

shall be taken as remaining due upon the bond bearing date the 5th day of March 1703, and be computed with interest from such time as the money secured by the said bond became payable until the payment thereof, and stand as a charge upon the heritable estate: And it is further ordered and adjudged, that the said decree, order, or interlocutory sentence of the 4th July last, whereby the Lords of Council and Session did find, “ that the said bond of 7000l. granted to the appellant Ann by her late husband, and the estate for life, in the house granted also to her by her said late husband, could not subsist as distinct separate rights, and that she could not claim the household goods, by virtue of her contract of marriage, without deducting the value thereof from the said bond, and therefore sustained the reason of the reduction of the decree mentioned in the said appeal,” as to those two articles be reversed.

For Appellants, T. Powys. P. King.
For Respondent, Rob. Raymond. J. Pratt.

The judgment of the Court of Session on the point of the maxim *debitor non presumitur donare*, though here reversed, is stated as an existing case in the Dictionary of Decisions, vol. II. voce *presumption*, p. 145. and in Erskine, B. 3. Tit. 3. §93.

William Lord Viscount Kilsyth, Sir Hugh Paterson of Bannockburn, John Murray of Touchadam, Archibald Seton of Touch, and John Erskine of Balgounie, Heritors of the Parish of St. Ninians in the Shire of Stirling, for themselves and in name and behalf of the other Heritors of the said Parish, - - - - *Appellants* ;
The Moderator and Presbytery of Stirling, *Respondents*.

Case 19.

13th June 1713.

Teind Court.—Reasons sufficient to reduce a decret of erection of a new parish. —The reasons of reduction ought to have been advised before ordering a new proof and perambulation.

IN 1696, an application was made to the Presbytery of Stirling by certain heritors of the parish of St. Ninians, setting forth that the said parish being near ten miles in length from west to east, and six in breadth from north to south, and very populous, it was impossible for one person to serve the cure; and several of the parishioners being at considerable distance from, and having bad roads to the church, could very seldom attend divine service; and there being free teinds therein sufficient for the maintenance of two ministers, the application therefore stated, that it was necessary that the said parish should be divided, and a new church erected

erected in the east part thereof. The Presbytery, having made a perambulation in consequence of this application, agreed that there should be a new parish church erected and built at Sauchinford, and that certain lands by them mentioned should be disjoined from the parish of St. Ninians, and annexed to the new parish of Sauchinford.

Accordingly, in 1697, the moderator of the said presbytery brought an action before the then commissioners for plantation of churches and valuation of teinds, against the heritors or proprietors of the said parish of St. Ninians, for disjunction of certain lands from that parish, and erecting them into a new parish; and to have a new church erected at Sauchinford, and a stipend settled and allocated to such minister as should be ordained to the new parish. Appearance was made by the appellants and other heritors of the parish in this action, as defenders therein, and the lords commissioners appointed two of their own number, or any one of them, to perambulate the bounds, and to report what was proper to be done.

The commissioners so appointed, accordingly met at Sauchinford, and after some steps taken by them, gave it as their opinion, that a new erection was proper and necessary in the east end of the said parish of St. Ninians, and that Sauchinford was the most convenient place for building the new church; and in these terms they made their report to the said commissioners for plantation of churches, &c. These commissioners, by their interlocutor, on the 26th of January 1697-8, "Separated and disjoined
" the lands" therein particularly mentioned "from the church
" and parish of St. Ninians, and united and erected them into a
" new parish by themselves, and decerned and ordained a new
" church to be built for the ease of all the inhabitants of the said
" lands at Sauchinford, to be thereafter called the parish church
" of Sauchinford, and ordained letters of horning to be directed
" to the heritors and parishioners to meet and stent themselves for
" buying ground for the church and church-yard, and for build-
" ing the said church and church-yard walls and manse." The defenders in the said action presented a petition reclaiming against said interlocutor, insisting that a new erection was unnecessary, and even if it were necessary, that Sauchinford was not a proper place for the new erection: but the lords commissioners, on the 2d of February thereafter, adhered to their former interlocutor. And in these terms decree was extracted.

Nothing, however, was done in consequence of this decree till June 1709, when the respondents brought an action before the lords of council and session as commissioners for plantation of churches and valuation of teinds, against the heritors of the parish to modify, allocate, and appoint a stipend for a minister to the said new kirk and parish, called the parish of Sauchinford.

And the appellants, on the other hand, brought their action to reduce and set aside the said decree, on the grounds, that the methods prescribed by the lords commissioners themselves in perambulating and surveying the said parish, and adjusting a place for building the said church, were by no means observed; that

the church was to have been built in the most inconvenient part of the parish; and likewise, that several of the heritors were not called in the said action, particularly the Duke of Montrose, then a minor, his tutors or guardians, nor the trustees of Cowan's Hospital, who were considerable proprietors in the parish.

The lords commissioners pronounced an interlocutor on the 11th of February 1712-13 in the following terms: "Before answer to the reasons of reduction, ordain the hails parishes of St. Ninians and Sauchinford to be perambulated, and for that effect grant commission to the sheriff of Linlithgow or his deputy to take and receive the oaths and depositions of such famous witnesses as shall be adduced for clearing the distances of places, or any other points which may happen to be controverted with relation to the new erected parish, or the conveniency or inconveniency of the new erected kirk; and in the mean time appoint the whole heritors of both parishes to depone upon their rentals before the said commissioners."

The appellants reclaimed, praying the lords commissioners to determine with regard to the reasons of reduction in the first place, before putting the heritors to the trouble or expence, which would be the consequence of the former interlocutor: but on the 18th of February 1712-13; the lords commissioners "adhered to their former interlocutor."

