of the summons, the defender, as now proprietor of the *dominium utile* of the feu No. 38 therein mentioned, is not entitled to occupy the self-contained lodging forming No. 1 Grosvenor Terrace therein mentioned, erected on said feu No. 38, otherwise than as a self-contained lodging, and interdicted, prohibited, and discharged the defender from occupying by himself or others the basement floor of said lodging for the purpose of a cabinet-making or upholstery business.

Counsel for the Pursuers (Reclaimers)—Blackburn, K.C.—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defender (Respondent)—Chree, K.C.—D. M. Wilson. Agents—Patrick & James, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

WOOD *v.* WESTERN CEMETERY COMPANY, LIMITED.

Police—Rates and Assessments—Exemption—Cemetery—"Ground Exclusively Appropriated as Burial Ground"—Profit-Earning Undertaking—Rating Exemptions (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 20), *sec.* 1.

The Rating Exemptions (Scotland) Act 1874, sec. 1, enacts that no assessment or rate for any county, burgh, parochial, or other local purpose is to be levied on or in respect of any ground "exclusively appropriated as burial ground."

On the ground that it was exempted in terms of this section, a cemetery company carrying on its business for profit refused to pay assessments in respect of ground fenced off and enclosed for burial purposes, but of which only a portion was at the time actually occupied by lairs.

Held that the whole ground so fenced off and enclosed was "exclusively appropriated as burial ground," and that the company was entitled to the benefit of the exemption.

The Rating Exemptions (Scotland) Act 1874 (37 and 38 Vict. cap. 20), sec. 1, enacts—"No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial, or other local purpose whatsoever, shall be assessed or levied . . . upon or in respect of any ground exclusively appropriated as burial ground."

William James Wood, collector of poor, school, and other rates for the parish of Glasgow, *pursuer*, brought an action against the Western Cemetery Company, Limited, Glasgow, *defenders*, for payment of £144, 11s. 3d., being the amount of assessments imposed by the Parish Council of Glasgow for the year 1909-10 on the defenders, as owners and occupants of the Western Cemetery, situated at Lochburn Road, Westfield, Maryhill, Glasgow.

The pursuer averred that the defenders had acquired and carried on the cemetery with the object of making profit by disposing, for money consideration, of rights of sepulture in it to members of the public who contracted with them for the acquisition of such rights, and that they earned large profits from the undertaking.

The defenders pleaded—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. The defenders' property, in respect of which the assessments now sought to be recovered were imposed, being exclusively appropriated as burial ground, and consequently exempt from assessment in terms of the Rating Exemptions (Scotland) Act 1874, the defenders should be assoilzied, with expenses."

On 1st November 1910 the Lord Ordinary (SKERRINGTON) sustained the first plea-in-law for the defenders, and dismissed the action.

Opinion.—"The question in this case is whether a cemetery which belongs to a cemetery company and is used for the purpose of making profit by selling rights of sepulture therein is exempted from local taxation as being 'exclusively appropriated as burial ground' within the meaning of the Act 37 and 38 Vict. cap. 20. I was informed that in practice such exemption has been allowed. The same statute exempts churches, &c., 'exclusively appropriated to public religious worship.' This latter exemption was considered by the Court in the case of *Trustees of College Street U.F. Church* v. *Parish Council of Edinburgh*, January 31, 1901, 3 F. 414, 38 S.L.R. 265. There does not, however, appear to be any decision as to the exemption of cemeteries from taxation.

"Counsel for the pursuer (a collector of rates) argued with great force that the exemption from taxation of a cemetery used as a source of profit to its owners was an anomaly, and constituted an injustice to the other ratepayers which Parliament could not have contemplated. He argued that the words of the statute were satisfied by holding that the exemption applied to public cemeteries such as parish churchyards or burial grounds established under the Act of 1855, and (possibly) to cemeteries which are dedicated as such by private trust. In such cases there is no question of making a profit out of the burying ground; and further, the dedication is complete because the public, or certain sections of the public, are entitled to insist upon the whole of the ground being used for burial purposes. In the case of a private cemetery like the one under consideration, the pursuer's counsel did not dispute that the portion of the ground actually occupied by lairs is exclusively appropriated as burial ground not merely *de facto* but also *de jure*. The law forbids any wanton disturbance of a grave, and it might be invoked not merely by a lair-

holder but also by a relative of the deceased. But he argued that the ground already given off for lairs is practically of no value to the Cemetery Company, and that the value of the cemetery as a profit-producing subject consists in the portion of the ground which has not yet been given off or 'appropriated as burial ground.' This argument does not, in my opinion, give sufficient weight to the fact that when the owner of a private cemetery has once allowed interments to take place he subjects himself to serious restrictions as to the use which he can lawfully make of the remainder of the ground—see *Cunningham* v. *Edmiston*, June 23, 1871, 9 Macph. 869, *per* Lord Gifford (Ordinary), p. 875, and Lord Deas, p. 885, 8 S.L.R. 576. In the absence of any relevant averments to the contrary, I must assume that the only profitable use which the defenders, the Cemetery Company, could lawfully make of the unoccupied portion of the ground, would be to use it as a burial ground, a phrase which in my opinion is not confined to actual interments, but might include other uses appropriate to a burial ground, such as the erection of a mortuary chapel or a cenotaph.

