial, particularly if controlled by the regulations of the Sanitary Commissioners, is not proved to be at variance with the contract of the parties, express or implied, and therefore cannot be the subject of legal prohibition.

With regard to the regulation of the fees for interments, I have no doubt of the competency of the Court interfering to regulate these fees on a proper case for such interference being presented. I think it must be held the implied contract that on the one hand the owners of the cemetery should undertake the whole charge of the burials, thereby saving the confusion and indecency of every one doing this on his own lair; and that, on the other hand, reasonable fees should be charged for the work so performed by the proprietors of the cemetery. I am, moreover, of opinion that these proprietors are not restricted to mere reimbursement of the expenses laid out by them, but are entitled to exact a reasonable profit on what may be called their business of interment. In any case of manifest excess I think the Court would be entitled to interfere, and to authorise a proper table of fees. But I do not think that this can competently or properly be done under the present action. The summons contains no conclusion for regulation of the fees apart from the enforcement of the principle that the defenders are not entitled to exact any profit whatever. It is only in following out a conclusion to this effect that the Court are called on to fix the fees. It may be doubted also whether there is in Court a sufficient representation of the lairholders to warrant the construction of a table which shall be binding on all. I therefore think that the Lord Ordinary has rightly disposed of this part of the case by not proceeding to the regulation demanded, but reserving all competent action to this effect.

I am of opinion that the Lord Ordinary has properly vindicated the right of two of the pursuers to have their individual lairs allocated and preserved. I agree with him also in holding that the pursuers have, in the abstract, a good title to sue all the conclusions of the summons, as conclusions alleged to arise out of the contract, express or implied, made by each of them. The failure of their case has arisen not out of a want of title to sue, but of a want of sufficient legal evidence of their alleged rights. The result, I think, shows the inexpediency of these very important arrangements being committed to the mercies of a private speculator, or not being sufficiently fenced by distinct and binding stipulations. But however to be regretted, the result arrived at by the Lord Ordinary seems to me, in a legal point of view, inevitable. I would fain trust, however, that arrangements may be made by which, with due regard to the legal interests of the pursuers, the management and regulation of this cemetery may be committed to a wisely chosen body representing the lairholders—with whom in point of expediency such management and regulation should very clearly remain.

LORD DEAS—I have experienced a good deal of difficulty about this case. Its two leading conclusions are—

First—That the title of the ground of which the cemetery consists be made over to and vested in a public body, the same as that which is vested with the property of the original Necropolis, and its first addition.

Second—That, alternatively, at all events, the management be vested in the same body as has the management of the other portions of the cemetery.

Now, I agree with the Lord Ordinary that individual lairholders cannot be said to have an absolute right of property in their lairs. But I am humbly of opinion that the title of the private proprietors who are feudally vested in the property is a title in trust merely for the lairholders. I think that sufficiently appears on the face of the disposition in their favour. That being the nature of the title, I have no doubt of the competency of an action to prove what the nature of the trust is. In such proof there is nothing to exclude either writings or parole testimony. And if you look to what has been adduced there is much, I think, to be said for the pursuers' contention. In fact, the pursuers are, I think, right about the facts. There may be doubt whether they have legal proof. I do not say they have. But, morally speaking, I have little doubt that Mr M'Laws, when he acquired the ground in question, meant it to form part of the same scheme, and be under the same management as the original cemetery and its eastern addition.

The action is brought by only eleven out of thirteen thousand. Now, while I agree with the Lord Ordinary that there are some rights which any one individual lairholder can pursue, there are also others in which an individual cannot insist. It may very well be that these eleven individuals are unanimous in thinking that a certain course should be pursued in this matter, and yet that the main body might be of a quite different opinion. I do not therefore see any possibility of pronouncing a declaratory judgment as required by the pursuers. That is quite a different question from the title to sue. There are, of course, many and great difficulties in bringing thirteen thousand persons into the field, but if they do not all choose to meet and agree to the action, they may all be cited as defenders. And if we had all that could be got at brought into the field it might then be held that we could proceed to do what is asked of us. But we have not got them into the field. And on this footing I am inclined to deal with the action, and decline to indicate an opinion on the question of trust. The general result I come to is not that the defender should be assoilzied from the conclusions of the action, but that the action should be dismissed. The term used, however, does not much matter, as I think it would come to much the same thing practically whether you assoilzie or dismiss.

As to the other conclusions of the action, or rather as to the rights of parties in other respects, I agree so entirely with the Lord Ordinary that I do not think it necessary to go into detail. The Lord Ordinary holds (1) that the lairholders have no absolute right of property in their lairs. I agree with him in that. There is merely a trust in the feudal holders for behoof of the lairholders. He holds (2) that the lairholders have a right of permanent use, and in this I quite concur; (3) that the ground is permanently and entirely dedicated to the purposes of a cemetery; (4) that it is part of the contract between the lairholders and the defenders that reasonable fees should be payable upon each interment, and that the defenders on receipt of these fees are both bound and exclusively entitled to see funerals conducted in decency and proper order. In all this I quite agree with him.

I am farther of opinion that the pursuers have a rightful complaint against any practice of pit burial that may exist. But they have also an adequate remedy in the Health of Towns Act, and if that mode of redress is found insufficient, I do not say that any individual lairholder might not come here with an interdict. But that remedy, together with the Health of Towns Act, is surely sufficient. The matter is not the subject for a general declarator.

Then as to the fees, I am disposed to think, in the same way, that if unreasonable fees are exacted from any individual he may get redress in his own person, but that does not give him, as an individual, right to a declarator under the circumstances and in the way attempted. Had we the whole body of lairholders here I think we might fairly enough consider the question, but not otherwise. And as to the defenders' right to make a profit out of these fees, I do not think we are called upon to give an opinion, but all I will say is that I think it very doubtful. It all depends upon the interpretation to be put upon the implied contract between the parties.

