United Kingdom House of Lords Decisions

(1850) 7 Bell 1

CASES DECIDED IN THE HOUSE OF LORDS, ON APPEAL FROM THE COURTS OF SCOTLAND. 1850.

No. 1

THE MOST NOBLE ALEXANDER DUKE OF HAMILTON, Appellant

v.

The MAGISTRATES and TOWN COUNCIL of the Burgh of Hamilton, Respondents

[HEARD 14th— JUDGMENT 21st February, 1850.]

Subject_**Kirk. —**

> Where parties have for a long time past the years of prescription and enjoyed possession of seats in a parish church, under some title or other, not plainly discoverable, it is not competent to dispossess them, at making a new distribution of the seats after a mere repair and reseating of the church.

In 1456, the town of Hamilton was erected into a Burgh of Barony. In 1543, it was created a Royal Burgh, but having lost some of its privileges as such, *non utendo*, it was in 1670 created into a Burgh of Regality by a Charter from the Duchess of Hamilton. In 1726, the Magistrates brought a declarator of their privileges and powers as a Royal Burgh in which a plea of prescription was sustained in favour of the Duke of Hamilton,

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as to the way of electing the Magistrates and Council: Thereafter the Burgh was governed until the passing of the Reform Act in 1833, under the Charter of the Duchess of Hamilton, 1670.

The parish of Hamilton is partly burghal, and partly rural. In the year 1791 its population was 3601. In 1821, the population had increased to 6000, and at the last census, it had still further increased to 10,854, of which latter number 8,875 persons resided in the burgh, and the remaining 1979 persons in the landward parts.

There is only one church for the whole parish. In 1451, this Parish Church was made Collegiate, and at that time James Lord Hamilton, built a new one, which continued to be used till the year 1732, when it was pulled down in order to improve the Duke of Hamilton's Park, and a new church, with the exception of the seating, was built by the Duke in another situation.

In 1475, the Magistrates of the Burgh had obtained a grant from Lord Hamilton of 100 acres of ground within the Burgh, which they have ever since held under his Lordship's successors, the Dukes of Hamilton. Thirty acres of this land have been feued by the Magistrates for building purposes, and the feu duties they thus derive amount to about 400 *l.* per annum.

The valuation and cess of these lands were never entered separately, but always continued to be entered on the cess-roll in one cumulo valuation with the other lands of the Hamilton family, but whether the Magistrates were assessed to, or paid any of the parish or public burdens in respect of these lands was a disputed matter between the parties, and on which side the truth lay, did not appear. What portion of the Parish Church was enjoyed by the predecessors of the Respondents in ancient times, and

whether as heritors or as Magistrates, does not either appear; but that they did possess some part is to be inferred from entries in the town accounts from 1703 to 1733, of receipts of “the rent of three back seats in the town's loft in

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the church,” some of the entries calling the loft “the Magistrates' loft,” “the Council's loft,” and sometimes the “Town's loft;” and the records of the burgh contain this entry, of date the 9th of May, 1734:—

> “‘His Grace the Duke of Hamilton having promised to give to the bailies the loft in the south-east aisle in the kirk, upon their being at the charges of laying the floor thereof, and building the breast or front of the same, they do, therefore, appoint John Hendry, their treasurer, to cause measure the said floor, and calculate what deals it will take to lay the same, over and above the timber of the old lofts belonging the town, presently lying in the Meal Market, and immediately to provide the said deals, that they may be seasoned in due time.’ Again, in the minutes of 7th September, 1734, ‘the bailies approve of the payment of 5 *l.* sterling, as the price of 80 Frederickshall deals, for the town's loft in the new church.’ And the minutes of 26th April, 1735, bear, that the Council having seen a letter ‘to Bailie Naismith from John Hamilton, one of the Duke of Hamilton's commissioners, desiring that they would, upon their own charges, build a stair to their gallery in the new church, and John Hendry, treasurer, having informed them that he had, this day, taken the advice of workmen anent the building of the said stair, and that they were of opinion that the timber of the stair to the town's gallery in the old church, will again serve to build the most part of the said new stair, they, therefore, agree to build the same on the town's charges, &c.’ And finally, the minutes of 20th September, 1735, bear that ‘the bailies and Council approve of an account of wright work, and others, wrought at the town's aisle of the new church, and authorize payment thereof.’”

The evidence upon the subject for the period subsequent to the building of the new church, was a little more precise, for the minutes of a meeting of the heritors held on the 11th of

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October, 1734, had the following entry:—

> "John Hamilton, Writer to the Signet, in the name of James Duke of Hamilton and Brandon, did represent to the foresaid heritors, that the new church of Hamilton, being now mostly furnished and sclated, that it was his Grace's inclination that the same should be proportioned and divided amongst the rexive heritors of the said parish, according to their rexive valuations, that so no time might be lost in finishing the gallarys in terms of a modell to be laid before them, and likewise the seats in the area of the church; and since the Duke did not insist to have his proportion in the church according to his valuation, he desired there might be so much of the area of the church set aside for his tennents as would conveniently hold them; which being considered by the heritors, they agree that the valuation be the rule both for divideing the gallarys and area of the church; and having considered a valuation-book of the said parish, they find the heritors following to have the greatest valuations, viz.—the Duke of Hamilton, who is to have the south-west isle for himself, and the area below for his servants; and out of the said Duke his proportion effeiring to his valuation, he agrees that the Magistrates and Town Councill of Hamilton shall have the gallary of the south-east isle."