"In these circumstances I am of opinion that the defenders' cemetery is *de facto* exclusively appropriated as burial ground, and that it is immaterial to point out that the defenders may, if they please, cease to sell lairs and so allow the unoccupied ground to remain unprofitable. The view above expressed as to cemeteries is consistent with the construction which I should be disposed to place upon the exemption of churches or premises exclusively appropriated to public religious worship. I do not think that it is a condition for obtaining the exemption that the church should be held under a title which forbids it to be used for any purpose except public worship. It is, I think, enough that it is *de facto* so used under circumstances which give rise to the inference that the user is of a more or less permanent character. The case of a cemetery is really *a fortiori* of the case of a church. As I have already explained, the vacant portion of the cemetery cannot (generally speaking), either *de facto* or *de jure*, be put to a profitable use for secular purposes, whereas there are voluntary churches in Scotland which might be used for secular purposes without alteration of their structure or violation of the law.

"I accordingly dismiss the action, but it will be open hereafter to the pursuer to allege and prove, if he can, that there are portions of the so-called cemetery which are not in any reasonable sense appropriated as burial ground."

The pursuer reclaimed.

Before the hearing took place the parties lodged a joint-minute of admissions in which it was stated, *inter alia*—"5. The whole lands were acquired for cemetery purposes, but until actually required and laid off for burial purposes the remaining ground was let to a farmer for agricultural purposes, the whole ground so let from time to time being returned for separate valuation and all assessments thereon being duly paid. 7. (1) That originally the defenders fenced off or enclosed as a cemetery ground a portion only of the . . . total area . . . extending to 14¾ acres or thereby; (2) that the remainder of said total area (excepting a road along the southern boundary extending to 65 acres) was then let by the defenders for agricultural purposes; (3) that the defenders have from time to time increased the extent of ground fenced off or enclosed for burial purposes by shifting the position of the fence, and bringing within the same successively parts of the ground previously let for agricultural purposes; and (4) that the portion of the total area . . . extending to 27·71 acres or thereby represents the extent of ground presently fenced off and enclosed for burial purposes. 12. That the whole area of 27·71 acres or thereby now fenced off or enclosed for cemetery purposes . . . is laid out as lairs for burial, with the necessary carriage drives, walks, grass and flower plots, and the said superintendent's house, &c.; that said 27·71 acres are divided into various sections containing lairs, the right of burial in which has been or is in course of being sold by the defenders on the terms and conditions and at the various scales of prices set forth in the rules and regulations, . . . and common lairs in which interments have been and are being made for a pecuniary consideration as stated in said rules and regulations; that the whole subjects before referred to, viz., (1) those let for agricultural purposes, (2) those feued to the Cremation Society, (3) the Jewish Mortuary Chapel, and (4) the superintendent's house and offices, do not form any part of the subjects entered in the valuation roll as the Western Cemetery, about the assessability of which the present action has been raised. 14. That the title conferred by the defenders on the purchasers of lairs or vaults is solely a right of burial in said cemetery. . . . 15. That no parish council rates or other assessments have hitherto been imposed on or paid by the defenders in respect of the foresaid subjects belonging to them, in so far as fenced off or enclosed for burial purposes. 16. That the profit derived by the defenders from the business carried on by them, which, however, partly represents return of capital, has been sufficient to yield an average dividend of 4·7 per cent. per annum to the preference shareholders, and of 5·03 to the ordinary shareholders."