The appeal was brought from "a decree made by the lords commissioners for plantation of kirks and valuation of teinds in the year 1697-8; and of two interlocutors of the 11th and 18th of February 1712-13, made by the lords of council and session."

Entered
21 April,
1713.

Heads of the Appellants' Argument.

If a new erection were necessary, it ought to have been done with the consent of the heritors of the parish; but though the appellants and all the heritors, except Sir John Schaw of Greenoch, and Mr. Greenyards his factor, (who made the original application to the presbytery,) pleaded against this new erection, yet the lords commissioners paid no regard to such opposition, but over-ruled the plea of the appellants. This arbitrary mode of proceeding in similar cases occasioned the parliament of Scotland, when they vested the powers, formerly lodged with the commissioners for plantation of churches, in the lords of session, to make an express injunction, that they should not disjoin any parishes, erect or build new churches, or annex or dismember churches, but with consent of the heritors having three parts in four at least of the valuation of the parish to be disjoined. And though this act of parliament be posterior to the decree of 1697-8, yet the reason and just foundation of the law ought to have some weight to avoid this decree.

The methods prescribed by the lords commissioners themselves for perambulating the parish were not observed by those entrusted by them. For they only went into one corner of the parish, and refused to perambulate the whole parish, when desired by some of

the heritors; and, without taking the depositions of witnesses, either touching the necessity of a new erection, or the place where the new church should be erected, they put some questions to the persons accidentally present, and went to a certain place where they could not see the tenth part of the parish, and had only in view that very part and those very lands contained in the presbytery's report. Upon this very slight view, they reported that a new erection was necessary, and that Sauchinford was the most convenient place for building the church. This favoured so much of partiality, first to appoint a perambulation upon the desire of only two heritors, and then to perambulate only that part which those two desired, being near to their own houses, that the decree ought certainly to have been reduced for that reason. And if any new erection were necessary, Sauchinford is the most improper place in the whole parish; for it is within two miles of the old parish church, and none of the lands annexed to the new erected parish are above three miles distant from such old church, and have a very good road to it, and several neighbouring churches; whereas several parts of the south-west end of the parish are seven or eight miles distant from the old church, and have very bad roads to it, and the new intended church will be two miles farther distant from these places.

It is an unquestionable rule and maxim of the law of Scotland, that any action of this kind, if not brought against all the heritors or proprietors, is in itself void, even against those against whom it is brought. In the present case, neither the Duke of Montrose's tutors, nor the trustees of Cowan's Hospital, who are considerable proprietors, were called, and consequently the decree must be reduced. This is so certain a rule that it has never been disputed or controverted, and the Lords of Session were so sensible of this, that they declined to give judgment upon it, but in a manner delayed it by their interlocutor of the 11th of February last.

If the decree of 1697-8 were so illegal and informal, it is apprehended the Lords of Session were in the wrong to decline giving judgment upon them, and to ordain a new perambulation; for all that trouble and expence was to no purpose, till it were determined whether the decree was good or not, and consequently a new erection necessary.

Heads of the Respondent's Argument.

The original application in this matter to the presbytery in 1696, was by many of the heritors of the parish, with concurrence of the minister. The decree which was obtained being in the hands of Sir John Schaw (the chief heritor who obtained it), and he happening to die leaving his son a minor, the respondents could not for several years procure the same to be exhibited.

When a commission of perambulation is granted, especially by judges to any of their own number, concerning the situation or bounding of any place, the same is best executed by ocular inspection, which the commissioners here made from eminences to
which

which they were conducted by the appellants themselves, and from whence they viewed the circumjacent places within the said parish, as appears by their report. As to their not perambulating the whole parish, there was no reason for such perambulation, since the libel, whereon the commission was founded, related only to the east end of the parish of St. Ninians, for a division whereof the suit was expressly brought.

With regard to the objection, that all the heritors were not summoned in the original action, it sufficiently appeared by the decret therein, that as well the Duke of Montrose and his mother and her husband, as the then masters (the sole managers) of Cowan's Hospital were all duly summoned.

It was to obviate every colour of objection for want of a sufficient perambulation, that the Lords of Session, before determining the reasons of reduction, granted commission for a new perambulation, and to take the depositions of the heritors upon their rentals, extant in process. And when the appellants petitioned against such new perambulation, &c. and prayed that the reasons of reduction might be first determined, as their petition was only designed for delay, their lordships refused the same.

After hearing counsel, it is ordered and adjudged, that the decree and interlocutors in the said appeal complained of, be reversed.

Judgment,
13 June
1713.

For Appellants,	Rob. Raymond.	Tho. Lutwyche,
For Respondent,	P. King.	John Pratt.

George Innes, Provost, Kenneth Mackenzie,
Alexander Falconer, and James Charles,
Baillies of the Burgh of Elgin, and James
Russell, Beadle or Sexton, - -

Appellants;

The Ministers of the Church of Elgin, her
Majesty's Advocate, and John Dundas,
Procurator for the Church of Scotland, -

Respondents.

Case 10.
Kaimes's
Law Tracts,
p. 276.
Maclaurin's
Crim. Cases,
p. 582.

3d July 1713.

*An Appeal from Interlocutors of the Court of Session, and Decrees of the Court of
Justiciary founded thereon.*

Intrusion into Churches.—The Magistrates of Elgin, being pannelled and convicted under the acts 1695, c. 22., and 1711, c. 7. of an intrusion into the Parish Church, and a fine imposed upon them, the Judgment is reversed.

PART of the ancient cathedral church of Elgin was fitted up for divine service in the modern form, and used as the parish church of Elgin. Adjoining to this parish church, but separated from it by a wall with a mutual door of communication was a chapel called the *Little or East Kirk*, which was also fitted up with pews and desks for publick worship; and of this *Little Kirk*, the appellants, who are of the episcopal communion, contended that