

1777. *June 25.* MR THOMAS MUTTER *against* HERITORS OF THE BURROUGH ACRES OF DUMFRIES.

## TEINDS.

The rule for valuing teinds when the titular has been accustomed to draw the *ipsa corpora*, or teind sheaves of burgh acres.

[*Fac. Coll.*, VII. 430; *Dict.*, *App. I.*, *Teinds*, No. 2.]

BRAXFIELD. When teinds are valued separately, it is a heavier sort of valuation than when jointly, and therefore an *ease* is given. The heritors however choose to adopt that rule, because they see that the proof will not come out clear. But this will not do when the extent of the drawn teind cannot be ascertained. There is no such thing as *averaging* in a case like this. What the Ordinary has done here, was also done in the case of *Lauder*.

COVINGTON. The same thing was done in the case of *Sir Robert Gordon*.

JUSTICE-CLERK. So also in the case of *Dalkeith*. The method proposed by the heritors is inextricable.

AUCHINLECK. The plan of the heritors is to make themselves considered as *socii*; which is impossible.

On the 25th June 1777, "The Lords repelled the general objection;" adhering to Lord Gardenston's interlocutor, and found expenses due.

*Act.* Ilay Campbell. *Alt.* A. Crosbie.

1773. *July 3.* AGNES YOUNG *against* AGNES, MARGARET, and ELIZABETH SCOT.

## DEATHBED.

Found sufficient that separate acts of convalescence should be proved, each by one witness.

[*Supp. V.* 423.]

JUSTICE-CLERK. The question is, Whether can reconvalence, by going to market, be held as proved, when one witness swears he saw the party on one market day in the market, and another that he also saw him on another day, and when there are not two concurring witnesses to any one act of appearing in market?" In a case like this there is no cross-questioning of witnesses, and so great room left for mistake, or something worse. Each is a single evidence to a single fact, and this I understand not to be sufficient.

BRAXFIELD. I cannot agree to this doctrine. Here it is of no consequence whether the man was in the market on the one day or the other: we must either hold the evidence good or hold the witnesses to be perjured.

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.