The pursuers argued—The ground here was not exclusively appropriated as burial ground, and so did not come under the exemption of section 1 of the Rating Exemptions (Scotland) Act 1874 (37 and 38 Vict. cap. 20). It could not be said to be so appropriated when its primary use was to realise profits. It was not the intention of the Legislature to exempt profit-making undertakings — *Trustees of College Street United Free Church* v. *Parish Council of Edinburgh*, January 31, 1901, 3 F. 414, *per* the Lord President at p. 418, 38 S.L.R. 265, at p. 267; the Burial Grounds (Scotland) Act 1855 (18 and 19 Vict. cap. 68), sections

17-26. Counsel also referred to *North Manchester Overseers* v. *Winstanley*, [1907] 1 K.B. 27, [1908] 1 K.B. 835, [1910] A.C. 7; *University of Edinburgh* v. *Greig*, July 20, 1865, 3 Macph. 1151, *rev.* June 8, 1868, 6 Macph. (H.L.) 97, 5 S.L.R. 620; *Craigton Cemetery Company, Limited* v. *Assessor for Lower Ward of Lanarkshire*, February 2, 1889, 16 R. 802, 26 S.L.R. 527; *Parish Council of Edinburgh* v. *Magistrates of Edinburgh*, 1907 S.C. 1079, 44 S.L.R. 811. It was only ground *de jure* appropriated that the Legislature intended to exempt, and the ground here was not so appropriated. Although the defenders' ground had been fenced off and enclosed for burial purposes, only part of it had so far been used for these purposes. Ground could not be said to be exclusively appropriated for burial purposes until it was actually used for such purposes. The value of the cemetery as a commercial undertaking consisted in the portion of the ground not yet occupied by lairs, and until the ground was so occupied it was not exclusively appropriated as burial ground, and so was not exempted under section 1 of the Act.

Argued for the defenders—The intention of the Legislature was that the exemption under the Act should extend to cemeteries like the defenders'. The Act was passed to give effect to the practice of assessors in exempting such cemeteries and to encourage the formation of cemetery companies. The words of section 1 must be reasonably interpreted. "Appropriate" meant "to set apart for, assign to a particular purpose or use, to the exclusion of all other purposes or uses." Whether the ground had been appropriated in the sense of the section must be evidenced by fact. Admission No. 12 concluded the case against the pursuer. The best evidence of appropriation was use, and there was in the present case user *de facto*. But appropriation was wider in its meaning than actual use—section 11 of Burial Grounds (Scotland) Act 1855 (18 and 19 Vict. cap. 68)—it included dedication—dedication to a particular purpose. Ground was dedicated to purposes of burial when it was fenced off for these purposes, and any person acquired a right which barred the owner of the ground from putting it to any other use. The Cemetery Company became so barred when the first lair-holder acquired his right to a lair—*Cunningham and Others* v. *Edmiston and Others*, June 23, 1871, 9 Macph. 869, *per* Lord Ordinary (Gifford), 8 S.L.R. 576; *Paterson and Others* v. *Beattie and Others*, March 4, 1845, 7 D. 561, *per* Lord Mackenzie at p. 569. It was necessary to distinguish between the purposes for which the company acquired the ground and carried on the cemetery, viz., to make profits, and the purposes to which the ground was put, viz., purposes of burial. The section of the Act dealt merely with the purposes to which the ground was put. If it was put exclusively to burial purposes then it was to be exempted. The defenders had been assessed on the whole ground as a *unum quid*, so that even if it were decided that the portion of it not yet actually occupied by lairs was liable to assessment, the action should be dismissed, since there were no means in the case of ascertaining what portion was exempt.

At advising—

Lord Kinnear—I think that this case has been rightly decided by the Lord Ordinary. His Lordship had not the advantage which we have now of having all the material facts before him conclusively determined by a joint-minute of admissions, for when the case first came before this Court we found that the parties were at variance upon some material points, and accordingly we gave them an opportunity—of which they have taken advantage—of removing any difficulty in fact by adjusting admissions. The result of the minute of admissions that is now before us appears to me to justify the inference drawn by the Lord Ordinary upon the imperfect materials before him, and I think that his Lordship has also come to a right conclusion in point of law.

The question is whether a cemetery belonging to the defenders is exempt from assessment by virtue of the provisions of 37 and 38 Vict. cap. 20. The provision in terms enacts that no assessment or rate "shall be assessed or levied . . . upon or in respect of any ground exclusively appropriated as burial ground."

The state of facts upon which the defenders claim the benefit of this exemption are that they are a company incorporated mainly for the purpose of establishing and conducting a cemetery, that they have acquired ground for the purpose of a cemetery, and that it has been partially occupied. They have acquired also other ground which is not in the meantime laid out for burial purposes but is put to other uses, and for that other ground they admit that they must be assessed as they are in the ordinary course. The property which is not appropriated to cemetery purposes is not entitled to any exemption. But, then, as regards the ground which is really the subject in dispute, they say that they had originally fenced off and enclosed as a cemetery ground a portion of the total area extending to 14¾ acres, that from time to time they increased the extent of the ground so fenced off and enclosed for burial purposes, and that now the portion totally annexed and situated within the boundaries shown on the plans extends to 27·71 acres, and that is the ground presently fenced off and enclosed for burial purposes. Then they say—I mean both the parties say, for it is a joint admission—"that the whole area of 27·71 acres or thereby now fenced off or enclosed for cemetery purposes, and enclosed within the boundaries coloured purple on said plan, is laid out as lairs for burial, with the necessary carriage drives, walks, grass and flower plots, and the said superintendent's house." They say that the "27·71 acres are divided into various sections containing lairs, the right of burial in which has been or is in course of being sold by the defenders on the terms and conditions and at the varying scales of

