No. 14. Earl of MANSFIELD, Appellant.—*Shadwell—Murray.*
JAMES WRIGHT, Esq. Respondent.—*Warren—Abercromby.*

Churchyard—Sepulchre.—A clergyman and one of his sons having been buried in a spot adjacent to, and in front of, the parish church, where the minister had his burial-place; and the church having been transported to another part of the parish; and the area, with the burial-place, having been excambed and conveyed to one of the heritors, who included them in his pleasure-grounds;—Held, (affirming the judgment of the Court of Session), That a son of the clergyman was entitled to insist on having the graves protected by a fence; and that he and the other near relations were entitled to visit the graves at all proper times.

March 17. 1824.

2D DIVISION.
Lord Pitmilly.

PRIOR to 1784 the parish-church of Scone stood on the Moot-Hill, near the old palace or abbey of Scone. The churchyard was placed at the distance of 200 or 300 yards from it; but the minister of the parish had his burial-ground close by the church itself. In the above year the appellant's predecessor, David Viscount of Stormont, being desirous to extend his pleasure-grounds, and include within them the Moot-Hill, and to remove the church and churchyard, applied to the Presbytery of Perth for authority to do so, and to rebuild a new church in a more convenient situation. This was agreed to by the Presbytery; and an excambion was executed, whereby the area on which the church stood was exchanged for a piece of ground belonging to Lord Stormont, on which the new church was to be built; but it did not appear that any excambion was made in regard to the churchyard, which accordingly remained as formerly. In consequence of this arrangement a new church was built, and around it there was a piece of ground enclosed by a wall, which, it was alleged by the appellant, was the property of Lord Stormont. In 1793 the Rev. Mr Hunter, the then clergyman of the parish, died, and was buried in this piece of ground, and in front of the new church. He was succeeded by the Rev. John Wright, whose son Charles having died in 1794, was buried, as a member of the clergyman's family, in the same piece of ground; and Mr Wright himself having also died about the end of the same year, was buried close by his son.

In 1804 the appellant, who had succeeded Lord Stormont, applied to the Presbytery for authority to remove the new church to another part of the parish, which was granted, and confirmed by a decree of the Court of Teinds. This decree, however, gave no authority to interfere with the churchyard, or any burial-place.

In virtue of it, the church, and the wall of the surrounding ground, was taken down, and a new church built in a different part of the parish. The area on which the church had been built, together with the surrounding ground, in which Mr Hunter, and the Rev. Mr Wright and his son, had been buried, were then enclosed as part of the appellant's pleasure-grounds, which he planted with trees and shrubbery. March 17. 1824.

In the meanwhile, the family of Mr Wright had removed to Edinburgh; but the respondent, his son, having visited Scone in 1817, and finding the graves of his father and brother unprotected, requested to be allowed to erect a fence around them, so as to prevent them from being intruded upon, and stated, that he conceived that he had a right to visit these graves at any time he thought fit. The appellant declined to allow the graves to be fenced round, but offered to place grave-stones or slabs upon them, and to grant permission to the respondent, or any of the family, to visit them, on leave being first asked. This, however, not being satisfactory to the respondent, he presented a petition to the Sheriff of Perthshire, in which he prayed him 'to ordain his Lordship to rebuild the walls of the churchyard 'of Scone, in which the petitioner's father and brother were 'buried, and to restore the churchyard, with the gate and neces-'sary access, in all respects, to the state and situation in which 'they were in the year 1794; or otherwise to grant warrant to, 'and authorize the petitioner, at his own expense, to erect and 'build an enclosure, with a gate in it, around the two graves of 'his late father and brother; and to ordain Lord Mansfield to 'give at all times free and open access thereto.' Answers having been lodged, the sheriff-depute pronounced this interlocutor:—'Finds, that in the year 1794, when the church was removed 'from its then site, an excambion took place under the sanction 'of the Presbytery, by which a portion of the grass glebe belong-'ing to the minister was conveyed to the Earl's father, the 'Viscount of Stormont, for the purpose of erecting a new 'church, and making a new churchyard, fit to accommodate 'the parish: Finds it admitted by the Earl, that though the 'old churchyard remains as the burying-ground for the parish, 'that in the ground surrounding the new church some per-'sons were interred, and, amongst others, that the Rev. Mr 'Wright and his son were interred in that ground in the year '1795; but finds it not alleged that a purchase was made from 'the heritors of any part of this ground as the burying-ground, 'or that it was enclosed with a wall or rail, or in any way

