

No 10. do not follow the common rules of heritage, but divide among the nearest relations, in the same degree.

Fol. Dic. v. 3. p. 370. Fac. Col.

* * This case is No 9. p. 543I. *voce* HERITABLE AND MOVEABLE.

1761. February 6.

LIEUTENANT-GENERAL SINCLAIR, and other HERITORS of the Parish of Kinghorn
against The MAGISTRATES and TOWN COUNCIL of that Burgh.

No 11.
Area of a church, how to be divided between a burgh and a landward parish. In what proportion are they to pay the expenses of repairing the church and manse.

THE parish of Kinghorn is partly landward, and consists partly of a burgh of that name. By the ancient usage of the parish, when the church and minister's manse fell into disrepair, the expenses necessary on that occasion were divided into two equal parts, one of which was paid by the town, and the other by the landward parish.

In 1759, the church and manse being both in disrepair, a meeting of the Heritors and Magistrates was called; and it appearing, from an estimate given in, that the expense of repairs would amount to L. 102 : 18 : 10 Sterling, the Magistrates and Town Council were appointed to make payment of one half of that sum, conform to use and wont, and the other half to be paid by the heritors, according to their respective valued rents within the parish.

The Magistrates brought a suspension of this decree, complaining that it was unequal and unreasonable to impose one half of the burden of these repairs upon the town, and lay only the other half upon the landward parish, which was extensive and opulent, and insisting, that the proper rule for settling the proportion of repairs to be paid by the town as well as the heritors of the country parish, was their respective valued rents. On the other hand, it was *maintained* by the heritors, that the town had been in the immemorial use of paying one half of these reparations; and that they had no reason to complain, as they possessed a much larger share of the church-area; at the same time, the heritors were indifferent in what proportion the division of repairs was made, provided the area of the church was divided in the same proportion. And in order to have this matter settled, a process was brought at the instance of the Heritors against the Magistrates and community of Kinghorn, for having the church area divided amongst them according to their several interests.

' THE LORD ORDINARY found the defenders liable in a share of repairing the manse, office-houses, and kirk of Kinghorn with the heritors of the landward part of the parish, in proportion to the amount of the cess paid out of the burgh of kinghorn, and that out of the landward part of the parish; and that the defenders are entitled only to the possession of a share of the area of the kirk effeiring to that proportion.'

Pleaded in a reclaiming bill for the defenders; *imo*, The established and general rule by which repairs are always proportioned, is according to the valued rent of the parish, and not according to the proportion of the cess payable out of it. The cess payable by any town to the royal burghs is not according to any valued rent, and variable according to the circumstances; more than one half of the cess paid by the burgh of Kinghorn is levied from the different trades and employments within the town; and this part of the cess which is paid by the trades, and which is neither imposed on their lands in the parish, nor their houses and burgh-acres, is by no law subjected to such public burdens. Suppose a gentleman should have a thriving and populous village upon his estate, this will not vary the rule, and he will only be obliged to pay such repairs in proportion to his valued rent.

2do, It will be attended with very great hardship upon the inhabitants of this burgh, if they are only found entitled to a share of the church-area in proportion to the share which, by the former part of the interlocutor, they are to pay of the repairs. Rather than submit to this inconvenience, they would agree to pay for the repairs of the church in proportion to the area they at present possess, notwithstanding the disparity between their valued rent and that of the landward parish. At the same time they apprehend that this cannot in reason extend to the manse, which, by the universal practice, is supported by the proportion of the valued rent. The different societies and individual inhabitants of the burgh have, by long possession, acquired a right of property in their lofts and seats, which cannot be taken from them; and it would occasion much confusion, if a new division were to take place.

Answered for the pursuers; The burden of repairing the kirk and manse must lie upon the heritors in the same proportion in which they are entitled to a share of the area; and this proportion ought to be ascertained according to the extent of the interest which every heritor has in the parish. As the property of the church is common to all the heritors, it cannot belong to them in any other proportion than that which corresponds to their property within the parish; 20th February 1739, Heritors of the parish of Faulkland *contra* The Kirk-session, No 8. p. 7916. The only question therefore is, how the extent of their property or interest in the parish is to be ascertained? The undoubted rule of dividing such burdens among landward heritors, is the valued rent, which has been agreed on as much more expedient than entering upon proofs of real rent, improvements thereof, and deductions from the same; and as this is the rule among the landward heritors themselves, so, when a burgh happens to be situated in a parish, the nearest estimation that can be taken to correspond to the general rule, is to compare the extent of the cess annually payable by the burgh, with that which is paid yearly out of the remaining lands in the parish, and to divide the burden of repairs in the same proportion. No other rule can be taken to answer the intention of the law. Neither has any distinction ever been made in this respect between the church and the

No 11. manse; the one as well as the other must be repaired and upheld by the heritors, and the method of levying the repairs has at all times been the same with regard to both.

In the *next* place, whatever rule shall be adopted with regard to proportioning the repairs between the town and country parish, the division of the area must necessarily correspond to the same rule; for it is an essential principle which no law can dispense with, that the burden must be allocated among the several parties in the same proportion that the property of the subject thereby affected is to be divided among them: 'Quem sequitur commodum, eum debet sequi et incommodum.' No possession for any length of time can entitle a party to a share in the area of a church who has no property in the parish; and as little can any possession entitle an heritor to a greater share of the church than corresponds to the lands he has in the parish. This would be to establish a prescriptive right without a title, nay, even contrary to the title of the party, which must, from the nature of the thing, be bounded by the property he has in the parish.

N. B. What the Lords chiefly regarded in the question about dividing the area, was the immemorial possession. And with respect to the other point of the repairs, it was at last agreed on by both parties, that the burgh should continue to pay the one half and the heritors the other.

"THE LORDS found, that the community of the burgh were entitled to retain possession of that proportion of the area of the kirk of Kinghorn presently possessed by them; and that the heritors of the landward parish were also entitled to retain possession of that proportion of the area of said kirk presently possessed by them, without prejudice to the heritors of the landward parish dividing the said proportion of the kirk ascertained to belong to them in common, and to the community of the burgh, dividing the proportion of said area ascertained to continue with the community. And of consent found, that as the community of the burgh of Kinghorn had been in use to pay one half of the repairs of the kirk, manse, and office houses; therefore that they were liable in the one half of the present repairs, and also in the half of all repairs on said kirk, manse, and office-houses, in time coming.'

Act. *Ferguson.*

Alt. *Garden.*

Clerk, *Gibson.*

J. C.

Fol. Dic. v. 3, p. 370. Fac. Col. No 17. p. 29.

1773. February 2.

JOHN DRUMMOND of Logiealmond, against The HERITORS of the Parishes of Monzie, Monedie, Crieff, and Others.

No 12.

"THE LORDS find, that the heritors of the lands annexed *quoad sacra* are liable in their proportion of upholding the fabric of the kirks to which they are