APPENDIX.

PART I.

KIRK.

1776. *November* 21.

COLONEL JAMES ST. CLAIR of ST. CLAIR, Pursuer, *against* MISS JANE ALEXANDER of ROSEBANK, Defender.

No. 1.
Whether there can be exclusive property in a seat in a church?

IN the year 1728, William Sinclair then of Roslin, feued out to Yaxley Davidson, merchant in Edinburgh, a part of that estate, which was afterward called Rosebank. At the period when Mr. Davidson acquired right to this property, there were three seats in the church of Lasswade, which belonged to the proprietor of Roslin. Though no express right was by his disposition given to Mr. Davidson of any seat in that church, yet having obtained liberty from Roslin to sit in one of these seats, he very soon after his purchase turned two of the above mentioned seats into one, and fitted them up properly for the accommodation of himself and his family.

The lands of Rosebank were conveyed by Mr. Davidson to one Captain M'Neill, who disponed them to Mr. Fairholm, from whom they were again purchased by the deceast Provost Alexander, the defender's father. Mr. Fairholm had made some reparations upon the seat in question, and Provost Alexander had all along used it as his exclusive property.

The defender Miss Alexander, considering this seat to be her exclusive property, as part and pertinent of the lands of Rosebank, she or her authors having possessed it beyond the years of the long prescription, refused to admit David Wilson, the tacksman of Roslin Inn, and his wife, to sit in the seat, and at one time in particular shut the seat door against Mrs. Wilson. This dispute was made the foundation of a complaint before the Sheriff against Miss Alexander; and Colonel St. Clair afterward brought an action of reduction and improbation before the Court of Session, in which he also concluded to have

No. 1. it found and declared, that he had the only right to the foresaid seat in the church of Lasswade. The Lord Covington Ordinary having taken the cause to report upon informations,

Pleaded for the pursuer: The plea of prescription set up by the defender is not relevant, it not being competent for any person to acquire by prescription a right to a seat or part of an area of the church, to the effect of excluding a considerable heritor in the parish from proper accommodation to him, his family and tenants, in attending public worship. Seats in churches are no doubt so far a subject of commerce, that they may be transferred from one hand to another; but they are at the same time so far *extra commercium*, that they cannot even by the act and deed of the proprietor, be applied to a different purpose from what they were originally intended. Every heritor in a parish is entitled to a seat in the church for the accommodation of himself and the possessors of his estate. This is an inherent right, and the law reprobates every paction tending to deprive him of it. For though an heritor may in some sense be considered as proprietor of his seat in the church, as well as of his estate, yet it is a property of that nature which is inseparable from his estate, so that he cannot alienate his estate, and reserve his seat in the church, or reserve his estate, and alienate his seat. Were it otherwise, the whole area of the parish church might belong to those who had not a furr of land in the parish, while the heritors and their tenants were left destitute of seats in their own parish church.

An heritor's interest in the area of a church, as part and pertinent of his property, passes to his successor in the lands, Bankton, B. 2. Tit. 8. § 192. Ersk. B. 2. Tit. 6. § 11. In the nature of the thing they do not admit of a separation,—and it would therefore be of no moment, although the defender and her authors should have possessed the whole seat in question, exclusive of all others, above the space of forty years; for this could never deprive the pursuer of that inherent right, which he as proprietor of the estate of Roslin has, to a just proportion of that part of the church area which belonged to that estate.

There is indeed a decision, January 15, 1697, Lithgow against Wilkieson, No. 16. p. 9637. in which the Court found, that seats in churches were not *inter res sanctas et religiosas*, so as to be *extra commercium*, but were conveyable by infeftment, and affectable by creditors. Yet though those seats in churches be thus transmissible by infeftment, and adjudgeable by creditors, it does not hence follow that they can by conveyance or adjudication be separated from the real property of the parish. And the Court in the case mentioned had no occasion to determine this question, because they gave the seat to the person who had a disposition to the lands.

2*d*, It was contended also for the pursuer, that even supposing a seat in the church to be a proper subject of the positive prescription, there was not here possession sufficient to establish it: Or supposing that there was such possession,

No. 1.

it was not an exclusive but a joint possession along with the tenants and possessors of the barony of Roslin. Nor is it of any moment, whether the possession had by the defender's authors, or that of the proprietors of Roslin, was most extensive. For the pursuer and his authors were not *in acquirendo*. The property of the seat, at least a joint property, was in them independent of prescription; and the possession held by them, however small, was sufficient to preserve their right from being lost by the negative prescription.