prices set forth," and that the other subjects which they have described, namely, "those let for agricultural purposes, those feued to the Cremation Society, the Jewish Mortuary Chapel, and the superintendent's house and offices, do not form any part of the subjects" about which the present question is raised. We are now concerned only with the 27 acres fenced off and enclosed for cemetery purposes. And then it is added that the whole "profit derived by the defenders from the business carried on by them, which, however, partly represents return of capital, has been sufficient to yield an average dividend of 4·7 per cent. per annum to the preference shareholders, and of 5·03 to the ordinary shareholders."

Now it appears to me that according to that description the ground which has been fenced off and enclosed and dedicated to the purposes of a cemetery is exactly within the terms of the exemption clause. It is appropriated exclusively to the purposes of a burial ground.

But then the reclaimer maintained two arguments to the contrary, both of which must be considered. In the first place, he said that ground is not exclusively appropriated to burial purposes so long as it is only partly occupied. It is not enough, according to his argument, that people designed certain ground for the purposes of a burial ground, but they must in fact make use of it for that purpose and for that purpose exclusively. But if the appropriation does not rest upon mere intention, but the ground has been actually set apart and dedicated to this one purpose to the exclusion of any other, the Act is satisfied. I agree that so long as people merely designed to use land in a particular way they do not come within the exemption, and I think the company is under the necessity of proving that the ground is in fact set apart. But in ordinary language it is set apart for the purposes of a cemetery when it is fenced off and enclosed for this purpose, and when so far as it is used at all it is used for the burial of persons who have already acquired rights for themselves or their relatives by purchasing lairs in the ground.

If this rested merely upon the fact of the ground having been fenced off and devoted to this purpose and to no other, I should have thought it enough. But then I think the legal effect of the contracts made by the company must be taken into account, and I take it to be decided by the case of *Cunningham* v. *Edmiston*, June 23, 1871, 9 Macph. 869, 8 S.L.R. 576, that when a company has formed a cemetery of this kind and given rights of interment in particular lairs which have been actually used for that purpose, the effect of the contract is not only to entitle the lairholders to insist that the particular lairs allocated to them shall be used exclusively for interment, but that there is also an implied obligation that the whole cemetery shall be used and applied for the purpose of interment and no other. It is set apart and expressly dedicated in the clearest manner to the purposes of a burial ground, and everybody who acquires a right of burial in that ground is entitled to insist that the cemetery so set apart shall be used only for the purposes of a cemetery.

Therefore I think it is no answer to say that the ground presently occupied by lairs is not the entire ground fenced and set off for the purposes of a cemetery. Upon the plain meaning of the words "ground appropriated" to a particular purpose, as I understand the language, means ground set apart for that purpose so as to admit of its being used for no other, notwithstanding that every part of it may not yet be completely occupied.

The second point the reclaimer maintained was this—He said that although the cemetery is so set apart, it is not exclusively appropriated to the purpose of a burial ground, because the proprietors earn a profit from the sale of lairs, and the point, as I understand it, is that this enactment is not intended for the benefit of any cemetery owners who use their land for the purpose of profit.

I cannot find any limitation of that kind in the words. They are perfectly clear and cover all ground exclusively appropriated for the purpose. It is said that the word "exclusively" excludes among other things the idea of profit. That, however, is not a construction but a perversion of the language. No doubt the word "purpose" is liable to ambiguity. It may signify the special use to which a piece of land is applied, or the ulterior intention of the owner in so using it. But it can hardly have both meanings at once, and in the present case the context shows very clearly which of the two is intended. The subject of the enactment is the ground itself. It is the ground that is to be set apart for one exclusive purpose, and if that condition is satisfied, it appears to me to be quite irrelevant to inquire whether the people who have so set it apart are to derive any emolument from it or not. It is said that this derives its proper force from the word "exclusively." But the operative exclusion which is postulated in the enactment must be due to the special use of the ground and not to the motives of the landowner. If a particular piece of land is used for the purposes of a burial ground alone, that will exclude market gardening or building and every other purpose for which it might have been suitable, just as completely and effectually when the owner hopes for a reasonable return for his expenditure as if he had acted from pure benevolence or public spirit. According to the ordinary use of language, it may be said that a man's ground is exclusively appropriated to a particular purpose whether he is making money out of that appropriation or not; and I think that an excellent illustration of the ordinary use of this language is to be found in the opinions that were delivered in the case of *Cunningham* v. *Edmiston* to which I have already referred, because in that case there could be no question that the cemetery which was brought

under the notice of the Court was conducted for profit, and the Court held that its proprietors were entitled to derive the profit from the interment fees which they exacted. But throughout the whole course of the opinions you find the learned Judges, especially Lord Gifford who was Lord Ordinary, say over and over again the point of the case that is to be kept in view is that the ground is exclusively dedicated for purposes of sepulture.

