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quired by his rights was a right to the feu-duties merely, and not to the superiority of the lands of Kirkpatrick. The rule that the vassal who refuses to enter forfeits to the superior the full rents of the lands from the date of citation is subject to exceptions, according to the discretion of the Court; and the circumstances of the present case, at least giving rise to so much reasonable doubt, if not to absolute certainty, in favour of the respondents, entitle it to an exception from that general rule, as they have never been contumacious, or wilfully refused to enter.

After hearing counsel, LORD MANSFIELD moved to affirm without assigning reasons. It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Henry Dundas, Ar. Macdonald, Andrew Crosbie.*

For Respondents, *Al. Wedderburn, Ilay Campell, Gilb. Elliot.*

Not reported in Court of Session. A point of form in the case is noticed in Brown's Suppl. "Tait," p. 460.

JOHN SHAW STEWART, Esq. - - - *Appellant.*
The MAGISTRATES and COUNCIL of Greenock, *Respondents.*

House of Lords, 2*d March* 1779.

CHURCHYARD—GROUND TAKEN FOR DO.—PARTIES TO SUIT—SUPERIOR AND VASSAL.—Held in the Court of Session, that by law, the ground to be chosen for erecting a new churchyard, is a burden upon the heritors of the parish; and the ground contiguous or adjoining to the old churchyard is to be set off, reserving to the heritor relief for the value against the other heritors, unless otherwise agreed on. Where action had proceeded and had been discussed on the merits, without objection to certain parties being called, appeal was taken to the House of Lords, where the objection was taken for the first time. Interlocutors in consequence reversed, without prejudice to call additional parties, or bring a new action. Question: whether a superior is bound to grant a feu-charter to a kirk-session, of ground for churchyard.

The ground on which the town of Greenock is built, belonged in property or superiority, to the appellant's ancestor, Sir John Shaw, then of Greenock. The town, which was then inconsiderable in size, and the adjoining country, formed one parish, having one church and churchyard. But the rapid increase of the population, from the shipping commercial traffic of the place, so extended the town that in 1741 it was necessary to subdivide the parish, and build

another church, which was done accordingly, by decree of disjunction, obtained before the Lords of Session, as Commissioners for Plantations of Churches. This decree disjoined certain parts of the town from the old parish, and erected the same into a separate pastoral charge, to be called the new church and parish of Greenock, with this *proviso*, that Sir John Shaw and the other heritors were not to be liable, nor their teinds or lands, for payment of stipend to the minister of the new parish; or for building, upholding, or repairing the church, manse, or school-house, or *any other parochial burdens whatever*, but that the whole parochial burdens should be borne by the baillie, feuars, and inhabitants of the burgh; this having been previously agreed upon between them and Sir John, in respect of the latter giving up all right to the patronage of the new parish, which by law belonged to him.

Nothing was said in this decree or proceeding about a churchyard; but, in consequence of the vast increase in population and extent of the town, the old churchyard soon became insufficient. Accordingly, some years after the new parish church, manse, and school-house were erected, the magistrates, on a representation made to that effect from the new kirk-session, applied to the appellant and his father to give the ground required, on the principle, that as owner of the ground contiguous and proper for the purpose, he was bound in law to furnish it, and that he must take his recourse *for the value* against the other heritors or landholders of the parish. This was refused, because in effect it was making him give ground for nothing, ten parts in eleven of the valuation of the parish belonging to him. Action was then brought against him by the Magistrates to compel the appellant to set off as much of his ground as was sufficient for the purpose of a churchyard for burying the inhabitants of the town and parish, and to adjudge and declare the ground so set off to be part of the common burying place, and the management thereof vested in the kirk-session. Submitting whether the appellant was entitled to any recompense from the other heritors and feuars of the parish, and if he was, that these heritors and feuars should be obliged to pay to the appellant their respective proportions of the value; and for that purpose they also were made parties to the action, but the kirk-session of the new parish of Greenock were not made parties. The defence given in took no notice of this, and was confined to an admission, on the part

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of the appellant, that he, as contiguous patron, was bound to furnish the ground, but insisted that he was entitled to a fair and adequate price. The discussion which ensued had reference chiefly to the locality to be allotted for that purpose. The respondents, on their part, insisting that ground should be set apart adjoining or contiguous to the present churchyard, and wished to appropriate the whole gardens and back grounds of a street called the Kirk Town, in a way that the churchyard would have touched the walls of the houses, whereas the appellant could only consent to give them such a space as would leave these back gardens belonging to the houses untouched, and sufficient area for new houses when the old were pulled down.