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'separate from the rest of the burying-ground: Finds, that 'although every person dying within any parish is entitled to be 'buried within the churchyard belonging to the parish, yet this 'confers no right on the relations of the deceased to enclose the 'ground, or appropriate it exclusively to the use of the body so 'interred; but the interest of relations in that case extends no 'further than to see that the churchyard shall not be applied to 'any ordinary use: Finds, that the petitioner, as not being resi-'dent within the parish, neither claims, nor has a title to claim, 'any right to bury in the said burying-ground: Finds, in the 'year 1804 the church of Scone was again, by a decree of the 'Commissioners of Teinds, removed to its present situation; and 'that the ground around the former church, used as a burying-'ground, occupied by the bodies of the Rev. Mr Wright and 'his son, and included in the respondent's policy, was protect-'ed from cattle, and never appropriated to tillage: Finds it 'averred by the Earl, and not denied by the petitioner, that 'the former offered to the petitioner to allow him, even at this 'distance of time, to cover the graves of his father and brother 'with slab-stones: Finds, under these circumstances, the appli-'cation was unnecessary; therefore dismisses the petition, assoil-'zies the defender, and decerns.' The respondent having then brought an advocation, the Lord Ordinary remitted 'to the 'sheriff, with this instruction, that he ordain the Earl of Mans-'field, at sight of the sheriff, to enclose with a stone fence or 'railing, as may be agreed upon, the ground in which the re-'mains of the late Mr Wright and his son are deposited, and to 'allow the relations of the deceased access to such enclosure.' The appellant having represented, his Lordship adhered, 'with 'this explanation, that access is to be allowed to the enclosed 'spot at all reasonable times, and on notice, if required, being 'given to the servants of the Earl, or others to whom the charge 'of the pleasure-ground may be intrusted by him. Against these judgments the appellant reclaimed to the Inner-House; and when the case came to be advised, there was a difference in the statements at the Bar as to the number of persons who had been interred in the churchyard erected in 1784. But

The Lord Justice-Clerk, on consulting with the other Judges, stated, that it was sufficient for the Court, without inquiring more minutely into the fact, to know, that the Rev. Mr Hunter, and the Rev. Mr Wright and his son, were interred in that churchyard.

Lord Craigie said, That as this was a case of a novel and inte-

resting nature, he had paid more than ordinary attention to it. It appeared that the ground upon which the churchyard was erected in 1784, had previously been the property of the Earl of Mansfield. From 1784 to 1804 every person dying in the parish had a right to be buried there; but in that year a new churchyard was furnished, and the ground of the former one being no longer occupied, returned to the Earl free and unburdened, excepting that it should not be disturbed till the remains of the bodies there interred should have returned to their original dust. There is no one requiring the walls of that churchyard to be rebuilt excepting the respondent. His Lordship thought that Mr Erskine's opinion was well founded, and that it applied to the present case. The Lord Ordinary had done more than the party required. The interlocutor had gone ultra petita. It had ordained the Earl to build a stone fence or railing, when the petition to the sheriff merely required permission to do so. He thought that Lord Mansfield had made a fair and liberal offer when he permitted the respondent to lay flag-stones upon the graves. If the walls had remained, and the churchyard continued, the family of a clergyman would not be allowed to lay flag-stones upon his grave.

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Lord Bannatyne said, That no doubt the ground that had been erected into a churchyard in 1784 ceased to be a churchyard in 1804, and returned to the Earl; but it returned under the express reservation that all the bodies that had been interred there were to be protected. It would do no harm, to prevent abuse, that the right of access should be limited to the immediate members of the family; but, on the whole, he thought the judgment of the Lord Ordinary well founded.

Lord Glenlee said, That the Earl's right to the ground of this churchyard was a right of a peculiar kind; it was neither a right of property nor a right of servitude. Lord Stormont got the ground (which formerly belonged to the minister) for a special purpose, and if the parishioners had opposed him in taking down the walls, when the church was removed in 1804, they would have been entitled to do so. There was some doubt whether the expense of enclosing these two graves should not be borne by the Earl, but that is of no great consequence, and, in the main, the interlocutor is right.

The Lord Justice-Clerk stated, That when the petition was moved in May 1819, he gave his reasons for refusing it without an answer; but some of their Lordships then thought, that as it was a new and interesting case, it should receive a more solemn con-

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sideration. He had since fully reconsidered the case, and the more he considered it, the more reason he found for confirming the Lord Ordinary's judgment, even in the most favourable view for Lord Mansfield, and upon his own statements. The late Lord Mansfield, no doubt, acquired right to the ground in 1784, but it was subject to the servitude or burden of that ground being formed into a churchyard. Since 1804 no person had a right to bury their dead there; and the respondent was not claiming any such right. There was no doubt that Mr Wright and his son were lawfully interred in the ground set apart for that purpose. They were interred near the grave of the previous minister of the parish, and without objection on the part of Lord Mansfield, or of any other person. Leave to bury their bodies there, indeed, could not have been refused. It is clear as the sun at noon-day, that by the common law no person can interfere with these graves, or do any thing affecting the ground, that can tend in any way to injure the feelings of the connexions of those who are there interred. No one has a right to break up the ground of interment to the remotest periods of time. There the dust must for ever remain. Lord Mansfield, notwithstanding, did take down the walls of the churchyard, and the son of a clergyman there interred comes forward and asks, that Lord Mansfield shall either restore the walls of the churchyard to the state in which they were before, or allow him, at his own expense, to make an enclosure of the immediate graves of his father and of his brother. He is well-founded in this demand. The finding of the Lord Ordinary, that the Earl shall form an enclosure, by erecting a wall or railing, was in fact accommodating the noble Earl. He was bound not to have interfered with any of the walls, and had he let them alone, the present application would not have been made necessary. There must be a fence around this sacred spot. He did not mean sacred in any other sense than as sacred to the feelings of those concerned. The expense of building this fence had been properly laid on Lord Mansfield, because he had taken down the former protecting fence, and rendered another necessary. The interlocutor of the Lord Ordinary could only refer to immediate descendants. If the whole inhabitants of Perth, under pretence of being relations, were to interfere with the Earl's grounds, the Judge Ordinary would prevent them. The Lord Ordinary had judiciously provided for any such risk, by limiting access to seasonable times, and by requiring reasonable notice.