The minutes of another meeting of a Committee of the heritors, held on the 18th February, 1735, bore that a person who had been employed to measure the area of the church reported "that, 'exclusive of the Duke of Hamilton's gallery, and servants' seats behind the same, and also exclusive of the common area within the circle, and the common passages, both above and below, the whole contents of the church extended to 2,605 feet; and the gallery in the south-east aisle, which Mr. John Hamilton, one of the Duke's commissioners, declared his Grace was to give to the Magistrates and Town Council of Hamilton, out of his valuation, amounts

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to 303 feet—which being deducted from the above 2,605 feet, there remain 2,302 feet; and it being declared, in the name of his Grace, that he was not to insist for his whole valuation, but wanted that a proper place be set apart for his tenants, Robert Strang proposed that 197 feet of the north-west gallery, besides a proportional part of the common area below, be set apart for that purpose.'"

In the proceedings be presently noticed, the Respondents averred, and the averment was not substantially denied, that the Magistrates and Council of the burgh, after the arrangement of 1734 and 1735, got allotted to them the south-east gallery of the new church which was then built, and that they floored, plastered, and made a stair to it, and had ever since possessed and enjoyed it. That the seats in this "new church then

built were principally the same as had been used in the old church by the respective parties who had sittings in it."

In the year 1841 the heritors directed a survey of the church to be made, with a view to ascertaining what repairs were necessary. The persons appointed for this purpose reported that the walls were sound, but that the wood-work of the galleries was decayed; that the arrangement and construction of the pews were very bad, and many of the pews would require to be renewed:—

> "The whole area will therefore require to have new flooring and sleepers laid at a higher level than the surrounding ground; and the seatings will, consequently, require to be taken out, and replaced, which ought to be done upon a better construction."

The Presbytery on the 9th of June, 1841, approved of this report, and decerned in terms thereof, "and instructed their clerk to furnish the heritors with an extract of their minute, and" enjoined the heritors to take immediate steps for executing the repairs.

The repairs and alterations reported as being necessary were effected under the authority of the heritors at various

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meetings of the body, and the expense of the repairs was defrayed by the same body.

At length in February, 1843, an application was made to the Sheriff by the general body of heritors, who had taken part in the repairs, setting forth "That, in order to avoid all disputes, and judicially to determine the respective proportions of the area-seats and sittings of the building effeiring to the heritors who have contributed under the aforesaid assessment towards the expense of the said improvements and repairs, the petitioners craved the Sheriff to divide and allocate the sittings in the church according to law," and praying the Sheriff to "make a division and allocation of the sittings in the galleries and area of the said church, by decree of Court, among the several heritors, according to the valued rent of their respective lands upon the cess-roll of the parish, and the ministers of the said parish, conform to their respective rights and interests, all in terms of law." Service and intimation of this application was ordered and made, and thereafter on 9th February, 1843, the Sheriff appointed the 6th of April for making a division and allocation of the sittings of the church.

The Respondents, though heritors of the parish in respect of the 100 acres before mentioned, which they had originally acquired under tithes from the ancestor of the Appellant, were not invited or summoned to take any part in the resolutions with

regard to the making of the repairs; neither was any service made upon them or intimation given to them of the application to the Sheriff or of his order for allocation and division of the sittings; neither were they assessed for any part of the expense of the repairs.

The Respondents, however, were of course aware from time to time of what was being done. At length they, on the 17th November, 1842, wrote to the Appellant's factor in these terms:—

> "You are aware that the Magistrates and Council have had,

> since the church was built in the year 1734, a front gallery and sittings behind. If it is not intended that they should get the same sittings and front seat which they formerly possessed prior to the church being repaired, which it is expected they will, I should like to be apprized of such intention before the division takes place;"

and no notice being taken of this letter, they served a protest upon the Appellant, in which they intimated to him that they "had a right to the gallery in the south-east aisle," and claimed the same, and protested against its being allocated to any other heritor; "First, because the church having been formerly legally divided, and the south-east gallery allocated to the Magistrates and Town Council of Hamilton, upwards of one hundred years ago, and which had since been possessed by them, as their own exclusive property, it was illegal again to divide the church, which had been recently merely repaired; and, second, assuming the proposed division to be legal, the Magistrates and Town Council of Hamilton, in respect of their property, the valuation of which is included in that of the Duke of Hamilton's valuation, and of the rights acquired by them, at the division of the church in 1734, are entitled to 303 square feet of the area of the church for sittings therein."

The Duke, in answer to this protest, denied the right asserted by the Respondents; but nevertheless he said that, following the example of his predecessors, he was willing, out of his own allocation, to accommodate the Respondents, and he proposed with that view to give them certain seats which he specified.

On the 6th of April, in the absence of the Respondents, the Sheriff made a new division of the sittings of the church, by which he allocated to other heritors the whole of the gallery which had previously been possessed by the Respondents, and set aside no part of the church for them, leaving them to be accommodated out of that part which was allocated to the

Appellant, and which they were informed would consist of three specified seats.

The gallery which had been possessed by the Respondents had afforded accommodation for seventy-six persons, and according to the new seating was capable of accommodating seventy-five persons, whereas the three seats which the Appellant proposed to give them, were equal to the accommodation of only nineteen persons.

The Respondents now presented a note of suspension and interdict to the Court of Session, against the Appellant and the heritors to whom the seats in the south-east gallery had been allocated, by which they prayed that Court to "prohibit and discharge the said Respondents, by themselves, or by their tenants, servants, or others acting in their name or on their behalf, or by their permission and authority, from entering to, or taking possession of, or occupying the seats in the south-east gallery of the parish church of Hamilton, which, for upwards of one hundred years, have been exclusively occupied and possessed by the Magistrates and Town Council of Hamilton, both *qua* such and as heritors within the parish, and which were specially allotted and set apart to them in the original division of the said church—and also from interfering with, interrupting, or molesting the complainers, in any manner of way, in the peaceable possession and enjoyment of the said gallery, and sittings or pews therein."