On the whole, I am for dismissing the action without pronouncing any decree upon the merits.

LORD PRESIDENT—If I could agree with my brother Lord Deas in thinking that this action should be dismissed, and not that the defenders should be assoilzied, I should not then adopt the judgment of the Lord Ordinary, or agree with any of the arguments upon which it is founded. If we were to dismiss the action then we could in no way enter upon the merits of the case. But that is by no means the state of the proceedings before us. The pursuers have a good title to sue. That has been found by the Lord Ordinary, and con-

curred in by your Lordships. But in considering the merits of the case we must keep in view that the pursuers are but a small number out of a very large body, and their right to insist in the conclusions of their action may be thereby affected. Be that as it may, once the parties have joined issue upon the merits of the case, I do not see my way to any other judgment than that of absolvitor. The grounds upon which we might have dismissed the action are contained in the first and second pleas for the defenders. These pleas were repelled by the Lord Ordinary's interlocutor of the 3d November. That interlocutor might have been brought under review, but it was acquiesced in. I am therefore of opinion that we must pronounce judgment on the merits, and that that judgment must be one of absolvitor.

On the merits themselves I so entirely concur with the Lord Ordinary that I think it would be mere waste of time for me to add anything. With regard, however, to the last head, like my brother Lord Ardmillan, I should have been very much inclined, if I saw my way to it, to adopt some measure for determining a fair rate of fees for interment. But I am afraid we could not do so except upon the assumption that the defenders are not entitled to charge any higher fees than would merely cover the bare working expenses of the cemetery. I am, on the contrary, of opinion that they are entitled to a fair margin of profit upon their outlay. But I cannot find room for such a judgment under the conclusions of the action. For the eighth conclusion is, "That except in the allocation and sale of such lairs in the said cemetery (if any) as remain yet undisposed of, the defenders are not entitled to derive or draw pecuniary profit from the regulation and management of the said cemetery, and of interments therein." That is the general proposition. But then it continues, "and in particular, that they are not entitled to charge higher or other rates or fees for interments in the said cemetery than such as are necessary to provide for the proper maintenance and annual working expenses thereof, or than such as may be fixed and determined by our said Lords." It is impossible to read that last sentence as inconsistent with what goes before, or with the general proposition by which it is introduced. It was argued that under these words a table of fees might be fixed by us upon any principle we thought proper; but I cannot so read them. I think they are only intended to ask that we fix a scale of fees upon the footing that they are to cover the working expenses and maintenance only.

On the other conclusions of the action I do not touch, the judgment of the Lord Ordinary is so entirely satisfactory to me.

Agent for the Pursuers—A. Kirk Mackie, S.S.C.
Agent for the Defenders—James Webster, S.S.C.

Friday, June 23.

WILLIAM WALKER *v.* JANE ANN FRASER OR WALKER, *et e contra.*

(*Ante*, p. 328.)

Husband and Wife—Divorce. In counter actions of divorce on the ground of adultery, decree of divorce pronounced against both parties.

Expenses. Wife *found* entitled to expenses in both Outer and Inner House in both actions.

In consequence of the interlocutor of the Court of 17th January 1871, procedure in the action at Mr Walker's instance was sisted till the action at Mrs Walker's instance was ripe for judgment. The latter action proceeded before Lord Ormidale, who on 7th March 1871 reported the case to the Court, intimating, as parties had requested him to state his impression of the evidence, that he considered a sufficient case had been established against the defender.

Both cases now came before the Court, Lord Ormidale having already pronounced decree of divorce in the action against Mrs Walker.

The general character of the evidence will sufficiently appear from the opinion of the Lord President.

FRASER, LANCASTER, and MACDONALD for Mr Walker.

The SOLICITOR-GENERAL, BALFOUR, and ROBERTSON for Mrs Walker.

At advising—

LORD PRESIDENT—We have before us counter actions of divorce—one at the instance of the husband against the wife, and the other at the instance of the wife against the husband. It is proper and necessary that judgment should be pronounced in these two cases at the same time, but it is not the less necessary that the two cases should be considered separately, because they depend upon independent and unconnected evidence. The wife's adultery is said to have been committed in the house occupied by the husband and wife in the neighbourhood of Edinburgh, and in other places in Edinburgh and in the neighbourhood of the home of the parties, and the time when this adultery was said to have been committed is in the year 1869-70. The husband's adultery is said to have been committed during his absence from home in places at a distance from Edinburgh, and at an entirely different and much earlier time than the time when the wife's adultery was committed —during a course of years ending with the year 1865. The case which came first into Court was the action at the instance of the husband, and I therefore proceed to consider the evidence led in that case to prove the adultery of the wife. There are certain articles of the condescendence which were not admitted to probation; but proof has been allowed, and has been led, in support of the sixth article, and also of the articles 9 to 17 inclusive. The sixth article of the condescendence is as follows:—"During the months of April, May, June, July, August, September, October, November, December, 1869, and the months of January and February 1870, the defender was constantly in the habit of meeting James Grant, novelist, No. 26 Danube Street, Edinburgh, clandestinely, or some other man or men, not the pursuer, unknown to the pursuer, with the exception of two periods, namely, from 1st to 28th June, and from 29th July to 16th August, 1869, during which two periods the defender was away from Edinburgh. The pursuer's occupation required that he should be often from home, and during the period above referred to, with the said two exceptions, the defender was daily alone with the said James Grant, or with some other man or men, not the pursuer, and unknown to the pursuer, in his house at Murrayfield. She was also frequently in company with the said James Grant, or such other man or men, unknown to the pursuer, at places in the near neighbourhood of pursuer's house at Murrayfield, and in Edinburgh, during said period, the