But then this argument was joined with another of a totally different kind, and, as I understood—I am not quite sure that I followed it—the two points were supposed to run in some way into one another and strengthen one another, because it was said the Act must be read with reference to the series of previous Acts by which Parliament had interfered for the regulation of public burial grounds. I cannot see what is the inference to be drawn from that fact. There are many other Acts about public burial grounds which do not confer this particular exemption. But by the time this Act was passed there were numerous cemeteries. In all the great towns in the kingdom there were cemeteries carried on by cemetery companies who got more or less profit—more or less return for the capital they had spent on the ground from interment fees; and therefore the existence of such cemeteries was a public fact just as much within the view of Parliament as the existence of other burial grounds which were under the control of public authorities.

The distinction between public parochial burial grounds, whether they are proper churchyards or not, and cemeteries which are carried on for a profit, is perfectly clear and obvious; but there is one characteristic common to both, and that is that both are dedicated exclusively to purposes of sepulture, and that is the criterion which Parliament has selected for the definition of the ground which is to be exempt from rates and taxes.

On the whole matter, therefore, I come to the conclusion with the Lord Ordinary that this cemetery, being exclusively appropriated for the purposes of a burial ground, falls within the exemption clause.

LORD JOHNSTON—I have very great difficulty in acceding to the judgment which your Lordship proposes in this case, because I am not satisfied that it was the intention of the Legislature that exemption should be given in the case where the ground in question, though truly a burial ground—that is, ground appropriated for the purposes of burial—was primarily devoted to profit-making, and was only appropriated to burial to that primary end.

I think, differing from your Lordship, that considerable light is thrown upon the meaning of the statute which we are called upon to interpret by a consideration of previous legislation. But, in the first place, whatever may be the right to exemption, all burial grounds, other than the old churchyards, have a value, and must enter the valuation roll. I need only refer to the case of the Portobello Cemetery—*The Edinburgh Parochial Board* v. *The Edinburgh Magistrates*, February 3, 1912, 49 S.L.R. 307—where a cemetery provided under the 1855 Act, that is to say, a parochial burial ground, and one, therefore, from which no profit could be gained, was entered in the valuation roll, leaving the parochial board to establish their right to exemption under the Statute of 1874. Therefore a burial ground has a value, and *a fortiori* has a value where it is a cemetery carried on for the purposes of profit.

I think, however, that one must approach the consideration of the statutes with some knowledge of the prior law with reference to the common law obligations to provide burial grounds for a parish. There are in Scotland some anomalous situations in which there are local burial grounds which have not been provided by the heritors of the parish. I can instance the Calton Burial Ground here, which, as is seen from the *Martyrs' Monument* case, March 4, 1845, 7 D. 561, was acquired by the Trades Council of the Calton Burgh for purposes of burial many generations ago—I do not know when—and which was treated, as far as I can judge, as part of the common good of the Corporation of Trades. Similarly there is the well-known cemetery in the centre of Dundee, which was a gift by Queen Mary to the burgh, and I have no doubt there are others.

But the ordinary parish burial ground in Scotland was the parish kirkyard. After the Reformation the common law placed upon the heritors of the parish the obligation to provide ground for burial purposes for the parish. The old Roman Catholic burial grounds round about the churches were naturally appropriated where these churches or their sites became the Reformed parish churches. Otherwise they had to be provided, and, in any case, to be extended when required by the heritors. Perhaps one of the most illustrative instances of the situation is to be found so late as the case of *Walker* v. *The Presbytery of Arbroath*, which occurred so recently as about 1876 (reported March 1, 1876), 3 R. 498, 13 S.L.R. 323, and in the House of Lords November 24, 1876, 4 R. 1, 14 S.L.R. 182. But by 1855 there had arrived a time when for sanitary reasons a great many burial grounds required to be closed or transferred to other places in order to provide larger accommodation. And accordingly in 1855 the Act, which is the current Parochial Burial Grounds Act in Scotland, was passed which provided for the closing of certain burial grounds and imposed upon the parochial boards, in place of the heritors, the duty of providing other burial grounds in place of those which were closed, and empowered them to acquire burial grounds where the needs of the community had outgrown the old parish kirkyard system. A great many burial grounds were so acquired, and, according to the enactment of the 1855 Act they could not be made the subject of profit. It is quite true that under that Act it was in the power of the parochial board