At the same time the Respondents, for themselves, and as representing the commonalty of the burgh, and as heritors of the parish, brought an action of reduction and declarator against the general body of heritors, concluding for reduction of the Sheriff's decree and scheme of division of the seating of the area of the church, and for declarator that the Respondents, "as the Magistrates and Town Council of the burgh of Hamilton, representing the community of the said burgh, and, as such, heritors within the parish of Hamilton, have

the only good and undoubted right to the gallery in the south-east aisle in the present parish church of Hamilton, and to access by the stair leading thereto, and that they are entitled now and henceforward, in time coming, exclusively of all others, to possess, occupy, and enjoy the same, as they did before the date of the said alterations and repairs, and without let, hindrance, or impediment from the Defenders, the Duke of Hamilton, Thomas Jackson, and John Hamilton, or any others whomsoever: And the said church OUGHT and SHOULD, by decree of the said Lords, to be divided between the Pursuers and the Defenders according to the state of their rights and possession previous to the repair of the church, and, for that purpose, the said Lords OUGHT and

SHOULD nominate and appoint the Sheriff of Lanarkshire, or one or other of his substitutes, to obtain a correct plan of the area and galleries of the said church, and the seats therein, and thereafter to allocate and set apart the gallery in the said south-east aisle for the Pursuers, and otherwise to divide the area and remaining galleries, and seats therein, amongst the Defenders, and allocate the division of them according to the state of their rights and possession previous to the repair of the church, and to cause number the seats so to be divided and allocated, and to obtain a proper and correct scheme of division, containing the names of the parties and the numbers of the seats allocated to them, care always being taken by him that there shall be allocated to each accommodation equal in point of situation and dimension to that which they possessed previous to the said repair, so as to ascertain and fix the proper rights and limits of the rights of each in time coming, all to be reported in due form: And the said Lords, by decree foresaid, OUGHT and SHOULD ratify, approve of, and confirm the said scheme and division, and report on the same being found correct, and the respective divisions and allocations, so made and approved of, OUGHT and SHOULD be

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DECERNED and ORDAINED, by decree of the said Lords, to belong to the Pursuers and Defenders respectively, and their respective successors or heirs, to be possessed and enjoyed by them, as their distinct property, in time coming."

The actions of reduction and declarator, and of suspension and interdict were conjoined, and in support of them the Respondents stated, *inter alia*, the following pleas in law.

"I. As the Magistrates and Councillors of the burgh of Hamilton, and as heritors of the parish, the Pursuers have a legal right of property in the parish church, and are entitled to suitable accommodation therein.

III. The decree of division was incompetently pronounced, and is illegal, inasmuch as the Pursuers were not cited or called, for their interest, in the process of division, either as Magistrates and Councillors, or as heritors.

IV. The pretended decree of division is, *quod* the Pursuers, a decree in absence, and ought to be suspended *simpliciter*.

V. When a parish church is taken down, and a new church is built in place or instead of it, the Magistrates and Town Council of a burgh, within the parish, and the heritors of the parish, are entitled to have allocated to them, in the new church, equal

accommodation, in point of situation and dimension, to that which they possessed in the old church.

VI. The Magistrates and Town Council of Hamilton have right to, and are entitled to occupy and possess, the gallery of the south-east aisle of the present parish church of Hamilton, in respect both of the right of property which belonged to them as Magistrates and Councillors, and as heritors in the former parish church, and of the agreement with the Duke and heritors in 1734, by which that gallery was assigned and allotted to them, as an equivalent for the gallery which belonged to them, and which they had occupied, in the former parish church—more especially as their title to

the right and possession claimed by them is fortified and rendered unexceptionable by acquiescence and prescription.

VII. Where a party at the original division of a parish church, by agreement with the patron and heritors gets allotted to him a certain proportion and place of the church, and afterwards possesses, with the acquiescence of the patron and the heritors—more especially if the possession be for more than forty years—it is incompetent for a sheriff to invert his possession; and he is entitled to continue in his place, and to possess, even although the space exceed the accommodation to which he is entitled, with reference to the extent of his lands in the parish, or the amount of his cess and valuation.

IX. Even on the assumption that there was a necessity for a re-division, and that it was legal to invert or encroach upon the possession of the Magistrates and Town Council, the Pursuers were entitled to get equivalent, suitable, and comfortable accommodation of space and sittings, in an equally eligible situation in the gallery or area of the church, corresponding to the former possession.

X. In the division of a church amongst the heritors of a parish which is partly burghal and partly landward, the Magistrates of the burgh are entitled to have allotted to them a reasonable and fair proportion of the church, with reference to the state of the population and circumstances.

XI. The Defenders have no legal right of property, either collectively or individually, or by one or more of their number, in the seats of the gallery of the south-east aisle of the church, illegally taken possession of by them, and allocated to the Defenders, the Duke of Hamilton and Messrs. Jackson and Hamilton, by the said decree, or any right to occupy the same."

On the other hand, the Apellant stated, *inter alia,* the following pleas in law.

“III. Even if the decree of division were reduced, the

remaining conclusions are incompetent, inasmuch as any new division of the area of the church would fall to proceed before the sheriff in common form.