In short, the utmost to which the defender can pretend is, that she shall have such a proportion of the seats in this church, allotted to the barony of Roslin, as shall correspond to the valued rent of her property, compared to the valued rent of the whole estate of Roslin.

For the defender pleaded: She has no occasion to controvert that the valued rent is the proper rule for dividing among the heritors of a parish, a church which has never been legally divided before; and that any heritor who has a less portion of the area of such a church than his valuation would entitle him to, may insist for a division. But after a church has been legally divided, and each heritor has got a portion effeiring to his valuation, there is nothing to hinder him when he feus out a part of his lands, to give the feuer a larger portion of his area in the church, than what would correspond to the valuation of the lands feued was it divided. Such bargain is fair and rational; more especially, as was the case when Rosebank was feued, since the feuer resided upon the ground with a large family, while the heritor had no house or family within the parish. How the heritor could come against his own deed in such a case, is inconceivable; nor could a subsequent feuer challenge it upon the ground, that by the feu of his lands he acquired by implication a right to a portion of the church effeiring to the valuation of these lands, and therefore he was entitled to set aside the former grant of a seat to the first feuer who had got more than his proportion. For as the heritor, the common author, was proprietor of the whole portion allotted to his lands, he might parcel it out in such proportions as he inclined.

That there can be no feu, however small, granted, without at the same time virtually giving along with it a proportion of the area of the church, does not seem to be Mr. Erskine's meaning in the passage quoted from him by the pursuer: For that author is only considering what rule ought to be followed in dividing a church of which there was formerly no legal division; and the decision Lithgow against Wilkieson, by no means supports the idea that every feu implies a right to a portion of the area of the church effeiring to the lands feued.

As to the cases put, of an heritor retaining his seat after selling his lands, or selling his lands to one person, and his seat to another, these can rarely happen. And the very extraordinary inconvenience of a church being altogether in the hands of strangers, were it actually to happen, must be removed by some extraordinary remedy.

No. 1. But such niceties are altogether unnecessary to be discussed in the present question. The defender is not a stranger in the parish, but an heritor; nor is the present question between her and the heritors in general, or another feuer complaining that he has no seat, but between her and her predecessor's author, or, which is the same thing, his successor, who is endeavouring to recal the grant or right which he conferred more than 40 years ago.

2*d*, As to the possession, it is completely established by the proof led, and though no writing appears, yet it is evident that a right was granted by Mr. Sinclair of Roslin to Mr. Davidson. At any rate, the constant uninterrupted and exclusive possession of the defender and her authors, founds a *præsumptio juris et de jure*, that a formal right was granted.

The Court, 21st November 1776, pronounced the following interlocutor: "Upon report of Lord Covington, the Lords find, that the defender Miss "Alexander *qua* proprietrix by progress of those parts of the lands of "Roslin, granted in feu by William St. Clair of Roslin, to the deceased Yax-"ley Davidson, is entitled to a rateable proportion of that space or area of "the church of Lasswade, appropriated to or occupied by the possessors of "the barony of Roslin, corresponding to the lands so acquired, and that the "pursuer Colonel St. Clair, as now standing in the right of the said barony, is "entitled to the residue of the said space or area appropriated to the whole "barony: And find, that Miss Alexander and her authors' possession of that "double pew in the church of Lasswade, which occupies about two thirds of the "foresaid space or area appropriated to the barony of Roslin, gives her no fur-"ther right either of property or possession than to a rateable proportion of her "lands with the rest of the said barony; but in regard it does not ap-"pear that there has been any regular division of the church, and that from the "proof it appears that the said area or space in its former and present state, has "been possessed in common by the defender Miss Alexander, and her au-"thors and their servants, and by the others feuers, tenants, and servants "of the remaining part of the said barony, Find, that the same com-"mon possession must be continued till such time as either a legal division of "the whole church shall be obtained, or a subdivision between the pursuers "and defender of that space or area appropriated to the whole barony, conform "to their respective rights and interests therein, and remit to the Lord Ordi-"nary to proceed accordingly."

Lord Ordinary, *Covington*. For Col. St. Clair, *R. M'Queen, Jo. M'Kenzie. Claud Boswell.* For Miss Alexander, *J. M'Laurin, W. Craig.* *M'Kenzie*, Clerk.

J. W.