to sell exclusive rights of sepulture. It was also in their power to impose dues in connection with burials, but it was equally provided by the statute that neither of these powers should be exercised for profit, that the utmost which the parochial board could do, in the way of raising funds by the sale of a limited portion for exclusive burial, and by the charge of burial dues, was *pro tanto* to meet the expenses of laying out and of maintaining the burial ground and so reduce the rates. But it was in full contemplation that there would always be a liability for a remainder of such expenses laid upon the rates.

It is therefore made perfectly clear that the Act of 1855 did not contemplate any possibility of profit. I notice that the statute incorporates a portion of what is called the Cemeteries Clauses Act 1847—those sections which provide for the protection and preservation of cemeteries. I think it right to say here—and I think it is an observation of some bearing in relation to this matter in Scotland—that the Cemeteries Clauses Act of 1847 is not a Scots Act; it is only an English and Irish Act; it did not apply to Scotland although certain sections of it were capable of being specially incorporated by reference in this general Act. That shows that at any rate in 1847 it was not common in Scotland for private enterprise to create public cemeteries which could require the use of a Cemetery Clauses Act, as must have been the case in England and Ireland. At the same time I quite concede that it is a fact that there were in Scotland in 1855, particularly in such large towns as Edinburgh and Glasgow, some cemeteries of the class of joint-stock company cemeteries—such as our own Dean Cemetery here, and, I have no doubt, others in Glasgow and in possibly one or two of the bigger towns. But they were few in number.

That being the state of matters so far as the provision of burial grounds goes, the statutes which deal with exemption from rates follow in this sequence. In 1833 there was passed an Act which exempted from poor and church rates churches, chapels, and other places of religious worship. Now from indications within that statute it is clear that it did not apply to Scotland, but there is in it a point which I think worthy of notice, namely, it is very carefully laid down that where there is any profit realised from any portion of such buildings as may be used for churches, chapels, meeting-houses, &c., the exemption shall not extend to such buildings.

From the first point, therefore, where legislation touches this matter, you have it made very clear that there is to be no exemption where profit to any extent is derived. Now not only does that statute not apply to Scotland, but it is, from our point of view, somewhat awkwardly worded, because it does not exempt the property—it exempts the person—"that no person or persons shall be liable to any such rates or cesses because of," &c.

The next statute is one which, I understand, was passed because it was doubted—and, as I think, clear—that the previous statute of 1833 did not apply to Scotland. This is the Statute of 1865, which referring to the statute which I have noted, provides, in the same words, that "no person shall be rated in respect of," and limits it to, exemption from poor rates. The limitation to poor rates and the awkward way in which, following the English Act, the exemption was given to the person and not to the place was, I have no doubt, the cause of the Act of 1874; and that statute, after referring to the Act of 1865, provides that no assessment or rate under any general or local Act of Parliament—extending, therefore, the exemption from poor rates to any assessment or rate—shall be assessed upon any church, chapel, meeting-house, or, extending it to include burial grounds, upon or in respect of any ground exclusively appropriated as burial ground.

Now I cannot take that sequence of statutory enactment without noticing two things—first, that the idea of the Legislature at the outset was to exempt that which was exclusively appropriated, but from which no profit was to accrue, and second, to extend the exemption to burial grounds just at a time when the operation of the Burial Grounds Act 1855 may be assumed to have begun to have effect. And I think it is not at all unreasonable to conclude that the reason for this, the extension of the exemption in 1874, was that a new class of burial grounds had arisen in the course of the preceding nineteen years which were not in the same position as parish kirkyards. Moreover, there is no conceivable reason for exempting from rates a private venture for profit because its profit is to be attained by supplying for valuable consideration burial ground to those who desire to obtain the exclusive use of it.

In view of the above, if I am asked what is really the meaning of "exclusively appropriated as burial ground," I confess to a hesitation in coming to the conclusion that ground which is put to the primary purpose of realising a profit is, in the sense of this statute and in the view of the legislation to which I have referred, to be held as "exclusively" appropriated as burial ground. It seems to me that those words were really intended by the statute to apply—and to apply only—to those classes of burial grounds, which were provided and were appropriated with a single eye to providing means of interment for the dead of the district.