July 31, 1776. The Lord Ordinary found, that "a burying ground "is a burden which nature, law, and reason lay upon the "heritors of every parish, and that the ground most com-"modious for the purpose, falls to be appropriated thereto, "and that the person whose ground is taken, is entitled to "have the value refunded to him by the several heritors, con-"form to their valuation, he himself bearing his proportion "thereof, which falls to be discounted from his claim against "the other heritors: Finds, that it is proper the ground to "be set apart, by way of addition to the present churchyard, "shall be contiguous and adjoining to the present church-"yard, and that it is proper that it should be of dry soil, that "being more commodious for the people who attend funerals, "especially in winter; and also, in respect dead bodies do "sooner consume in such soil; and that the consideration "of the conveniency and propriety of the ground must de-"termine; and what is urged in behalf of the defender Mr. "Shaw Stewart, that the ground pointed out by the pursuers "for this purpose is more valuable than what he insists should "be taken, is in so small a spot as is here needed no ways "be regarded, but before fixing the particular spot, appoints "a sketch or plan of the present churchyard and grounds "immediately adjacent, to be given."

Dec. 20, 1776. His Lordship thereafter found the ground pointed out by the pursuers was the most suitable, and ordered it to be set apart accordingly. A reclaiming petition was presented to the Court, submitting that the ground pointed out by the appellant was the most suitable, and that the payment fell to be made by the town, or its inhabitants, and not by the heritors of the old parish. At this time it was not known, and not pleaded, that, by the terms of the decree of disjunction above referred to, the town was bound to relieve the

heritors of the landward parish of all *parochial burdens*, under which clause churchyards must be included. 1779.

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The Court still held that the additional burying ground was nearer for the parish, a portion must be furnished by the heritors thereof having ground for the purpose. But found 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, and within the community respectively, and further ordained Mr. John Shaw Stewart to give in a condescendence of the ground he proposes to furnish, both as to quantity, situation, and price demanded by him.*

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* *Notes from Lord President Campbell's Session Papers.*

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Hailes.—" I think the session have nothing to do with it, except by concurrence of the heritors for behoof of the poor. The heritors are not bound to furnish ground to a town without indemnification; and if bound to furnish ground, they may do it in place most convenient for them. Entitled to charge."

Braxfield.—" The general rule as to parochial burdens, is, that they are to be borne by the heritors according to the valued rents. For the most part this rule is equitable, but not always. In case of church, burgh, and landward parish, must accommodate each other while they remain one parish. When a new church is to be built, first a plan ought to be made, then to consider what proportion necessary to answer each. If inhabitants of burghs double, then give them two-thirds of the area, and pay expense of building accordingly. The same rule applies to churchyards. No doubt the ground must be provided by the heritors; but it is a question who is to be at the expense. There is no obligation on the heritors to accommodate the town. They must, therefore, be reimbursed so far by the town. Suppose nine-tenths of this the proportion. As to the administration; if there is a common burial place, after setting off to each a proportion, it ought to be vested in the Magistrates for behoof of the community. No difference between royal burgh and burgh of barony."

Covington.—" The rule of the act of Parliament never can apply. Suppose village."

" Servitude on moss."

" Always (churchyards ?) subject to after augmentations."

" At present must give what will accommodate. Rule (as to expense) ought to be the real rent. This done in West Kirk."

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Five were condescended on by the appellant. Objections were stated to those, such as one place had bad access, another wet, another *within* town, and at last the new kirk-session proposed a piece of ground at a considerable distance from the town, while the original demand was to have ground set apart next to the old churchyard. The piece of ground at the distance was let on lease by the appellant to James Bartholomew; and the Court, concurring in this last proposition, pronounced this interlocutor, finding "that the piece
Aug. 9, 1777. "of ground lying on the road to Innerkip, and distant 139
"falls from the Mid Quay of Greenock, is the proper place
"to be chosen for the burying ground, found the value or
"grassum to be paid by the new kirk-session to John Shaw
"Stewart to be £165, with £3. 6s. 8d. sterling of feu-duty,
"and ordained him, on payment of the said grassum, to
"grant a feu-right to the new kirk-session; reserving to the
"tenant of the ground set of, to be heard for any claim of
"damages he can qualify."

Dissatisfied with the value fixed on, as well as with the ground set apart, which was just in a line with the direction which the fine buildings of the town were likely to take; and also discovering that the case had assumed a new shape, and that all parties interested had not been called, he brought the present appeal to the House of Lords.

Pleaded for the Appellant.—The new kirk-session, not having been made parties to the action in any shape, the Court ought not to have allowed any proposals by them to

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PRESIDENT.—"Lay a proportion on the burgh and the heritors, according to number of inhabitants. The situation of ground ought to be without the town, unless they can agree on what will be cheaper."

