No. 2.

'arising from the said debt due by the said James Dunlop, and the dividend already paid from the Company's effects, in extinction of the debts due by the said John Carlyle and Company to their creditors, along with the other funds arising from the estate of the said John Carlyle and Company, remaining in the hands of the pursuers, and yet undivided, that the said pursuers, as trustees for the creditors of the said John Carlyle and Company, are entitled to be again ranked on the estate and effects of the said James Dunlop, for the balance which will then be remaining due to the creditors of the said John Carlyle and Company; the trustees of the said James Dunlop junior being entitled to an assignation from the said John Carlyle and Company's creditors, so far as they shall draw upon the said second ranking, for the purpose of operating a relief to the estate of the said James Dunlop, from the other partners of the said John Carlyle and Company, in so far as the said creditors, by the said second ranking, shall draw from the effects of the said James Dunlop more than his proportional share, as an individual of the Company; and remit to the Lord Ordinary to proceed accordingly.'

Both parties having reclaimed against this interlocutor, and both petitions having been answered, the Court (8th August 1776,) 'adhered.'

Lord Ordinary, *Kennet.* Act. *M'Queen, Ilay Campbell.* Alt. *Wight, D. F. Dundas, Blair, Craig.*

J. W.

*** Both parties having appealed, The HOUSE of LORDS (9th May 1777,) ORDERED and ADJUDGED, that the original and cross appeals be, and the same are hereby dismissed, and that the several interlocutors therein complained of be affirmed, with the following addition, viz. that no dividend fairly made, before notice of the respondent's claim, ought to be disturbed, but the respondents are to be paid up equal to the other creditors, before the other creditors receive any more.

1801. *May* 13.

WILLIAM DUNN and Others, *against* The Reverend WILLIAM BRUNTON.

No. 3.

A schism having taken place in a congregation of Burgher Seceders, a majority of the congregation, including the managers, in whom the meeting-house and minister's dwelling-house stood

IN 1757, a subscription was opened by the Burgher Seceders in Aberdeen for purchasing ground, and building a meeting-house. The subscription papers bore, 'That this house, when built, is to be employed as a church or meeting-house by a minister of the Old Associate Synod, who strictly maintains the principles of the Church of Scotland, both in doctrine, worship, discipline, and government, as contained in the Scriptures of the Old and New Testament, and in agreeableness thereto, summed up in the Westminister Confession of Faith, Larger and Shorter Catechisms; and this minister to be regularly called, after trial had, by the voice of the people, who are statedly to attend his Ministry, and settled among us agreeable to the ancient practice of the Church of Scotland, and still practised by the said Synod. Contributors having a title to the ground and house, according to the quantity of their

'contributions, shall have power to elect managers and trustees from the con-
'gregation.'

A meeting-house was in consequence procured, and used for fourteen years, when, having been found inconvenient, it was sold, and it was resolved to build a more commodious one.

The minutes of the managers, in 1771, bear, That one of their number, 'Mr William Knowles appeared, and made offer of the Guild-Brethren's Hos-
'pital, and pertinents thereof, then belonging to him, to the managers of the 'Associate congregation, and that for the end and purpose of building a meet-
'ing-house for public worship, according to the received standard of the Church 'of Scotland worship, discipline, and government contained in our said stand-
'ard, and as now professed by the Associate Synod, to whom we profess sub-
'jection in the Lord; and this to be for the use of the Associate congregation 'at Aberdeen maintaining the same principles.'

His offer was accepted of by the managers and congregation. Mr. Knowles took infeftment on a charter from the Magistrates of Aberdeen.

A meeting-house, session-house, and dwelling-house for the minister, were built on the grounds. The expense was defrayed by voluntary subscription, and money borrowed, which was afterwards discharged from the produce of the seat-rents, &c.