But I cannot possibly avoid giving the utmost deference to the opinion which your Lordships I know entertain that the words used in the statute are only capable of interpretation in the way in which your Lordship has interpreted them. Although I have expressed my views and doubts as to the intention of the Legislature, I cannot but admit that the words used by the Legislature would primarily and (if one did not go back to the history of the thing) naturally be read as your Lordship reads

them. And therefore I do not venture to carry my doubts beyond the expression which I have given to them. I therefore assent to the judgment which your Lordship proposes, and in which I understand Lord Mackenzie concurs.

LORD MACKENZIE—The question in the case is whether the defenders are liable for poor, school, and other assessments for the year from Whitsunday 1909 to Whitsunday 1910. Assessment notices were duly sent to the defenders, who deny their liability to pay and plead the terms of the Act 37 and 38 Vict. c. 20, which provides—section (1)—"... [*quotes, v. sup.*] ..." The pursuer denies that the ground in respect of which the notices were served is exclusively appropriated as burial ground. There is no question that the defenders acquired and carry on the cemetery for the purpose of making profit. A minute of admissions has been put in from which the following facts appear:—The total extent of the land acquired by the defenders extended to 54·35 acres. They originally fenced off or enclosed as cemetery ground 14¾ acres or thereby. The remainder of the total area excepting a road was then let by the defenders for agricultural purposes. From time to time the defenders have increased the extent of the ground fenced off for burial purposes, and there are now 27·71 acres so enclosed. The following subjects have been entered separately in the valuation roll and assessments thereon duly paid:—(1) The lands leased for agricultural purposes, (2) the cemetery superintendent's house and offices, (3) ground feued to the Scottish Burial Reform and Cremation Society, Limited, and (4) a mortuary chapel within the fence enclosing ground set apart for burial purposes, used in connection with the portions thereof set aside for several of the Jewish synagogues.

The twelfth article of the minute of admissions is as follows—"... [*quotes, v. sup.*] ..."

The case is within a short compass and depends on the construction of the words "exclusively appropriated" contained in the statute. About the meaning of the word "appropriated" there cannot be doubt. It means what is set apart for a particular purpose and use. The word "exclusively" adds little to its meaning. It signifies that the ground is set apart for the particular purpose and no other.

It was contended by the pursuer's counsel that in order to get the benefit of the exemption the ground must be *de jure* appropriated—that is to say, as I understood the argument, that it must be possible to find a perpetual dedication either in the common law or in some other Act of Parliament. There is nothing in this argument. Even under the Act of 1855 (18 and 19 Vict. c. 68) there is no statutory dedication of ground as burial ground. It was next contended that there could not be exclusive appropriation unless and until a particular lair had been *de facto* used for the purpose of interment. The answer to this is twofold—that ground may be appropriated to a purpose before it is actually used, and, second, that in a reasonable sense the whole of the 27·71 acres is now being used as burial ground. The ground must be taken in its actual state, as was done in the case of a church in the *College Street United Free Church, Edinburgh* v. *The Parish Council of Edinburgh*, January 31, 1901, 3 F. 414, 26 S.L.R. 265; and as was done in the case of *The Crighton Cemetery Company, Limited* v. *The Assessor for Lower Ward of Lanarkshire*, June 14, 1889, 16 R. 802, 26 S.L.R. 527. The 1855 Act, sec. 11, shows that appropriation is wider than use. The twelfth article of the minute of admissions appears to me to conclude the matter against the pursuer. It is admitted that the whole of the 27·71 acres is fenced of and laid out as lairs in which the right of burial has been or is in course of being sold, and common lairs in which interments have been and are being made for payment. The right which each purchaser of a lair acquires over the whole 27·71 acres fenced off for cemetery purposes, is described in the case of *Paterson* v. *Beattie*, March 4, 1845, 7 D. 561. In that case Lord Mackenzie pointed out that the holders of portions of burial ground had important rights as against the corporation from whom they had purchased, and also against the disponees from the corporation, who were barred from doing anything inconsistent with the ordinary use of a burial ground. In *Cunningham* v. *Edmiston*, June 23, 1871, 9 Macph. 869, at p. 576, 8 S.L.R. 875, the Lord Ordinary (Lord Gifford) expressed the opinion, which the judges of the Inner House agreed with, that it is 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, and that each lair-holder must be held to have stipulated not only for a right of sepulture in the lair allocated to him, but that the adjoining and surrounding ground should be dedicated exclusively to the same purpose. In my opinion each lair-holder in the present case when he acquired the right to a lair within the area at that date fenced off for cemetery purposes, acquired the rights described by Lord Gifford over the whole of that area. These rights, which originally extended over the 14¾ acres, now extend over the whole of the 27·71 acres dealt with in the twelfth article of the minute of admissions.