GARDENSTON.—"I am surprised at this question. Sir John ought to have accommodated the town. He looks too narrowly to his interest. The town is not obliged to purchase the whole ground. He must bear his share. Many of the inhabitants his tenants or feuars. Must value a rent on the whole cost. Must arrange the rent payable to himself in the village. D. Cathcart also an interest. As to situation, the conveniency of the heritor who furnishes the land ought to be considered."

PRESIDENT.—"Roll of examinable persons."

"Find that town and country must relieve one another, according to number of examinable persons in each, and to condescend on the ground."

influence their judgment. The respondents (pursuers) further insist that the appellant convey to the kirk-session the ground in question, but the kirk-session is no party to this suit, although it is insisted that the management of the burying ground shall be in them. The lessee of the ground chosen is not made a party, yet he had a material interest, and there was no evidence whatever adduced, or allowed, as to the value of the ground taken. But these irregularities in form are not all he had to complain of. Looking to the locality and situation of the ground, he was greatly injured in the value put upon it. Whether the heritors, the town, or the kirk-session, were the proper parties to pay, it was incontestable that he was entitled to the full value. No proof of this was taken, but the Court proceeded on a mere extrajudicial proposal of the kirk-session. The value is material, for, as superior, he was not bound in law to receive a corporation which never dies as his vassal, because he would thereby lose his casualties. If he receives it, it must only be in consideration of certain periodical payments, expressly stipulated in lieu of the casualties. Vesting the right in the kirk-session, will be a disadvantage also to the superior, because it will render it impossible for him to enforce payment of the feu-duty or rent reserved. No personal action can lie against the kirk-session. They have no corporate funds to attach. And there can be no poinding of the ground, there being no fruits in the churchyard to be poinded. But, besides, the ground chosen being let on lease, of which eleven years were yet to run, involves the superior in an action of damages at lessee's instance, which has not been taken into consideration at all.

Pleaded for the Respondents.—The furnishing burial-ground for the purposes of sepulture, is a burden which public necessity as well as law lays upon the heritors, who have ground proper and convenient for such purpose, and who may be compelled to set off such ground, upon being proportionably relieved by the other heritors. And the appellant, in this case, has, instead thereof, been found entitled to the full value of his ground from the new kirk-session. And the value fixed for that ground is full and adequate, and much higher than the adjacent ground.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *reversed*, without prejudice to the pursuers (the respondents in this appeal) insisting upon their title

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and claims, either by adding proper parties to the present summons and suit, or by raising and commencing a new summons or suit, for bringing all proper parties before the Court of Session, and thereupon to proceed as they shall be advised.

For Appellant, *Henry Dundas, Ar. Macdonald.*
For Respondents, *Al. Wedderburn, Alex. Murray.*

NOTE.—In the report of this case in the Court of Session, it is stated that after the interlocutor of the Court, 5th July 1777, the case was settled by Mr. Shaw Stewart accepting the offer of the new kirk-session; but this appears erroneous, from the subsequent interlocutors of the Court and appeal to the House of Lords. The reversal of the judgment is not noticed, M. 8019, "Kirk-yard and App. 1, No. 1. *Vide* Dunlop, p. 80. The reversal in the House of Lords on point of form, leaves the principle as fixed in the decision unaffected, although the judgment cannot be founded on as an authoritative determination. Mr. Dunlop, (Parochial Law, p. 82,) says, "that there are certainly strong grounds on which to support that "judgment, although, at the same time, the strict interpretation the "Court have lately put on the obligations of heritors, in regard to "*churches*, may justly lead to doubt how far they would impose on "them a burden nowhere laid on them by Act of Parliament."

JOHN ALSTON, ALEXANDER ELLIOT, WILLIAM COLQUHOUN, and Others, - } *Appellants;*

MESSRS. COLIN CAMPBELL & Co., Merchants in Greenock, and JOHN M'ALLISTER, } *Respondents.*

House of Lords, 3*d March* 1779.

SALE ABSOLUTE OR QUALIFIED—INSURANCE—INSURABLE INTEREST.—A party sold a vessel to his creditor, under a vendition *ex facie* absolute, but, as shewn by the correspondence, was intended as a security for his debt. He thereafter insured the vessel. Held, on her loss, that he had still an insurable interest,—the sale being merely in security.

Richard Caldwell was owner of the ship Frederick, then on a foreign voyage, and being pressed for money by the respondent M'Allister, who was his creditor to a large amount, Caldwell, in order to satisfy him as far as possible, wrote him with certain securities. He says, "The securities I "now enclose you are, 1st, A bill of sale of the Snow Fred-