

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.    |

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|--|---------------------|
| George Innes, Provost, Kenneth Mackenzie,<br>Alexander Falconer, and James Charles,<br>Baillies of the Burgh of Elgin, and James<br>Russell, Beadle or Sexton, - - - | <i>Appellants;</i>  |
| The Ministers of the Church of Elgin, her<br>Majesty's Advocate, and John Dundas,<br>Procurator for the Church of Scotland, -  | <i>Respondents.</i> |

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

they had the disposal for religious uses exclusive of the ministers of Elgin.

In 1704 Mr. Henderson, an episcopal minister, with consent and permission of the then magistrates of Elgin, made use of the Little Kirk for divine worship; but the ministers of the burgh made their complaint to the Privy Council, and their Lordships made an order commanding and ordaining the sheriff of the county of Elgin to put and keep the said ministers in peaceable possession of the said *Little Kirk*, and to hinder and debar all other persons from making use of the said *Little Kirk* in time coming as they should be answerable at their highest peril. Mr. Henderson was accordingly by virtue of this order removed, and the ministers put and kept in possession.

In 1712, however, the appellants took a further step in exercise of the contested right. Having granted leave to Mr. Blair, an episcopal clergyman, to perform divine service in the Little Kirk, for the benefit of the inhabitants of Elgin who were of that communion, the appellant Russell, to whom the keys had been entrusted by the ministers of Elgin, delivered them on the 29th of May that year to the magistrates, or opened the doors for them, who with Mr. Blair accordingly took possession of the Little Kirk.

The respondent the procurator for the church, with the concurrence of her Majesty's advocate, brought a criminal action against the appellants, and also against Mr. Blair, before the Lords of Justiciary, for an intrusion into the said *Little Kirk*, as being contrary to the act of parliament 1695, c. 22. and the Toleration Act 1711, c. 7. and demanded the restitution thereof to the ministers of Elgin, and that the appellants might be assessed in damages: but as to Mr. Blair the prosecution was soon after dropt.

1695, c. 22.  
1711, c. 7.

The appellants made defences, the magistrates insisting upon their right to dispose of the said chapel; and the Lords of Justiciary in consideration of what was alleged on either side, before they would give their final judgment, remitted this point to be determined by the Court of Session, viz. "Whether or not the place called the Little Kirk then possessed by the episcopal minister, be a parish church or part of the parish church of Elgin."

Parties accordingly were heard before the Court of Session, and on the 24th of July 1712, the Court "allowed a conjunct probation to both parties for proving if or not the said *Little Kirk* be habite or reputed to have been antiently the choir of the said church called St. Giles's, or part of the said Great Church; or how far the said Little Kirk, either in the time of presbytery or episcopacy, has been possessed by the ministers of Elgin, by preaching, baptizing, catechising, or marrying therein; and how far possessed by the magistrates and town council for other uses, exclusive of the said ministers."

Witnesses were examined, and the Court of Session on the 16th of December 1712 "Found it proved, that the place now called

"the

“ the Little Kirk has been habite and reputed to have antiently  
 “ been the choir of the church of Elgin called St. Giles’s church,  
 “ which is the parish church, and that the said *Little Kirk* is a  
 “ part of the said St. Giles’s church; and that both in the times  
 “ of episcopacy and presbytery, the said *Little Kirk* has been  
 “ made use of for divine service, for preaching, baptising, and  
 “ catechising therein: and find it not proved, that the magistrates  
 “ of Elgin have employed the said Little Kirk for any other uses  
 “ exclusive of the bishop and ministers their using and possessing  
 “ thereof: and therefore find, the said place called the Little  
 “ Kirk of Elgin is part of the said St. Giles’s church, the parish  
 “ church of Elgin.”

The proceedings of the Court of Session being reported to the Lords of Justiciary, the appellants presented a petition to their Lordships, stating that the interlocutor of the Court of Session of the 16th December was void, not being signed the day it was pronounced, and several alterations being made upon it the day after: but the Lords of Justiciary pronounced an interlocutor on the 9th of February 1712-13, which, after reciting the said interlocutor of the Court of Session, “ Found that the present established  
 “ ministers their entrusting James Russell with the keys of the  
 “ Little Kirk, and his refusing to deliver the same to the said  
 “ ministers, but delivering the same to Mr. Blair. or opening the  
 “ said *Little Kirk* for his use, relevant to infer an arbitrary punishment, damages, and expences against the said James Russell;  
 “ and also found that the magistrates their turning the said established ministers out of the possession of the said kirk, and putting the said Mr. Blair in possession of the same relevant to  
 “ oblige the magistrates to reponne the said established ministers  
 “ to the peaceable possession of the said Little Kirk, and to infer  
 “ an arbitrary punishment, damages, and expences against the  
 “ said magistrates; repelled the defence proponed for the magistrates and James Russell; and remitted them and the libel as  
 “ found relevant to the knowledge of an assize.”

After a proof taken before the jury, they by their verdict  
 “ found that James Russell had the trust of the keys of the said  
 “ Little Kirk, and that the magistrates with Mr. Blair took possession of the said Little Kirk upon the 29th of May 1712.”  
 After this verdict was returned, the Court of Justiciary on the 2d of March 1712-13 “ decerned and ordained the said magistrates  
 “ and their successors in office, and the said James Russell jointly  
 “ and severally to deliver all the keys of the said Little Kirk to  
 “ the established ministers and Kirk Session of the said burgh and  
 “ parish, and to put the established ministers and Kirk Session in  
 “ peaceable possession of the said *Little Kirk*, and to pay 30l.  
 “ sterling as expences, and a fine of 20l. sterling; and ordained  
 “ Kenneth Mackenzie” (the cautioner for the other appellants)  
 “ to make present payment of the said sums, or be imprisoned till  
 “ payment thereof.”