In 1772, the congregation named trustees and managers of the subjects and funds, who granted an obligation, bearing, 'That the said subjects and funds 'are declared to be in trust from, and for behoof of said congregation allen-
'arly, continuing to adhere to and profess the principles of the Church of Scot-
'land as presently espoused and professed by the seceders commonly called 'Burghers; or that part of said congregation continuing in profession of, and 'adhering to said principles, and in subjection to the judicatories of the said 'Burghers Seceders, they also adhering to and maintaining the said principles.'

Upon the death of the former incumbent, a call was, in 1794, given to the Reverend William Brunton, in the following terms: 'Call, Associate Congre-
'gation, to Mr. Brunton: We, under subscribers, members of the Associate 'Congregation of Aberdeen, who have seen it our duty to separate from the 'Established Church of Scotland, being destitute of a fixed pastor, and sensible 'of our need of one to break the bread of life amongst us, and being assured 'by good information, and our own experience, of the ministerial abilities, 'piety, literature, and prudence, of you Mr. Brunton, preacher of the gospel, 'presently under the inspection of the presbytery of Glasgow, We do hereby 'call and entreat you to undertake the office of a pastor among us, and the 'oversight of our souls; and we promise you all necessary subsistence, encou-
'ragement, and obedience in the Lord.'

A petition was presented to the Associate Presbytery, in name of the congregation, craving them to appoint a 'member of presbytery to moderate a call for 'one to be their minister.' Upon this occasion, a commissioner from the congregation appeared in support of the petition, who gave in a paper, in which

No. 3. feudally vested, were found entitled to exclude the minister from possession of both, although the measures of the clergyman, and minority of the congregation, which led to these proceedings, were sanctioned by the Associate Synod, in subjection to whom the congregation had been formed.

No. 3. the 'congregation agrees, that their minister's stipend should be L.80 Sterling 'yearly, to be paid by equal portions, at the two terms, and the house and per-'tinents belonging thereto, formerly possessed by our late pastor, and to free 'him of every expense at the sacrament.'

The petition was granted, and Mr. Brunton was settled minister of the congregation.

At his ordination, he subscribed a formula prescribed to every clergyman of the sect, by which 'he acknowledged the perpetual obligation of the National 'Covenant of Scotland, and of the Solemn League and Covenant,' and declared his unqualified approbation of the Westminster Confession of Faith, in all its branches.

Not long after this, a schism took place among the Burgher Seceders. Hitherto they had adopted the Established Church government, in having synods, presbyteries, and congregations, and had followed implicitly the Westminster Confession of Faith.

But doubts came now to be entertained of the obligation of the covenants upon posterity, and of the propriety of the 23d article of the Confession, sect. 3., by which it is declared, that the civil Magistrate 'hath authority, and it is 'his duty to take order that unity and peace be preserved in the church; that 'the truth of God be kept pure and entire; that all blasphemy and heresies 'be suppressed; all corruptions and abuses in worship and discipline prevent-'ed or reformed, and all the ordinances of God duly settled, administered, and 'observed; for the better effecting whereof, he hath power to call synods, to 'be present at them, and to provide, that whatsoever is transacted in them be 'according to the mind of God.'

The objectors to the formula and Confession in these particulars, came to be designed friends of the 'New Light,' while those who wished matters to remain as they were, were said to prefer the 'Old Light.'

Overtures were made by the former to their church-courts for a relaxation of the formula with regard to the disputed articles.

The Synod resolved, that the formula should remain; but they prefixed the following preamble to it: 'Whereas some parts of the standard books of the 'synod have been interpreted as favouring compulsitory measures in religion, 'the Synod hereby declare, That they do not require an approbation of any 'such principle, from any candidate for licence or ordination; and whereas a 'controversy has arisen among us respecting the nature and kind of the obli-'gation of our Solemn Covenants on posterity, whether it be entirely of the same kind upon us as upon our ancestors who swore them, the Synod hereby 'declare, That, while they hold the obligation of our Covenants upon posterity, 'they do not interfere with that controversy which has arisen respecting the 'nature and kind of it, and recommend it to all their members to suppress that 'controversy, as tending to generate strife rather than godly edifying.'