IV. Even if the Pursuers, *qua* heritors, were entitled to challenge the decree of division, to the effect of having a portion of the area of the church set apart to them effeiring to the valuation of their property, they are not entitled to be heard in the reduction without paying the whole expenses of the process of division, as well as those incurred in this process, in respect, (1.) That they never did claim in that character, and to that effect, but as having a separate and exclusive right of property in the gallery: (2.) Because, though in the full knowledge of the proceedings, they made no claim merely to a portion of the church effeiring to the valuation of their property: and, (3.) Because they never tendered, and never have paid, one farthing of the expense of the alterations and repairs of the church. Separately—The Respondents, against whom the suspension is directed, are entitled to the expenses incurred by them in that suit, which could, in the circumstances, be of no avail, all parties interested not having been called.

V. The Pursuers have not, as Magistrates of the barony, or otherwise, instructed any right or title to the gallery claimed by them, and consequently, they are not entitled to decree, either of reduction and declarator, or of interdict, as craved.

VI. The alterations, improvements, and repairs, made by the Respondents on the church, were, in reality, equal to the erection of an entirely new church—and a new division of the area, according to the respective valuations of the lands of the several heritors, was rendered absolutely necessary; and, at all events, the Pursuers are barred from now, for the first time, taking that objection to the division.

VII. The proceedings in the process of division were, in all respects, regular and competent; and the church of

Hamilton being exclusively a landward parish church, and no part of the expense of its erection or repair having been assessed on the inhabitants, or tendered by the Pursuers, as representing them, the Pursuers have no right or title, by virtue of their office, to a share of the area.

VIII. As the Pursuers do not stand rated, either in the cess-rolls of the county of Lanark, or parish of Hamilton, as heritors—and as they have never contributed towards payment of any of the parochial burdens—they could not be specially made parties to the proceedings in the process of division of the church.

IX. Any use or possession which the Pursuers, and their predecessors in office, have had of a portion of the area of the parish church since 1734, was not in virtue of any legal right or title pertaining to them, either as magistrates or heritors, but *ex gratiâ* of the family of Hamilton only, and out of that portion of the area of the church allocated to the Hamilton estates.

XI. Moreover, no arrangement, such as that of 1734, between the Duke of Hamilton, as proprietor of the dukedom and entailed estates of Hamilton, can affect either the rights of his Grace's successors in the entailed estate, or the other heritors in the parish, when a new division of the church has been rendered necessary."

Cases by the parties were ordered by the Lord Ordinary, and given into the Court (2 Division), and thereafter on the 24th of June, 1846, the Court pronounced the following interlocutor which was the subject of the appeal:

> "In the process of reduction and declarator, sustain the fourth reason of reduction, and reduce and set aside the decree and scheme of division pronounced and approved of by the Sheriff, of date the 6th day of April, 1843, sought to be reduced, so far as relates to the allocation and appropriation of the gallery of the south-east aisle, of which the Pursuers were in possession prior to the repairs and alterations recently

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> executed in the interior of the church; and find and declare that the Magistrates and Town Council of Hamilton have the only good and undoubted right to the gallery in the south-east aisle in the present parish church, and to access thereto by the stair leading to the same, and are entitled to possess, occupy, and enjoy the same, as heretofore, without molestation or hindrance from the Defenders, or any of them; and reduce, decern, and declare accordingly: And in the process of suspension and interdict, in respect of the judgment in the process of reduction and declarator, interdict, prohibit, and discharge, as craved: Find the Pursuers entitled to the expenses incurred by them, with the exception of the expenses in the Bill-Chamber: Allow an account to be given in, and remit to the Auditor to tax the same, and to report."

Mr. Bethell and *Mr. Wortley,* for the Appellant.—There is no evidence of any original right to the seats in the parish church claimed by the Respondents other than what they derived *ex mera gratiâ* of the Appellant's predecessors, which they or he were at any time entitled to recal. The very title of the Appellant and his predecessors, which has been that merely of heirs of entail, prevented the possibility of the gift by them to the Respondents being of an absolute indefeasible nature; they could not have made a gift of the part of the church to which they were entitled in respect of their lands any more than they could have made a gift of part of the lands themselves. The gift would in the one case as much as in the other have inferred a breach of the entail, with its consequent forfeiture, for the seats of the parish church go along with the lands to which they are allocated *Dunl: Par. Law*, p. 42. Such an act with such a consequence will not be implied, but must be established by conclusive evidence, and such evidence being wanting, the gift must be held to partake of the quality and character of the tenure of the donor.

Such being the case, the gift was at an end when that which was given ceased to exist. The repairs of the church made an entirely new state of things, and restored the rights of parties to their original condition. An entirely new allotment being necessary, it rested with the Appellant whether to repeat or refrain from the generosity of his ancestors, and any claim upon him by the Respondents as a matter of right was out of the question.

The area of the church of a landward parish belongs to the heritors before division in one common right; and when the division is made, it is according to their respective valuations; and from the time of division each heritor has an individual right in the particular portion allocated to him. But so soon as a rebuilding or repairing of the church disturbs or destroys the allocation, the respective rights of the heritors become again merged in one common right to be again divided and ascertained as to each individual, according to their respective valuations, as they may exist at the time of division, after the changes of property which may have occurred subsequent to the previous division, and without any right in each heritor to the portion of the area which he may have previously enjoyed (*Ersk*. iii. 6, 11, *Wemyss Morton*, 16 D. B. and M., 332).

In the present instance, the repairs of the church obliterated the seating of the church as it had previously existed, and parties were remitted to their original rights, and so the Respondents, owing the enjoyment they had hitherto had to the bounty and grace of the Appellant and his predecessors, had no right which they could set up to take any part in the new allocation. Accordingly, though the proceedings taken in regard to the church were notorious to them as they were to every other person in the parish,

they neither took nor claimed a right to take any part which would infer a responsibility. They did not assert any right to assist in the deliberations as to the propriety of the repairs, or as to the mode or extent to which

they should be made. It was only at the eleventh hour when the division was about to be made, that the idea occurred to them of putting forward a claim to a share, shewing thereby the apprehension which they themselves entertained of their own position and rights.