Their Lordships, therefore, on the 8th of June 1820, adhered, and found the appellant liable in expenses.* March 17. 1824.

The appellant then entered an appeal to the House of Lords, and maintained,—

1. That as the ground in which the graves were situated belonged in property to him, and as they were situated in a place where they were as little liable to be intruded upon as in any churchyard, and as he had offered to cover them with gravestones or slabs, the respondent was not entitled to insist on having them enclosed and fenced round. And,

2. That if the ground was to be regarded as a burial-place or churchyard, then it was incumbent, not upon the appellant, but upon the whole heritors of the parish, to erect that enclosure; and that, in the prayer of the respondent's own petition, he had offered to make it, whereas the appellant had been ordained to do so by the judgments of the Court of Session.

On the other hand, it was pleaded by the respondent,—

That from time immemorial the clergymen of the parish, and their families, had been buried close to the church, and not in the ordinary churchyard, which was at a distance from the church; —that accordingly Mr Hunter, and the respondent's father and brother, were so buried, and therefore the ground was to be regarded as a proper burial-place, and as such it had been enclosed, but the wall had been taken down by the appellant;—that such being the case, the respondent had a right to see the ground protected in the same manner as any other churchyard, so that the remains of his relations might not be disturbed, which would not be accomplished by covering the graves with slab-stones; and that he ought not to be impeded in having access to the graves.

The House of Lords 'ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

The Lord Chancellor said,—That he felt great satisfaction in not being obliged, in moving for judgment in this case, to propose any thing which might ultimately foreclose the rights of either party, because the interlocutors of the Court of Session still leave to the parties an opportunity to settle the dispute. How that Court came to annex so many conditions to their interlocutors (a practice totally unheard-of in England) his Lordship confessed he did not understand. But in moving for an affirmance of the judgment, he trusted there was still some hope of an arrangement between parties so respectable; and unless they came to some understanding, he did not see how these interlocutors could be carried into execution.

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* Not reported.

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Appellant's Authorities.—1597, ch. 232.; Heinec. Instit. l. 2. t. 1. § 323.; 1. Craig, 15. 11.; Lithgow, Jan. 15. 1697, (9637.); 2. Ersk. 1. 8.; Spence, Dec. 1. 1808, (F. C.); Connel on Parishes, 167. 179.

Respondent's Authorities.—1. Craig, 15. 2.; 2. Bank. 8. 184.; 1. Bank. 3. 12.; 2. Ersk. 1. 8.

SPOTTISWOODE and ROBERTSON—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 19.)

No. 15.

PETER and JOHN HUTTON, Appellants.—*Sol.-Gen. Wetherell—Walker.*

DAVID GIBSON, Respondent.—*Murray.*

Process—Amendment of Libel.—Held, (affirming the judgment of the Court of Session), That it is competent, before great avizandum is made with an action of reduction on the head of forgery, to amend the libel, by adding deathbed as an additional reason.

March 23. 1824.

2D DIVISION.
Lord Cringletie.

DAVID GIBSON, the heir of conquest of the late Peter Gibson, merchant in Edinburgh, who died on the 3d of September 1803, leaving, as was alleged, two deeds of settlement,—the one dated on the 2d of September, being the day preceding his death, and the other on the 3d of June 1802,—brought an action of reduction improbation of them, on the ground that they were false and forged. To that action he called the appellants, Peter and John Hutton, as defenders, who had the chief interest under the deeds, and by whom he alleged the forgery had been committed. The action having come before Lord Reston, a warrant was granted for transmitting the principal deeds from the record, which was accordingly done without objection. Immediately thereafter Gibson proposed to make an amendment of the libel, by adding the following reason of reduction:—

'The said pretended deed of settlement, dated the 2d day of 'September 1803, and recorded in the books of Council and 'Session the 7th day of the said month and year, even if it were 'a genuine deed, truly signed, and regularly executed by the 'said Peter Gibson, is liable to the objection of deathbed, as it 'is said to bear date the day before the said Peter Gibson's 'death, or on one or other of the days of the said month of September and year foresaid in which he died, or of the month 'preceding, or at any rate within sixty days of his death, while