Mr. Brunton was a friend to the New Light, but the managers, the elders, and a majority of the congregation, remained of the Old Light.

No. 3.

In consequence of this difference of opinion, the elders refused to assist at the sacrament, and the seat-rents were withheld. Both parties applied to the Synod, who supported Mr. Brunton, and censured and suspended some of his opponents.

The managers and their friends at last resolved to exclude Mr. Brunton from the meeting-house, by locking the doors against him. But he prevented this resolution from being carried into execution, by getting new locks put upon the meeting-house.

Upon this the managers took infeftment upon the deed, nominating them, and, in concurrence with Mr. Knowles, the original feuer of the ground from the Magistrates, presented a petition to the Sheriff, stating, that they were entitled to the exclusive possession of the meeting and session house, as being their property. They likewise brought a process for removing Mr. Brunton from the dwelling-house.

In these actions, the Sheriff ultimately found, 'That, in respect it is not 'denied by either of the parties, that the pursuers were elected and accepted 'as managers of the seceder congregation, on the terms on which the former 'managers of that society accepted and acted; they hold the subjects contained 'in their infeftments in trust only, and conformably to the obligation in pro- 'cess, of date the 17th February 1774, from and for behoof of the Associate 'Congregation in Aberdeen, commonly called Burghers, allenarly, continuing 'to adhere to and profess the principles of the Church of Scotland, as were at 'that period espoused and professed by the seceders commonly called Burghers, 'or that part of said congregation continuing possession of, and adhering to, 'said principles, and in subjection to the judicatories of the said Burgher 'Seceders, they also adhering to and maintaining the said principles;—but, in 'respect it is disputed whether the said judicatories adhere to and maintain 'the principles aforesaid, and professed by them at the date of the foresaid 'obligation, and that this point has not been brought under consideration of 'this Court, and is not a proper subject of cognizance by it; found, That as in 'this case the defender has not denied, that the pursuers and those who con- 'cur with them are a majority of the congregation, and has not asserted that 'they are opposed by a majority of the contributors to, or of the heirs of the 'contributors to, the expense of erecting the houses in question, and has not 'brought sufficient evidence to show, that the call in his favour imported a 'right to him to the possession of said houses for life, or until removed by 'the judicatories of the Burgher Seceders; the pursuers have a title to pursue 'and insist in the conjoined processes now depending;—therefore sustained 'said title, and decerned against the defender in terms of the original petition 'presented for the pursuers, and also of the libel of removing at their in- 'stance.'

The defender having complained by advocation, the Lord Ordinary on the Bills reported the case on informations.

No. 3. The pursuers

Pleaded: The English toleration act, (1st William and Mary, Chap. 18.) exempts dissenters from penalties under certain conditions, but it gives them no endowments nor privileges.

And the Scotch act, 10th Anne, C. 7. § 5. with a reference to Episcopal meetings, declares, 'That it shall be free and lawful for all the subjects of 'that part of Great Britain called Scotland, to assemble and meet together for 'Divine Service, without any disturbance, and to settle their congregations in 'what towns or places they shall think fit to choose, except parish churches; 'and for the *Episcopal* ministers, not only to pray and preach in the Episcopal 'congregations, but to administer the sacraments and marry, without incurring 'any pain or penalty whatsoever.'

The spirit of this enactment has indeed been extended to the Secession, though it had no existence at the date of the enactment. But it is necessary to distinguish *toleration* from *establishment*.

The National Church is upon a known footing. The churches are the property of the public; and the burden of erecting and keeping them in repair, as well as the maintenance of the established Clergy, and the providing manses for them, are imposed upon certain classes of the community, according to fixed rules: Whoever be the patron, a clergyman once appointed holds his office by the public law of the land, and can only be deprived of it by regular judicial proceedings.

The dissenters are in a very different situation: Their churches are not public, but the property of the individuals who contributed for their erection. The support of them is optional: The affording their clergy a dwelling house and stipend are in the same situation: They do not hold their offices by any fixed rules: They depend upon their bargain with their congregation, and in general their situation is precarious and dependant.

