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upon the borough. And so the Lord Ordinary's last interlocutor imports, agreeably to the decision in the case of Kinghorn, and to the known rule in such cases.

“ THE LORDS find, That the Lowland church of Campbletown, being a parochial church, ought to be repaired and rebuilt at the expense of the heritors and borough; and, as the defenders are not heritors, find they are not entitled to any part of the area, except such share of that part falling to the borough as may effeer to them, in proportion with the other inhabitants.

Act. Ilay Campbell.

Alt. Cha. Hay.

Clerk, Tait.

Fac. Col. No 154. p. 19.

1776. December 17.

No 14.

EARL of MARCHMONT and Others *against* EARL of HOME and Others.

THE church of Eccles being rebuilt, the Sheriff, in a process of division of the area, found that a former division was an improper one, being against the consent of some of the principal heritors, and that the same was not binding; and found that each heritor's share must be set apart by itself, and that the heritors have choice of place, according to the valuation of their several estates, and appointed a sworn surveyor and measurer to proportion the said area accordingly. THE LORDS, in an advocation, sustained that judgment, with this variation, That each heritor, in proportion to his valued rent, must have a seat in the church for himself and family, distinct from the share of the area, to be allotted to his tenants; but that, in dividing the whole area of the church, the area of each heritor's seat must be taken *in computo* in making up his share corresponding to his valued rent.—See APPENDIX.

Fol. Dic. v. 3. p. 370.

1781. November 20.

The FEUERS and HEADS of FAMILIES in the TOWN of CRIEFF, *against* The HERITORS of the PARISH of CRIEFF.

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A church having become ruinous, the question occurred, at whose expense must it be rebuilt. Two thirds of the parishioners resided in a burgh, the remainder in

THE parish church of Crieff being insufficient for accommodating the whole parish, and having likewise become ruinous, the question occurred, by whom, and in what proportions, the expense of building a new one was to be defrayed.

The old church was capable of containing 500 persons; and no discovery could be made, by whom it had been either originally erected, or afterwards repaired. The Presbytery of Auchterarder, within whose bounds it is situated, reported, that the new church ought to be sufficient to contain 1200 hearers, and that the examinable persons in the parish amounted to 1980. Of these,

belonged to the landward part of the parish, the rest resided in the town of Grief; being either inhabitants of the old burgh of regality of that name, or of an adjacent village, built on grounds feued by the neighbouring heritors.

The question was brought before the Court on informations; and appearing to be attended with considerable difficulty, became the subject of a hearing in presence, when it was

Pleaded for the inhabitants and feuers; Landed property first presents itself as the subject of those public burdens which are of a permanent nature. Hence, when tithes, which are a proportion of the produce of lands, were first allotted to the maintenance of the Christian church, a fourth part was dedicated to the building and reparation of churches; Burn's Ecclesiastical History, vol. 1. p. 247. This fund, from the misapplication of tithes, soon became inadequate to the charge; and long before our separation from the Romish communion, parsons, or others having right to tithes, were liable only in a third of this expense, the remainder devolving on the parishioners, according to their substance; Lord Hailes's Mem. can. 6. And although the import of these expressions might at first seem to affect the inhabitants at large, practice, which is the best interpreter of laws, has, agreeably to the original nature of this imposition, confined it to heritable proprietors. It was accordingly levied, not by personal taxation, but by assessments upon land; Spottiswoode, *voce* Kirkmen. See APPENDIX.

By an act of Privy Council in 1563*, ratified in Parliament in 1572, the regulations which had been in force before the Reformation, were renewed; Sir George Mackenzie's Observations. Hence, when, by acts 1690, c. 23. and 1693, c. 25. the ministers of the church of Scotland became stipendiary, and were, of course, relieved of that part of this burden to which they were formerly subjected as titulars of the tithes, the practice did not transfer it to the people of the parish, but to the heritors alone; Bankton, b. 2. tit. 8. § 82. From that period, they have been uniformly exposed to this expense, by assessment; first, according to the real rents of their landed estates, and after the general valuation, according to the valued rent. Thus the payment of cess points out, with precision, not only the persons subject to this expense, but also the proportions by which it is levied.

Such being the general rule in this matter, it is next to be considered, what are the exceptions, and whether there is room for any in the present instance? One exception, and the only one which has occurred, takes place where a parish is partly landward, and partly made up of a royal burgh. As the statutes have made no provision for this case, so it would appear, that, at first, royal burghs, in their corporate capacities, were subjected, like other heritors, according to the public burdens or cess which they paid; and that the alteration in this respect has been owing not to the law, nor to the intervention of courts of

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the landward part of the parish. The Court found that the expense of building as much of the church as should be necessary for accommodating the landward parish, should be defrayed by the heritors according to their respective valued rents, and divided among them in the same proportion; and that the expense of the remaining part should be defrayed by the feuers and proprietors of houses, in proportion to their real rents, and divided amongst them in the same proportion.