And even when they did then make a claim to the particular gallery, it was not as heritors, but in respect of some supposed claim upon the Appellant as an individual heritor.

Nevertheless the conclusions of the summons assert as against the general body of heritors a right to a particular portion of the church, and a new division of the area of the church, according to the rights of parties previous to the repair; a demand which is obviously inconsistent with the rights of the other heritors; for, as already observed, when the state of the previous possession is destroyed by repairs or rebuilding, the parties are remitted to their original rights. No heritor can claim any particular portion of the area. All he has right to is an unascertained undefined portion.

Possession then, for however long a period, cannot be of any service as a title of possession, either as against an individual heritor or as against the general body of heritors, for any contract which might be implied is necessarily at an end so soon as the new division and allocation take place. And so far as regarded the Appellant, the possession, such as it was, was not adverse to him, but, on the contrary, was under him, and consistent with his titles.

Mr. Rolt and *Mr. Anderson* for the Respondents.—The rule for the division of the area of a parish church, though not laid down in positive precise terms, in the authorities for the law of Scotland, seems to be pretty much the same as that stated by Sir J. Nicholl in Fuller v. Lane, 2 Add. 419: That by the general law and of common right, all the pews in a parish church are

the common property of the parishioners, who are entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The parishioners indeed have a claim to be seated according to their rank and station; but the church-wardens are not, in providing for this, to overlook the claims of all the parishioners to

be seated, if sittings can be afforded them. This is fairly the result of the decided cases in Scotland, and of the different passages in the text writers, which all admit the principle, and only raise discussion as to the particular mode in which it is to be worked out. *Ersk.* ii. 1, 8, says, Though churches fall not under commerce, because a church is the house of God, the heritors and other inhabitants may nevertheless acquire a *quasi* property in the seats of a church limited to the special purpose of attending divine service.

Where the parish church is entirely landward, it has been assumed that the population is equally extended over the whole parish; and that if the area of the church be divided according to the proportion of land held by each heritor or proprietor, the spiritual wants of the community in the parish will thus be provided for. But the portion of the area thus allocated to each heritor does not become his own private property, which he may dispose of as he pleases. He holds it merely as a pertinent to his lands, for the accommodation, not of himself and his family alone, but of his tenants and servants *(Ersk.* ii. 6, 11), to whose exclusion he cannot let or otherwise dispose of it (Skirving v. Young, Mor. 7930.

In this arrangement the vassals of a lord do not claim in a subordinate degree to him, and are not dependent upon the sub-division to be made by him for their portion of the area—they claim and have allocated to them a portion in their own original right as heritors.

Where the parish is not entirely landward, but partly burghal and partly landward; where there is within the parish a town having within it a number of inhabitants greatly

exceeding what is to be found in any corresponding area of the parish, the rule of division, viz., the accommodation of every parishioner, is still recognized, but the mode of working it out is different. To apportion the area according to the extent of land possessed by each heritor would obviously leave many of the inhabitants of the town unprovided with church accommodation. In Ure v. Carnegie, Mor. 7929, the Court found that the area of the parish church of Forfar fell to be divided between the community of that burgh and the heritors of the parish in proportion to the population. But the other authorities do not show the exact rule of division in such a case; for the question raised has generally been in regard to the right of the community of a town or burgh to accommodation, or its liability for repairs, according to a state of possession dating from ancient times, the authority or origin of which has not been disclosed. In Sinclair v. Heirs of Kinghorn, Mor. 7918, it was found that the community of the burgh of Kinghorn was entitled to retain possession of that

proportion (one-half) of the area of the church which was presently possessed by them, and that the heritors were entitled to retain the other half, each body dividing it among its members according to their rights. In Cathcart v. Weir, Mor. 7928, where the heritors complained that the community of the burgh of Greenock enjoyed more than their due proportion, according to valuation in the cess-books, the Court refused to allow a division, being of opinion that there was, from the long possession, sufficient presumptive proof of a proper and regular division.

Then as to liability for repairs of the parish church, it was found in Argyll v. Rowat, Mor. 7921, that the repair of the Church of Campbeltown must be at the expense of the heritors of the parish and of the community of the burgh. In Feuars v. Heritors of Crieff, Hailes, 892, that the repairs were to be borne by the inhabitants of the town and the heritors of

the parish rateably according to accommodation. And in Lockhart v. Lockhart, 10 S. & D., 243, where the question regarded the repair of the manse, it was held that the magistrates of the Burgh of Lanark, as representing the community, were liable, along with the heritors of the parish, and in Gavin v. Trinity House, 4 Sh. 61, when the magistrates of North Leith proved long possession by the community of a certain portion of the area of the parish church, but were unable to show any grant or written title, it was held, the church having been pulled down and rebuilt, that the corporations were entitled to have the possession continued.

All these authorities plainly recognize the right of the community of a town or burgh to have accommodation in the parish church, without regard to the amount of valuation of the lands within the town or burgh, as compared with the lands in the parish generally, and that where there is proof of past possession by them, that possession is not to be disturbed.