Even the national Church courts cannot directly interfere in any question of property, though indirectly their sentences may affect it, in those cases where an ecclesiastical situation and character are necessary to the enjoyment of it.

But dissenting church courts are in no respect recognised by the law, and can in no respect affect property. Their clergy derive their rights, not from their act of ordination, but wholly from the contract of parties, to be judged of altogether independently of the church courts.

The right to the property in the present case, therefore, must be judged by the common rules. The pursuers, with whom the great body of the congregation concur, are duly infeft in the subjects, for which a feu-duty is payable by them. Their infeftment is not under reduction, and they must be entitled to possession under it. Indeed, the keys were formerly in the possession of the managers; and all that the Sheriff has done is reponing them against the illegal act of the defender, in altering the locks. The seceding church courts

have no power to decide this question of possession, and no sentence of theirs can affect its decision. No. 3.

The defender has no real right in the subjects in question; and if he has any right at all, it must be of a personal nature, arising from the civil contract which took place at his appointment.

No sufficient evidence of this personal claim has been produced. And if there had, the supposed contract must be mutually fulfilled. It was an inherent condition in it, that he should adhere to the standards adopted by the congregation at the date of the call to him, and subscribed by himself at his settlement. From these, however, he has departed, and neither the church courts, nor the defender, and the minority adhering to him, can force the majority to adopt the innovation.

Answered: Considering this as a mere question of civil right, the pursuers are not absolute proprietors of the subjects, but they are trustees for the congregation, of which the defender became a member by his settlement; or at least he came then to have an interest in the property, of which he cannot be deprived, except upon legal grounds, judicially established.

There is no occasion to inquire, whether the congregation might not, upon a vacancy, convert the subjects to other uses, but, like any other society, who have the free disposal of their property, but who, after granting a lease, or appointing a manager, cannot disappoint the right derived from themselves by a third party, the congregation cannot defeat the *jus quæsitum* of the defender.

Further, the right of the defender is much strengthened by its resulting from a religious engagement undertaken with reference to the rules and constitution of a church, tolerated and protected by the law.

The Burgher Seceding Church differs from the National Church only in the article of patronage. It is formed after the same plan, adopts the same standards; the ministers are subject to the same trials,—they are ordained in the same manner,—they hold their office during life, or good behaviour, and they have the same rights with the ministers of the Established Church. Their stipend, indeed, is not so well secured, but their right to their house is equally so. In maintaining possession of his house, the defender is precisely in the situation with a minister of the Established Church defending possession of his manse and glebe.

By the toleration-acts, as explained by the practice of the civil courts, dissenters are not merely connived at; they are supported and protected, and, in all questions among members of any particular sect, courts of law are bound to maintain the constitution of the sect as much as that of the National Church.

The sentences of the dissenting church courts are supported in England; 1. Blackstone's Reports, p. 386. Where the writ of *mandamus* is equally com-

No. 3. petent for protecting a dissenting pastor in the possession of his rights, as a minister of the National Church; Espinasse Law of Trials at N. P., vol. 2. p. 661. *et seq.*; Sir James Burrow's Rep., vol. 3. p. 1265., 1790; Josham, Appendix to Mr. Fourneaux Letters to Judge Blackstone. The Scotch case, 7th March 1791, Auchincloss, (not reported,) was decided upon the same principle.

There has here been no departure from the original standards on the part of the Synod, adhering to whom is the only crime of the defender. The Synod have surely a right of interpreting the standards; and this, in the present instance, they have only exerted to the effect of relieving the consciences of those who doubt the present obligation of the Covenants, and think part of the Confession of Faith, without some explanation, inconsistent with the principles of toleration suitable for the Secession to maintain.

The Court were much divided in opinion.

