1776. *December* 17.

THE EARL of MARCHMONT and Others, *against* The EARL of HOME and Others.

No. 2.
Division of a kirk. Area, after being seated, how to be divided.

See No. 14. p. 7924.

THE parish church of Eccles having become ruinous, it was found necessary to build a new one.

Several estimates were given in, but the heritors differing among themselves, it was sometime before any one was adopted. At last, however, the church was finished; but the disagreement of the heritors having prevented an amicable division of the area when seated, a summons of division of the kirk was raised before the Sheriff of Berwickshire, by Lord Marchmont and some other heritors.

Some procedure took place before the Sheriff, this judicial division being opposed by the Earl of Home and other heritors, who were averse to the measures of Lord Marchmont and his friends. At last, the following interlocutor was pronounced: "The Sheriff having considered the libel, defences "for the Earl of Home and others, answers thereto by the Earl of Marchmont "and others, with the minutes of the heritors present, for dividing the seats "of the said church in April and May last, repels the objection to the competency of the court: Finds it fully instructed by the minutes of procedure, "that the division of the church then alleged to have been made was an improper mode of division, against the consent of some of the most considerable "heritors of the parish, and not finished; that the same is not good nor binding upon those who entered their dissent, or were absent from the meetings; "Finds, that each heritor's share must be allocated and set apart by itself, and "that the heritors have choice of place one after another, according to the "valuation of their several estates in the parish: Appoints a division of the "said church amongst the heritors accordingly; and that the same may be "properly done or ascertained, nominates and appoints Alexander Low, land-"surveyor and measurer, to measure the area of the said church, and propor-"tion the same among the several heritors according to their respective valua-"tions, setting apart each heritor's share by itself, to be verified by him upon "oath, and decerns accordingly."

This judgment was brought before Lord Gardenstone by a bill of advocation, who, after hearing parties, remitted the cause simpliciter.

In a petition to the Court, it was pleaded for the Earl of Home and the other heritors joining with him, in substance, that the heritors, according to their valuation, might be entitled to have their choice of the principal seats, for the accommodation of themselves and families; but when they have made that choice, that the other heritors should be entitled to their choice in their proper course, and that what seats were necessary for their tenants should not be included in their choice, till after each heritor, down to the lowest, had

No. 2.

chosen, when afterwards, in the same order, they might chuse for their tenants. In this way alone could the area be divided, so as not to allow the principal heritors, by chusing for themselves and their tenants at once, to exclude from any possibility of accommodation in the church those heritors who had inferior valuations. And it was added, that any measure or rule of division, by which the parish-church of Eccles would be turned almost entirely into private property, and by which a great number of the inhabitants would not have it in their power to have access to the church, was not only in itself a measure contrary to reason and justice, but opposite to the consideration in which a parish church should be held, which ought rather to be considered as *publici juris*, than private property, and as something of the nature of a *res sacra*. Churches are not now founded by private endowments, nor built and repaired by a stent on the whole parishioners, as had been the case in former times. But still it is as absurd for heritors, in consequence of their being at the expense of building a church, to claim a right of absolute property in it, as it would be for the titular of the teinds, or patron, or heritors having right to their teinds, to insist, that because the burden of the stipend fell upon them, they should have the whole labour of the minister to themselves.

It was answered for the Earl of Marchmont and the heritors agreeing with him, that a place of worship, in so far as respects the use of it, may not improperly be termed *res sacra;* and that so far as concerns the appropriation of it for the use of a whole parish, it may properly enough have the denomination of *juris publici.* However, in every other respect, as being the subject of division and separate possession, the divided parts can be considered only as private property following the land to which they are allocated upon the division. Unless it be pretended that the kirk is to remain a common, and that the person who comes first is to be first served, provided he live within the parish,—this must be the inevitable consequence. Justice and good sense naturally dictate the rule of division adopted. Those who receive the largest share of the area are those who have spent the largest share of their fortune in the creation of that area.

It is therefore evident, that the heritors possessed of the highest valuation have right to the greatest share in the division of a church. And from this it follows, that they are entitled in their order to a first and single choice. The notion of different choices in different places of the church, is absurd and imaginary. By the first and single choice, every heritor sees at once the extent of area which falls to his allotment, and according to that allotment he is enabled to make a proportional division among the occupiers and inhabitants of his own estate. The matter would be otherwise perfectly inextricable, and besides, this rule of division has been the immemorial practice.

The Court pronounced the following interlocutor: "The Lords having advised this petition, with the answers, they adhere to the Lord Ordinary's interlocutor, with this variation, that each heritor, in proportion to his valued

No. 2.

" rent, may have a seat in the church for himself and family, distinct from the " share of the area to be allotted to their 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 of the whole area corresponding to his va- " lued rent; and, with this variation, they refuse the desire of the petition."

Both parties differing about the precise meaning of this interlocutor, petitions were given in on both sides, and some farther procedure took place. The Earl of Home craved that the interlocutor might be so explained, as to give all the heritors a preference to the principal and most commodious seats in the first instance, leaving the tenants and other inhabitants upon the estates of the principal heritors to be provided for by a second choice. The Earl of Marchmont craved that it might be found, in express terms, that the heritors were entitled to make choice in their turn according to their valuations, not only of family seats, but of their whole allotments, whether lying together or distinct, as should be most convenient.

The Court adhered to their interlocutor; but they so explained it from the Bench, that every heritor should be first provided in a family seat, according to his valuation, and afterward by a second choice, and according to the same rule, should make his election of as much more as made up his share, conform to his valuation.

Lord Ordinary, *Gardenstone*. For the Earl of Marchmont, *Dean of Faculty Dundas, Pat. Murray*. For the Earl of Home, *Crosbie*.

J. W.

1805. *February* 16. BELL *against* The EARL of WEMYSS.

No. 3.

The proprietor of a coal-mine is not liable for any part of the expense of building a new parish-church.

The church of Inveresk having become ruinous, it became necessary to build a new one, of sufficient dimensions for the accommodation of the parish. Application was accordingly made to the presbytery, who approved of the plan proposed by the heritors, and decerned for payment of the estimated expense. It was agreed, that the real value should be the rule for proportioning the expense.

Part of it having been laid upon the Earl of Wemyss, as proprietor of extensive coal-mines within the parish, this mode of assessment was objected to, by presenting a bill of suspension, which was passed.

The Lord Ordinary reported the cause.

The collector of the assessment

Pleaded: Since the establishment of the reformed religion, and the passing of the acts 1690, C. 23. 1693. C. 25. by which the clergy were rendered stipendiary, the original rule as to the expense of building parish-churches,