* To be found in Lord Kames's Abridgement of Scottish Statutes.

No 15. law, but to the conduct of the office-bearers in those communities. The magistrates, and heads of corporations, have thought proper to erect seats for themselves separately from the rest of the congregation. In doing so, they have appropriated that part of the church to which custom has affixed a degree of eminence and dignity. On these accounts, they have been in use to subject themselves to a larger proportion of the expense than would fall upon them by the valued rent. Hence, in the case of the Town of Kinghorn, No 11. p. 7918., the Court, 'in respect of the practice,' found that town liable in the half of the expense of building the church, although its valued rent was very inconsiderable. At all events, the reasons for excepting royal burghs from the ordinary rule do not exist in the parish of Crieff. A royal burgh, as an aggregate body, may acquire a right, and it is subject to legal compulsatories in the persons of its magistrates; whereas a multitude of feuers, or the inhabitants of a village, collectively considered, are incapable of either. The first may be viewed as a permanent establishment, whereas the same casualties which draw the last together at one period, may disperse them at another.

Farther; A decision agreeable to the plea of the heritors, would be attended with great inconveniency, or great injustice. The present inhabitants of the village of Crieff, from the vicissitudes incident to people of their rank, must soon give place to others. If they acquire a property in the church corresponding to their contribution in building, the new-comers must be excluded altogether. If, again, the right of the original contributors ceases with their residence, the new-comers will enjoy seats in the church at the expense of the former inhabitants. It is obvious, too, that the same reasons which are urged for a departure from the general rule in this case, will occur even in a parish entirely landward, it being next to impossible that the progress of population on every estate in the parish should be exactly uniform.

Neither will the landholders in the end be losers from the necessity of enlarging the church. The same causes which gave rise to it, by exciting industry, and improvements in agriculture, must augment the value and profits of their estates; and as they acquire a property in the area of the church proportioned to their several disbursements in building it, by letting out what they have no occasion for to those who have not enough, they will soon be enabled to indemnify themselves.

Answered for the heritors; It is quite unnecessary to go back to the history of the Christian church, in the consideration of a question which is precisely defined by the law of this country. In conformity to the general maxim, '*Quod cujus est emolumentum, apud eum onus esse debet,*' the burden now under consideration has been imposed on the parishioners, according to their substance. In parishes entirely landward, indeed, this Court has taxed landholders with the whole, according to their valued rents. There the precarious situation of the other parishioners rendered a deviation from the general rule in some degree necessary. Besides, in such a case, every heritor paying for his tenants, on this

account draws a higher rent for his land ; and the recourse to the valued rent, which is a fixed, and, in general, a pretty equal standard, by saving the trouble of a proof, is beneficial to all parties. But these reasons are nowise applicable to the case of a royal burgh, a considerable market town, or populous village, where an obligation to accommodate the parishioners with churches would render land itself a burden on the holders. Accordingly, the custom there is, either to assess the landward part of the parish for the expense of a church necessary for their own occasions, and to impose the remainder upon the town, or that the last should build an ayle, or church of relief, for themselves. All these several modes have been adopted in the royal burgh of Selkirk, in the village of Saltcoats, and burgh of Paisley. Hence, too, the decision in the case of the Town of Kinghorn, in which the judgment indeed bears, that the Court went upon the practice as to building, and upon consent as to repairing ; but that practice affords conclusive evidence of the general idea, that burghs do not contribute to this expense according to the valued rent ; and the consent would not have been given, had there existed a probability of a more favourable judgment.

The scheme suggested, of the heritors letting the seats, is liable to many objections. There is no court of law who could give effect to it, by obliging the heritors to let, or the parishioners to hire, seats in the parish church. The benefit of a national church would thus become the subject of an unseemly traffic, and the bulk of the people, instead of enjoying, at a moderate expense, the right of attending the public worship of God, must pay, for a precarious liberty of doing so, whatever the heritors chose to exact.

The difficulties and injustice said to arise from subjecting the feuers and inhabitants of the town of Crieff to any part of this burden, are purely ideal. The real rents of their respective properties, whether feu-holdings or tenements of houses, can be readily ascertained. According to these, the proprietors will be liable in the expense of building, and in the same proportion they and their successors will acquire a share in the area of the church after it is built.

THE LORDS found, " That in the circumstances of this case, the valued rent could not be the rule of affixing or apportioning the expense of building the whole church ; but that the expense of building as much of the said church as should be necessary for accommodating the landward parish, should be defrayed by the heritors according to their respective valued rents, and divided among them in the same proportion ; and that the expense of the remaining part should be defrayed by the feuers and proprietors of houses, in proportion to their real rents, and divided amongst them in the same proportion."

Reporter, *Lord Covington.* For the Feuers and Inhabitants, *Henry Erskine, Robertson.*
For the Heritors; *Ilay Campbell, Ro. Dundas.* Clerk, *Orme.*

Fol. Dic. v. 3. p. 370. Fac. Col. No 4. p. 6.