In the present case there is evidence that the Respondents' predecessors had accommodation in the church which existed prior to that built in 1734, and that they had a gallery or loft in the church then built. The inference of law from these facts is, that the accommodation so enjoyed had been enjoyed from all time. The obseqious terms of the minutes of Presbytery, in 1734, expressed as if every thing were referable to the grace and bounty of the Appellant's predecessor proves but little more than that such was the language of the time in matters in which a person of his dignity was concerned, although having relation to questions of undoubted right. So slight a circumstance as that will not overcome the presumption of law, that the accommodation in the church which had been enjoyed was so enjoyed by right.

[*Lord Chancellor*.—If you begin your title with the church built in 1734, and the church was originally built in 1451 by the Duke of Hamilton, and part given to the Respondents,

then the evidence of title prior to 1734, gives no better title than the arrangement in that year.]

The onus is on the Appellants to show that Respondents did not acquire their possession in the way in which it would be acquired in a parish church as accommodation for the inhabitants of the burgh.

Whatever new arrangement might have been justified had the church been pulled down and rebuilt, and a new adjustment according to existing rights as they might have been altered in the lapse of time by sale or exchange of lands within the parish, there was no right in any one, where repair was all that took place, to disturb the previous possession.

But the proceedings show, that whether the possession was to be disturbed or maintained, the Respondents were not invited to take any part. They were passed over as parties having no right or interest in what was going on, although they represent the community of the burgh, who, through the Respondents alone, can obtain that accommodation in the church, which the law intends that all should have.

Mr. Bethell in reply. A parish church is not an easement but a tenement, to which a title must be established. If possession of a gallery adverse to the heritors be shown, and also a title to it, exclusive of them, the interlocutor appealed from may stand, not otherwise; but no title has been proved of any kind, beyond the mere bounty of the Appellant's predecessor, which he was entitled at any time to recall. Even if the Respondents, as representing the community, should be considered as entitled to any part of the area, that would not give them right to any specific portion of it, but only to an aliquot part to be selected by the competent authority; but the prayer of the suspension has regard specifically to the south-east gallery alone, and the proceedings show that the claim is made by the Respondents not only as representing the community, but as heritors.

Lord Chancellor.—My Lords, the consideration of this case by the learned Judges of the Court of Session has led to an investigation which involves some questions of ancient and doubtful matters of fact and of law, in which there has been great

difficulty in ascertaining some of the earlier facts which form the history of this case. It appears to me, upon considering the opinions of the learned Judges and the papers in these proceedings, that your Lordships may come to a very safe conclusion without any necessity for considering many of those points, or endeavouring to ascertain the accuracy of many of those facts. There appear to me to be facts about which there is no question, and rules in the law of Scotland respecting which there is no reasonable doubt, which enable your Lordships to come to a safe conclusion upon the matters in issue between the parties.

My Lords, it is hardly necessary to observe, that it appears from the proceedings that the noble family of Hamilton have possessed a preponderating influence in this parish not only from the station they hold, but as proprietors of by far the larger proportion of the parish. Therefore it may well be expected, certainly in earlier times, that we should find a want of that regularity in the proceedings which might be looked for in a parish where the influence and power of property was more balanced than it appears to have been in this one. But about one fact there appears to be no doubt, viz., that anterior to the year 1734, when the church, which has been lately repaired, was in fact rebuilt, rebuilt for the convenience of the Duke and at his expense (that of course cannot affect the interests or rights of parties in the subsequent building), the Magistrates, either as representing the community, or more likely as heritors themselves, had some interest in the allocation of the seats in the church. There is evidence sufficient to show that they had a loft in the former church. When that church was entirely

removed and a new church built, it became necessary to have a new distribution and allocation of the seats.

Now the Magistrates, neither as such, as representing the community, nor as heritors, appear to have intervened nominally in the transaction; but it is equally clear that they had a recognized interest in the old church, and that they had an admitted interest in the new church when built. For we find, in answer to the 11th Condescendence for the Duke, that this is stated:—

> "Admitted that, in 1734, the new church was divided, and that, out of the area set apart to the Duke of Hamilton's entailed lands and estates in the parish, his Grace agreed that the Magistrates and Town Council should have the gallery of the south-east aisle;"

and "admitted that the Duke of Hamilton's valuation included the valuation of the Pursuers' property, which formed only a very small part in the valuation." Here, then,

we have it admitted on the part of the Duke, and it is a fact which must be assumed to be the ground-work of any result which your Lordships may come to, that the Magistrates had an interest, which, unless it has been merged in the Duke's, and consented by them to be represented in the Duke's valuation, would have given them some title to intervene in the distribution of the seats in the year 1734. It is not at all a matter of surprise that they did not assert that important right, but that the Duke, who was the great proprietor, and under whom they held property, at all events under whose influence they were very much living, included their heritages in the valuation attributed to him. That could only have been done of course, reserving to them all such interest as they might derive from that property, whatever it might be, in the distribution of the seats. It shews, however, that the distribution of the seats, and the allocation of particular seats by the Duke to the Magistrates, was not a purely voluntary transaction. It was what was fair and proper;—it might have been more than they

otherwise could have claimed, but it was a result arising from the fact of their having permitted their property to be included in the valuation attributed to the Duke; and that is evidently the ground-work of the grant subsequently made by the Duke, and the consent given by them to the division of the property, and the seat which was reserved for the Magistrates. For we find in the extract of the minutes of the heritors of the parish of Hamilton, in the Appendix to the original case, “they agree that the valuation be the rule for dividing the galleries and area of the church, and having considered a valuation-book of the said parish, they find the heritors following to have the greatest valuations, viz., the Duke of Hamilton, who is to have the south-west aisle for himself, and the area below for his servants; and out of the said Duke his proportion effeiring to his valuation, he agrees that the Magistrates and Town Councill of Hamilton shall have the gallery of the south-east aisle.”