On the one hand, it was observed, That mortifications in favour of dissenting meeting-houses are legal. The donors cannot recal their gift; and when any dispute arises, the Court must judge of the terms of the mortification in each particular case. In the establishment of the Burgher Seceders at Aberdeen, the jurisdiction of the Associate Synod is completely recognised; and no deviation from the standards has been proved, sufficient to relieve the congregation from their subjection to it.

On the other hand, it was said, There is no positive statute tolerating the Secession; the act of Queen Anne relates only to Episcopals. But the spirit of the law gives the secession toleration and protection. This, however, is very different from acknowledging the church judicatories, which has in no case been done by the courts of this country.

The situation of a seceding minister as to his temporal rights, is very different from that of a minister of the Established Church. The former cannot be allowed to represent his office as flowing in any shape, or deriving permanency from the proceedings of what may be called a Synod, or other ecclesiastical court of his sect. His rights depend wholly upon his agreements with the members of the congregation who elected him; and when a dispute arises with regard to the property of the congregation, it must be decided without reference to the sentences or doctrines of the church courts, and according to the ordinary rules of municipal law.

In the case of Auchincloss against Black, Lord Justice-Clerk Macqueen refused to review the proceedings of the Associate Synod, so far as they regarded an ecclesiastical offence; but in an advocation from the Sheriff between the same parties, he sustained the competency of certain proceedings, respecting the possession of the meeting-house, glebe and manse, and admitted the relevancy of an investigation as to which of the parties were supported by a majority of the congregation. Similar investigations took place in the cases of Allan

against Macrae, 8th March 1793; and 26th May 1797, Smith against Kyd. These cases have been omitted in the Faculty Reports, but in both of them the property was found to be in the contributors, and the right of management in a majority. In like manner, here, the only point for discussion is, in whom the property is vested; and it is admitted that the majority of the congregation is in favour of the pursuers. No. 3.

The Court can enter into no investigation as to the religious grounds of the schism here, and, if they did, they must presume the majority in the right.

The bill of advocation was refused. (See No. 27. p. 14583.)

Lord Ordinary, *Bannatyne.* Act. *Solicitor-General Blair, Ar. Campbell.*
Alt. *H. Erskine, Wm. Robertson, J. G. Bell, Maconochie*

D. D. *Fac. Coll. No. 14. p. 29.*

1808. *July 5.*

JAMES and DAVID PATERSON, *against* DAVID CALDER and his CURATOR *ad litem.*

No. 4.
The heir of *A.* a partner of a Company, and an *obligee* in a bond of cash-credit for sums to be drawn by *B.* another partner of that Company, in name of the Company, is bound for sums drawn by *B.* in that name, after the Company has been dissolved by the death of *A.* no notice of that event having been given to the bank granting the credit.

In the year 1801, a bond was granted to Carrick and Company, bankers in Glasgow, by Archibald Paterson, Archibald Calder, and John Aitchison, who formed a Company, under the firm of Archibald Paterson and Company, and by James Paterson and David Paterson, who were not copartners of that Company, "For £400 Sterling, or such sum or sums as I the said Archibald "Paterson shall draw out by drafts or orders on, or receipts to, the cashier of "the said Banking Company, (signed) *Archibald Paterson and Company.*" The two latter obligants of course were only cautioners, though nothing was said on that subject in the bond. In January 1802, Archibald Calder died. No notice of his death was given to Carrick and Company, though it was said to have been notified in the newspapers.

At the time of Archibald Calder's death, the debt to Carrick and Company, on the cash-credit, amounted to £390; but it was said, that the remaining partners paid up the whole of this sum upon the 25th June 1803. Notwithstanding all this, Archibald Paterson continued to draw money from Carrick and Company by drafts or receipts in the name of *Archibald Paterson and Company* down to the 5th November 1803.

At that period, the balance due to Carrick and Company, amounted to £432. 9*s.* 7*d.* Of this sum, Carrick and Company demanded payment from James and David Paterson, cautioners in the bond of cash-credit, Archibald Paterson being then unable to pay it. James and David Paterson paid it on