Thursday, October 20.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

WRIGHT *v.* WRIGHT.

Churchyard—Gravestone.

A deceased person was buried in a cemetery in which during his life he had expressed a wish that he should be buried. The price of the grave was stated in the residue account made up by his executor, a brother, to have been paid out of his estate, but the receipt for it was taken in the executor's own name as an individual. The mother of the deceased some time after his death erected a suitable tombstone over his grave, but two years afterwards the executor removed the stone as having been put up without his permission. *Held* that the removal of the stone was illegal, and that the executor was bound to restore it.

Duncan Wright died unmarried in 1875. Previous to his death he had expressed to his mother and sister, with whom he resided, his desire that a grave should be obtained for him in Allanvale Cemetery, near Aberdeen. He left a will by which he distributed among certain friends and relatives a sum of £200. Shortly before his death he gave to his mother a sum of £100 as a *mortis causa* donation. After his death his brothers William and Alexander Wright bought for him a grave in Allanvale Cemetery, and there he was buried on 7th August 1875. A receipt for the price paid for the lair was in accordance with the practice of the Cemetery Company granted to William Wright, who paid the money. William Wright afterwards was decerned executor to his brother, and in the residue account given up by him as executor there was entered as a payment by him as executor the sum paid for the grave in Allanvale Cemetery. In the month of October following the acquisition of the grave for Duncan he acquired the adjoining lair for his own family, and in 1877 he obtained from the Cemetery Company a certificate of the right of burial in both lairs.

In 1878 the mother of William and Duncan Wright erected a tombstone over the grave of Duncan. She did this without consulting William, with whom she was on bad terms, and at a meeting between them in October 1879 he threatened to remove the stone. In August 1879 she heard that he was proceeding to do so, and applied to the Sheriff for an interdict against his threatened removal of the stone. She obtained interim interdict, but before her petition could be served he had removed the stone. She then presented a petition to have him ordained to restore it. The defender averred that his brother Duncan had died insolvent, that he had paid a number of his debts, and that the grave in which he was buried had been bought and paid for by him. He therefore pleaded that the grave being his property, and the stone having been erected without his consent, he was entitled to remove it.

After a proof, at which the facts above detailed were elicited, and at which the defender deponed that the grave had been bought with his own money and belonged to him, the Sheriff-Substitute (THOMSON) pronounced this interlocutor:—"Finds that the grave in which Duncan Wright is buried is the property of the respondent; that the gravestone in question was erected without his knowledge; that there had been no such acquiescence by the respondent in the erection or continuance of the stone as to debar him from removing it on the ground of dedication, or of such an act being indecorous or *contra bonos mores;* therefore sustains the defences, refuses the prayer of petition," &c.

On appeal the Sheriff (GUTHRIE SMITH) adhered, with this note—"It is melancholy to see a dispute like this between a man and his mother as to the kind of memorial which should be placed over the grave of his deceased brother. Most people will think that on such a subject, from a feeling of regard for the dead, no less than of duty to the living, respect should be paid to a mother's wishes, and that when in her sorrow

'She placed a decent stone his grave above,
Neatly engraved, the offering of her love,'

any difference of opinion in the family might have been adjusted without a resort to the courts of law.

"The legal question is a question of some novelty, on which not much light is to be obtained from the authorities. The Sheriff is disposed to think that when a monumental stone has been erected, either by the executor himself, or with his consent, the family or next-of-kin have an interest in its preservation sufficient to create a title to resist any interference with it, or at least such an interference as might be considered inconsistent with the pious purpose to which it is dedicated. That interference might consist in changing the stone or changing the inscription, and the executor or funerator could not, it is thought, maintain that he had such a right of property in the stone as entitled him to do what he pleased with it without respect either to the memory of the deceased or what was due to the feelings of surviving relations. There may be vested in him the decision of all questions relating to the form and character of the memorial in the first instance, but as soon as the stone is erected or dedicated, and his office is thereby accomplished, other interests emerge which cannot be disregarded. In this view, a point largely discussed in this case, namely, who paid for the grave, and in whose name the title should have been taken, although not without importance, is not by itself decisive, because the defender suffered the deceased to be buried there, and the spot came to be hallowed with tender associations, which may reasonably qualify any legal right originally competent to the defender. But all this assumes that there has been dedication, which means that the stone was erected with the consent or acquiescence of the party in whose hands the control of the matter was vested, and, as the Sheriff-Substitute has observed, the petitioner's case here fails in point of fact. The defender maintains that his mother is the trespasser, she having unwarrantably and without his consent erected the stone, and on the evidence the Sheriff is inclined to think that this is true. It seems to be sufficiently proved that he was not consulted

at first as he certainly ought to have been, and he denies that he had any knowledge of the kind of stone which was put up till these proceedings were taken. The judgment of the Sheriff-Substitute must therefore be affirmed, but in the circumstances costs have been given to neither side."