In the subsequent proceedings, that agreement is recited, and we find it speaks of “the gallery in the south-east isle, which Mr. John Hamilton declared his Grace was to give to the Magistrates and Town Councill of Hamilton out of his valuation;” and so it proceeds, and the ultimate division proceeded on that ground, and that gallery was devoted to the Magistrates upon that footing.

Now that continued from 1734 until the time arrived for the repair of the church, which is the subject of the present dispute. We have, therefore, these facts, some title on the part of the Magistrates in the original church, a seat in the original church called the loft, the act of abstaining by the Magistrates from bringing forward their own claim, a permission by them that their property should be included in the Duke's valuation, an agreement by the Duke to appropriate to them a certain portion of what

was allotted to him in respect of his share, and that agreement adopted by the heritors, and a distribution of

the seats, and amongst others this particular seat of the Magistrates, growing out of that transaction between the Duke and the Magistrates. We, therefore, have that which, beyond all doubt, constitutes a right in the Magistrates during the continuance of the old church. I do not find this to be a matter of dispute. Lord Moncreiff's opinion, which is contrary to the opinions of the great majority of the Judges, does not raise any question as to the title of the Magistrates to have that seat continued to them, so long at least as the old church remained.

Now, according to that fact, if it be so, the sole question remaining is, whether what has taken place does entitle the parties to a new distribution of the seats, or whether in allocating to particular parties the seats in the repaired church they were not bound to take the title to the former seats as the rule upon which the new distribution of the seats was to take place? About that no question is now raised. Lord Moncreiff disputes it, but, looking at the authorities referred to, it does not appear to me to be a matter of any doubt that in a repair of a church of this description, the title to the old seats governs the title to the new. There is no enlargement of the church, there is no intervention of other parties, no new interest to be considered, but there is merely the taking down of the old and decayed fittings-up of the interior and substituting new ones in their place. The very peculiar form and shape of this church also shows that there could not be, certainly not with reference to this particular gallery, any great difference in the location of the new gallery from that which existed in the old state of things. The question, therefore, is whether those who had an admitted title to seats in the gallery anterior to the alteration and refitting which has recently taken place have not thereby a right to similar sittings in the church recently fitted-up?

Now, if there had been a new church built, the circumstances would have been altogether different. But that is not the case we have to deal with. We merely have to deal with the

question whether the carcase of the church, the walls of the church, remaining the same, and the fittings up being renewed, that deprives a party of the title which he had in the old church before the old fittings were taken down; or whether he has not a title to the new seat substituted in the place of that which has been removed? My Lords, it appears that the Magistrates had an admitted and undisputed title in the old church, whatever may have been its origin, or however erroneous the principle of the original

apportionment. I refer only to its origin for the purpose of showing that it is clear that it was not a gratuitous gift, or a mere permission to the Magistrates to occupy their seat, but that it was an arrangement between the Duke and the Magistrates, adopted by all the other heritors, growing out of the circumstances which I have before alluded to, that the Magistrates should have their seat-room recognized, though not as heritors, or parties intervening and claiming their own right, but although they did not appear as heritors, the right was conceded in that character. But, unfortunately, their not appearing as heritors has led to the present error, because if they had appeared as heritors they necessarily would have been parties before the Sheriff in the distribution and allocation of seats; but not appearing in that character, but as deriving their title through the Duke, who is the principal heritor, it appears that the giving of the seats to other parties has proceeded in their absence, they not being, in point of fact, parties to the new distribution, although in substance they ought to have been. Then the Magistrates came to the Court of Session, and complained that they had been deprived of their right to the seats. Unless the alterations of the church were such as to justify the Sheriff in overturning the arrangement, and disregarding the right which the parties had, whether that right was by gratuitous gift, or by dedication, or whether by allocation as parties entitled to the former seats, the Sheriff was not justified, under the circumstances, in depriving them

of their seats. Then the Court of Session has merely done that which justice required, viz., declaring that the parties claiming are entitled to the seats which they formerly possessed, and which the alterations of the church never justified the Sheriff in taking from them.

Then comes another question about which, however, Lord Moncrieff concurs with the other Judges, and as to which there does not seem to be any important difference, viz., whether it is right for the interlocutor to stop there, or whether it ought to proceed further, and give directions to the Sheriff. Now, it does not seem to be a matter in dispute that the Sheriff, after this declarator on the part of the Court of Session, will have to re-consider the course to be adopted, because the whole scheme is altered and affected by the declarator. He has, under an erroneous supposition connected with the rights of the parties, adopted a particular scheme, the purport of which is to deprive these Magistrates of their seats. But that being brought to his knowledge, and proper proceedings being adopted for bringing that before him, although there is no new general distribution of the seats in the church, yet there must be a certain degree of discretion in the Sheriff in fixing the identity of new seats, as representing the old seats. That seems to me to be established by the cases that have been referred to by the learned Judges as a proper proceeding to originate with the Sheriff; and the instruction which the declarator of the Court of Session contained upon that subject

appears to me to be right. The result therefore is, that, although there are matters which if it were necessary to go into them would require considerable investigation before we could come to a conclusion as to the ancient law of Scotland upon the subject of the distribution of seats in churches under different circumstances; yet, that what appear unquestionably to be the facts of this case will not give rise to the necessity of considering these questions. Upon the facts which I have

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already stated, your Lordships will, I trust, think it right to affirm the interlocutor appealed from.

Lord Brougham.—My Lords, not having had the advantage of being present and hearing the whole of the argument in this case (I heard only the argument for the Appellant and part of the reply), I should have the greatest hesitation in propounding any opinion contrary to that of my noble and learned friend, who had the advantage of hearing the whole of it, even if I did not fully concur in the substance of what has fallen from him.

