President. Reconvalescence, by going to kirk or market, is held sufficient in law, because such an act is public, at which many witnesses may be present. In some generic crimes one witness is sufficient, as in treason, adultery, &c.; but the general rule is the other way. I do not think that a single witness will be sufficient as to one fact. There is an end of all questions about death-bed, if that is once admitted; for no person endeavouring to support a deed will ever call above one witness, and there will be no check as to that witness.

Kaimes. In generic facts, where things naturally follow one another, there is no occasion for a concurrence of evidence.

Monboddo. Of the same opinion. In such case the evidence becomes circumstantiated.

On the 3d July 1777, "The Lords found reconvalescence proved;" adhering to Lord Covington's interlocutor.

Act. R. Blair. *Alt.* A. Ogilvie.

Diss. Justice-Clerk, Kaimes, Gardenston, Auchinleck, Hailes, President.

1777. *July* 4. Magistrates of Greenock *against* John Shaw Stewart.

KIRK-YARD.

Additional burying-ground necessary for a parish, partly landward and partly composed of the inhabitants of a populous burgh of barony, must be furnished by the heritors having ground proper for that purpose, and they are to be indemnified by the other heritors and by the community, in proportion to the examinable persons within the parish.

[*Fac. Col. VII.* 450; *Dict., App.* 1, *Kirk-Yard, No.* 1.]

Hailes. This question could never occur in our ancient law; for, as the Popish clergy reaped great emoluments from burying the dead, they were always ready to furnish burial-ground. There is no doubt that the church-yard belongs to the heritors, subject to the single burden of interring the dead. The grass of it is theirs, and the trees planted in the church-yard are theirs. They have connived at the kirk-session drawing the emoluments arising from what is called *layers*, because this is applied by the kirk-session for the use of the poor, for whose maintenance the heritors are ultimately liable. I think that the heritors must furnish the ground for an additional church-yard, and that the ground so furnished will continue theirs, and that they will have all the profits arising from it. The only question in effect, is, *Who* shall *advance* the money?—for, it will, in course of time, be replaced by the wonted emoluments. I doubt as to making the town or inhabitants advance the money; for here there is only a burgh of barony without funds, and without the power of assessment. But I am clearly of opinion that the heritors must fix the place, and that it would be most unreasonable to allow the town or the inhabitants to choose any spot which might suit their caprice.

Braxfield. Here we are in a new question, and we must determine it as we best can by analogy, and according to rules of equity. In building of churches, the general rule of law is, that the expense shall be borne by the heritors according to their valued rent. This, in most cases, is an equitable rule, but cases may occur when it will not be so. Thus, when there happens to be a burgh and a landward parish, the burgh may chance to contain two-thirds of the inhabitants of the parish, and yet may not have above one-tenth of the valuation. The rule then is to inquire what proportion of the church will accommodate the burgh, and what the landward parish, and then to proportion the expense accordingly. To apply this to the case of church-yards, the ground must be furnished by the heritors, for no one else can furnish it. But *who* is to be at the expense? In common cases the heritors are, because they and their tenants and dependants have the whole use of the church-yard. But when there is a town, the town for the same reason must pay its proportion. As to administration, *that* is generally left with the kirk-session, because the profit goes to the poor, and the heritors are so far relieved. But in this particular case I think that the ground should be vested in the burgh.

Covington. It is impossible that the statutory rules can take place here. Where there is a burgh, the real rent of the burgh, and of the landward parish, ought to be the rule in proportioning the expense.

President. A general rule must be assumed here. There was a church-yard sufficient for the parish till the town became enlarged. My doubt is whether the heritors should be burdened at all? It is impossible that the heritors should be solely burdened. The community ought to be burdened according to the probable use that will be made of the church-yard. I see no inconveniency in having the church-yard at a distance, but much in having it near the church. Why take ground of great value when you may have ground of less value? I do not see why money should be paid for *layers?* Burying ought to be free, and I did not know that there was any such exaction in Scotland.

Gardenston. I am surprised that this should be a question. I have a little village of my own, and if the number of inhabitants should increase to my benefit, I would not grudge them a church-yard. The common rules cannot apply to this case, where there is a burgh. It is unreasonable however that the community, who have not the whole use, should pay for the whole; and the price demanded is exorbitant. The situation of the ground must be such as is most convenient for the heritors.

Justice-Clerk. Here is a great town, exceedingly populous; there are many persons in it who have no property in it: it might seem reasonable to take them all *in computo*.

Kaimes. If we go into such *minutiæ*, matters will become inextricable.

On the 4th July 1777, " The Lords found that the additional burying-ground, necessary for the parish, must be furnished by the heritors thereof having ground proper for the purpose; but found that the heritors who furnish the same must be indemnified by the other heritors, and by the community of the Town of Greenock, in proportion to the examinable persons within the

parish, residing upon their estates, and within the community respectively;" varying the interlocutor of Lord Auchinleck.

Act. Ch. Brown. *Alt.* J. M'Laurin.

1777. *July* 4. JOHN MACKENZIE of Delvin *against* SIR HECTOR MACKENZIE.

SUPERIOR AND VASSAL—TAILYIE.

Found that a superior of entailed lands was obliged to enter the heir of entail, who in this case was likewise the heir of the former investiture, and lineal successor in the lands, on receiving a *duplicando* of the feu-duty, and was not entitled to demand from him a year's rent, or other composition, reserving, however, to the superior and his successors in the superiority, any right which they may have to a year's rent, or other composition, on the entry of any future heir of entail, not an heir of investiture prior to the tailyie.

[*Faculty Collection, VII.* 445; *Dict., App. I, Superior and Vas., No.* 2.]

AUCHINLECK. When the superior grants a charter to a man and his heirs, all that he can demand is a duplicando; but when the vassal chooses to make the estate go to another series, who are called *heirs*, but in truth are *disponees*, they ought to be considered in the light of disponees.

MONBODDO. Formerly there was a *delectus personæ* in vassals, as now in tenants. Then the circuit of entering by adjudication came in, and at last, by the statute 20th Geo. II., the superior was obliged to enter the vassal without any circuit at all. The defender is heir of the investiture, and must be received; but the superior is entitled to insist for a reservation. It would be *fraudem facere legi,* if the superior was not allowed to secure himself, in the event of what is equivalent to a sale.

COVINGTON. The superior may be a loser, but that is no more than a consequential loss. As the law has obliged the superior to enter heirs of entail, and has made no distinction as to the nature of such heirs, I do not see how the superior can have any claim.

KAIMES. It is difficult to argue, when, as I may say, the law alters and leaves us in the lurch. Formerly the superior was not obliged to acknowledge any stranger. Now his benefit arises from acknowledging strangers. This is just the reverse of what was anciently the case. The law says that entails may be made. *Where* is the superior's loss, unless it be that the law has authorised entails?

BRAXFIELD. I could have wished to know what was the practice. The law, as now modelled, stands thus,—The superior is entitled to a renewal of investiture; if to an heir, he receives a duplicand of the feu-duty; if to a stranger, he receives a year's rent. He is not bound to receive a stranger without pay-