The pursuer appealed to the Second Division of the Court of Session, and argued — The defender could not be allowed to contradict his own statement in the executry accounts that the grave was bought with Duncan's money. It was a legal thing for his relatives to erect the stone, and an illegal thing to remove it. The defender, assuming the grave to be his, had acquiesced in the presence of the stone for more than a year.

At advising—

LORD YOUNG—This is a distressing case, in respect of the relationship of the parties and of the subject of dispute. The parties are a mother and her son, and the subject is the grave of a dead son and brother. The defender's brother Duncan died in 1875, worth, according to the information before us, at least £300, £200 of which came into the hands of his brother, the defender, as executor, and £100 of which, being the remainder, had been given by him to his mother shortly before his death, but would be available by law for the payment of his debts if required. He had expressed a desire that a grave should be provided for him in Allanvale Cemetery, and after his death the defender and his brother Alexander, who is now also dead, went to that cemetery and purchased a grave in pursuance of his wishes at a sum of £3, 16s., and there he was buried, the total amount of the sickbed and funeral expenses being, according to the account given up by the defender as executor, £87, 12s. 8d. After two years his mother, the pursuer, put up a monument of an inexpensive but suitable and appropriate kind over the grave thus acquired. It does not appear that she previously asked the defender's consent, and I am not surprised that she did not. He and his mother were not on good terms, and when he heard of the stone being there he was displeased with the liberty which his mother had taken in not consulting him, and said he would remove the stone, and this he did about a year after he had threatened to do so, when the stone had been in its place about two years. The mother resorted to the Sheriff against her son for redress against this outrage, as she conceived it to be, and first of all applied for an interdict against his removing the stone, but he had wind of that and had the stone removed on the very morning of the service of the interdict, but before it was served. We have to consider whether he ought to restore the stone, as is craved in the second petition. I think that the grave was acquired and that the dead brother was buried there in accordance with his own wishes and with his funds, and that though the defender took the receipt in his own name, that does not make him proprietor in the sense of entitling him to remove the tombstone as being in violation of his property right. We do not need therefore to enter on the question whether the mother in a question with him could have established a legal right to erect the stone. I am not surprised that there is a scarcity of authority on that point. The good feeling of most people on such a subject makes such a dispute very rare. But the mother had erected a tombstone, and was acting in accordance with the custom and the feelings of this country in placing over her dead son's grave this memorial of her affection, and she placed it over a grave acquired in accordance with the dead son's wish. To take this stone away was in my opinion quite illegal. That is the question we have to deal with. If it was illegal, as I think it was, then the claim of the mother to have the stone removed is irresistible. I am therefore for granting the prayer of the petition.

LORDS CRAIGHILL and RUTHERFURD-CLARK concurred.

The LORD JUSTICE-CLERK was absent.

This interlocutor was pronounced:—

"Find in fact (1) that in pursuance of the desire expressed by the deceased Duncan Wright, the grave referred to on record was bought and paid for with the money of the said deceased, by the defender and respondent, his brother, and the deceased buried therein in 1875; (2) That the pursuer and appellant, the mother of the said deceased, in May 1878 caused the erection over said grave of the tombstone referred to, and that the same was altogether suitable and proper; and (3) That in August 1880 the said respondent, at his own hand and without lawful authority, removed the said tombstone: Find in law that the said removal of the tombstone was illegal, and that the appellant, by whom it had been lawfully erected, is entitled to complain thereof and to demand the restoration of the said stone: Recal the interlocutor appealed against, ordain the respondent to restore and place the said stone upon the said grave, and decern."

Counsel for Appellant—Kennedy. Agent—John Macpherson, W.S.

Counsel for Respondent—Keir. Agent—R. C. Gray, S.S.C.

Thursday, October 20.

OUTER HOUSE.

[Lord Fraser.

THE TININVER LIME COMPANY *v.* COGHILL & SON.

Proof—Writ—Contract.

In the construction of a contract embodied in letters of offer and acceptance the Court will not allow investigation into prior communings between the parties.

In the course of a proof taken before Lord Fraser in this action, the defenders' counsel proposed to ask one of the partners of the pursuers' firm a question having reference to certain communings between the parties; following upon these communings a contract of sale had been constituted by letters of offer and acceptance between the parties. The question was objected to, on the ground that it involved investigation into prior