The fact that the defenders conduct their business for profit does not in my opinion affect the question whether they are entitled to exemption under the Act. That is a matter with which the Act has no concern. Nor does it matter from what source they draw their profit. They are and remain occupiers of the whole—*Edinburgh Southern Cemetery Company* v. *Surveyor of Taxes*, 17 R. 154. The only question to be determined is whether the ground is exclusively appropriated or not. The fact that the defenders make a profit is merely an accident. The pursuer's case accordingly in my opinion fails. The defender's counsel argued that the assessment is imposed on the cemetery as *unum quid*, and that even

upon the pursuer's own argument part of the whole has been exclusively appropriated by use for purposes of interment. *Ex concessis* assessments cannot be imposed upon what is *de facto* occupied, and as there are no materials in the case for ascertaining what part is exempt, it would not be possible to give an operative decree under the conclusions of this action.

The LORD PRESIDENT, who was present at advising, gave no opinion, not having heard the case.

The Court adhered.

Counsel for the Pursuer—M'Lennan, K.C. —Kemp. Agents—R. Addison Smith & Company, W.S.

Counsel for the Defenders—Murray, K.C. —D. Anderson. Agents—Nisbet, Mathison, & Oliphant, W.S.

Saturday, July 13.

SECOND DIVISION.

PAUL'S TRUSTEE *v.* THOMAS JUSTICE & SONS, LIMITED.

Company—Capital—Lien of Company for Debts Due to it—"Holder" of Shares.

By its articles of association a company had a lien "on all shares . . . for all moneys due to it from the holder or any joint-holders thereof." A shareholder, who was indebted to two banks, transferred to and registered in the name of nominees of the banks certain shares standing in his own name, and purchased and registered in the same names certain other shares which had never been registered in his own name, all in security of the debt due by him to the banks. On the shareholder's death his estates were sequestrated. The banks having obtained payment of their debt out of other securities, admitted that they held the shares for the deccased's trustee, and were ready to transfer them to him, but the company claimed a lien on them in respect of a debt due by the deceased to it. On a special case being brought to decide whether the company was entitled to the lien, *held* that the expression "holder" of shares in the articles meant "registered holder" of shares, and since the deceased's trustee was not the registered holder of the shares, although he had the radical right to them, the debt due by the deceased was not a debt due by the "holder" of the shares, and the company was not entitled to the lien.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), enacts, sec. 24—"(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members. (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company." Section 27—"No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland."

On 9th December 1911 a Special Case was presented to the Court by Stephen Mason Rae, C.A., Dundee, trustee on the sequestrated estates of the deceased George Brodie Paul, solicitor, Dundee (*first party*), and Thomas Justice & Sons, Limited, Dundee (*second parties*), to decide as to the right of the second parties to a lien over certain shares in their company belonging to the said George Brodie Paul.

The Case stated—"1. The estates of the deceased George Brodie Paul, sometime solicitor in Dundee, were sequestrated on 29th July 1911, and the said Stephen Mason Rae, the party of the first part, was appointed trustee thereon. . . . The parties of the second part are creditors upon the estate of the said deceased George Brodie Paul, and have lodged a claim thereon, amounting to £3854, 8s. 3d. The said George Brodie Paul died on 23rd January 1911.

"2. At the date of the death of the deceased George Brodie Paul he held the following shares in Messrs Justice & Sons, Limited, namely (1) . . . (2) . . . (3) . . . (4) . . . With the exception of the shares under head 4 above mentioned, the whole other shares referred to were, during his lifetime, assigned by the said George Brodie Paul in security of advances made to him, or obligations undertaken by him, to the Bank of Scotland, Dundee, and the British Linen Bank respectively. The shares under head 1 were originally acquired by the deceased Mr Paul, and were registered in his name, but on 22nd January 1909 they were transferred by him to certain nominees of the Bank of Scotland, and at the date of the sequestration they stood registered in the names of these nominees. At the date of the sequestration the shares under heads 2 and 3 stood in name of certain nominees of the British Linen Bank, Dundee. [Certain of these shares] were originally acquired by Mr Paul and registered in his own name, but they were transferred by him to the said bank's nominees on 7th September 1906. The other shares under these two heads were acquired by Mr Paul but were never registered in his name, the transfer having been taken direct from the seller to the bank's nominees. The shares under head 4 have all along been registered in Mr Paul's name, and they was so standing at the date of the sequestration and no question arises as to them.

"3. In addition to the above-mentioned shares the Bank of Scotland and the British Linen Bank held assignations of insurance policies over Mr Paul's life and certain other securities. After Mr Paul's death the said banks realised the said insurance policies and other securities, which produced sufficient sums to meet