My Lords, it appeared to me, in the course of that part of the argument which I heard, that considerable misapprehension existed below in citing another case—it was the case of Peterhead. What we now say, however, is independent of that case entirely. But it does appear that considerable misapprehension existed below amongst some of the learned Judges respecting that case. I agree with Lord Moncrieff that that case does not govern this; it does not apply to this. And what we now say steers quite clear of that case.

I have one observation to make, my Lords, as to the way in which the learned Judges in the Court below have given their opinion upon the remit. When I inquired at the bar, during the argument, how it is done, it appeared that they hear all the counsel together, and then make up their minds apart. Then one learned Judge writes his opinion, with his reasons, and then what follows?—"I agree with Lord Robertson," says one. "I am of the same opinion as Lord Robertson," says another. "I entirely agree with Lord Robertson," says a third. Well, no doubt they do agree with Lord Robertson in opinion; but we have not the benefit of their reasons. There are Lord Robertson's reasons given; but we have not the great satisfaction of knowing that each of those learned Judges has applied his mind to the whole of the case, as Lord Robertson had

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applied his mind to the whole of the case. That I do not complain of; but I notice it in passing, for it takes away greatly from the value, it impairs much the authority of the agreement and concurrence of the learned Judges, when one follows the other through the gap, as it were. They come to the same point, but they come through the gap made by the learned Judge who is the leader. Therefore it may happen—I do not know that it is so in this case—but it has happened to me to observe that a case has been cited by one learned Judge, the leader (if I may so call him); he says, "This case decides" so and so. The other learned Judges, one after the other, say "I agree" with such a learned Judge. And if he happens to have made an error in saying, "This case is on all fours with the other," or "The other case decides this," all the others appear to agree in the error. Whereas it is a hundred to one if each learned Judge had given his own reasons for his opinion, that if the first learned Judge had made an error in the application of a case, he would have made that error alone; and the other three, if they had looked into it, would not have followed him in the error, but they would have said, "I agree, but I do not think the Peterhead case applies," or "I agree, but I do not think the Kinghorn case applies." The chances are very much against every one of the four falling into the same mistake in construing any particular case. Was not that so, Mr. Bethell, that they all agreed in that way in this case?

Mr. Bethell.—Yes, my Lord.

Mr. Rolt.—There were separate opinions of several of the Judges upon that point.

Lord Brougham.—Upon that point, but not upon the Peterhead case. That is just my argument. They agree with Lord Robertson; they give separate opinions upon the other points; but if he had made an error in the application of the Peterhead case, and if the others had looked into it each for himself, it is

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contrary to the doctrine of chances that all four should make the same error severally; but it is very much according to the doctrine of chances, indeed, it is a certainty that the other three Judges, if they arrive at their agreement in that way, will agree with him in the error as well as in that which is right. I only notice this in passing, because we have often had occasion to regret that we had not the inestimable benefit of the individual opinions of the learned Judges in cases which have come before this House. One is exceedingly loth to impose additional labour upon these learned persons, but still there would be great advantage in having the full benefit of their very learned and very useful opinions. I know that many solicitors, when I was at the bar, made it a rule when they wanted the opinions of several counsel, to lay cases before each separately. I do not know whether since I left the profession, a change has taken place in this as well as in other things. They said, "We will send the case to four

learned gentlemen individually, and then call them all together for consultation, after having got their opinions separately." A very wise proceeding in my humble judgment, for then they had the benefit of each forming a separate opinion. Whereas they said, "If we call all four together at the same time, one takes the lead in giving his opinion, and the others are apt to follow. And we have in fact only the benefit of the opinion of one instead of having the benefit of the opinion of four." Now it is just upon the same principle that I have made the observation which I have now addressed to your Lordships.

My Lords, my noble and learned friend has put the case on grounds perfectly clear and satisfactory to my mind. If I had differed from him, it would have been with the greatest reluctance, not having had the advantage of hearing the whole of the argument, that I should have expressed an opinion. But I entirely go along with my noble and learned friend, with whom I have talked over the case in private, in the advice which

he has given to your Lordships that this appeal should be dismissed.

Mr. Bethell.—Will your Lordships pardon me upon the question of costs? I would ask permission to call your Lordships' attention to the fact that you have directed a remit in this case; and I believe that it is usual only to give the costs arising subsequently to the remit. Your Lordships could not decide the case without having the opinions of the Judges upon the remit.

Mr. Rolt.—There was, my Lord, the case of Leith v. Young, I believe, in the last session, in which there was a remit, and in which the opinions of the Judges were seven to six; and there your Lordships, I believe, dismissed the appeal, with costs, notwithstanding the remit.

Lord Brougham.—We never consider that a narrow division of opinion among the Judges affects the question of costs.

Mr. Bethell.—The point was not raised there; it is raised now. Your Lordships decided that you would have a remit before you proceeded further.

Lord Chancellor.— With respect to the remit, the learned Counsel for the Appellant succeeded so far on the former hearing, as to induce your Lordships to entertain more doubt upon the matter than perhaps your Lordships may now think, upon further examination of the case, it was right to entertain; but the result of that proceeding was for the benefit of the Duke. He was the party who raised the doubt which gave rise to

the remit. But that certainly is no reason why, since it has failed, the costs should not be given.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondents, the costs incurred by them in respect of the said

appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That, unless the costs certified as aforesaid shall be paid to the parties entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

Solicitors: Richardson, Connell, and Loch— Thomas Deans.

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