The appeal was brought from “ several interlocutory orders,  
 “ or sentences of the Lords of Session of the 24th of July and 16th

Entered,  
 17 April  
 1713.

“ of December 1712, and the orders, sentences, or decrees of the  
 “ Lords of Justiciary of the 9th of February and 2d of March  
 “ 1712-13 founded thereon.”

*Argument of the Appellants (a).*

The parish church of Elgin, being large enough for the presbyterian congregation, the leave granted by the appellants to Mr. Blair to perform divine service in the Little Kirk, could be no disturbance to them.

The magistrates having merely insisted on their right of disposing of the said Little Kirk for holy uses (b), the words in the interlocutor of the Court of Session, of the 24th July 1712, allowing it to be proved “ how far possessed by the magistrates and “ town-council for other uses,” were inserted without reason.

When the witnesses were examined on both sides, the appellants did fully prove, that the Little Kirk, when ruinous, was repaired at the sole charge of the magistrates and community, as a church belonging to themselves, distinct from the parish church; that the seats therein were erected by the burgeses, and that no country parishioners had seats therein, but such only as were burgeses or tenants of the said town; that the Bishop of Moray and his Vicar always administered the sacraments, and preached in St. Giles’s church, and never in the Little Kirk but only in 1684, by the magistrates’ allowance, when St. Giles’s church was ruinous; on which occasion the Bishop made application to the magistrates and town-council for the use of the Little Kirk, and as soon as the parish church was repaired, he returned the keys of the Little Kirk to the magistrates, thanking them for the use thereof, and using these words “ we found it close, and we return it “ close:” that the Little Kirk hath not within memory of man been reputed the parish church or any part thereof, and is of a different sort of building, and that the magistrates had frequently disposed of the same for religious uses: that there is no communication between the Great Church and the Little Kirk, save only by a very small door, which has been made in the wall, which divides the same, of late years, for the convenience of ringing the bell: that upon the revolution, when the government was in some disorder, the parish ministers usurped the possession of this chapel, but as soon as the publick affairs were settled, the magistrates demanded the keys thereof from them, as a place to which the ministers had no right, and they being sensible thereof delivered up the same accordingly, and they were afterwards kept by such persons as were appointed by the magistrates.

But afterwards on the removal of an episcopal minister, as not legally qualified, the presbyterian ministers in some measure possessed the said chapel by permission of the magistrates, and made use thereof for baptising, catechising, and weekly lectures, which the respondents having proved, and having also made some slender

(a) In this case, on account of its singularity, it was deemed proper not to abridge the argument. The Judgment is also stated at length.

(b) This fact is denied by the respondents.

proof that the said Little Kirk had been reputed by some to have been the choir belonging to the great church, the Court of Session on that evidence, and by taking advantage of the words "to other uses" inserted in their interlocutor before mentioned, proceeded to pronounce their other interlocutor of the 16th of December 1712, though the appellants had made sufficient proof of the magistrates disposing of the said Little Kirk to the same religious uses, exclusive of the parish ministers.

Though this last mentioned interlocutor was pronounced on the 16th day of December, yet it was not written fair or signed by the Lord President on the day it was pronounced as it ought to have been; but the Court of Session did the next day make several alterations thereon, without calling parties before them, contrary to the act 1693. c. 18. whereby the said interlocutor became null and void. And when this interlocutor was transmitted to the lords of justiciary, the appellants gave in a petition to their lordships representing that it was for these reasons become null and void; and that they presumed the truth of the fact consisted with their lordships own knowledge, as being judges in both Courts, and offering to make proof thereof if they should be admitted to do so. The lords of justiciary however, without taking any notice of this matter, or allowing the appellants to produce witnesses (as they could have done) to prove the same, or giving any answer thereto, pronounced their interlocutor of the 9th of February last on the relevancy, wherein the said void interlocutor of the Lords of Session of the 16th of December last is recited as the ground thereof.

*Argument of the Respondents.*

The cathedral or parish church of Elgin, was at first built in the form of a cross, the west part of which formed the body of the church, the east the choir, and upon the south and north are two little aisles, and over all a large steeple raised upon four arches in the center.

The witnesses examined in this cause fully proved, that the Little Kirk was anciently the choir of the great church; that these two are joined together by a steeple which stands upon four arches, whereof one looks into the great church, and the other into the Little Kirk; that the last is built up, but the difference of the building wherewith it is filled up, is easily distinguishable, and there is still a door left in the said wall, by which people sitting near to it may in the Little Kirk hear a sermon preached in the Great Church: That several of the proprietors of the parish have seats in the Little Kirk, and it was lately repaired by the Kirk Session: That for several years it was the only parish church, the other being out of repair, and that the present parish ministers have been in use to preach, baptise, catechise, marry, and keep sessions in the said Little Kirk, and always preached their weekly sermons on Tuesdays there: and that, as well before as after the revolution, the parish ministers of Elgin made use of the said Little Kirk for divine service. All these facts are not only proved  
by

by the witnesses for the respondents, but also by several of those adduced for the appellants.

The appellants in their defences before the Lords of Justiciary pretended to a property in the Little Kirk, and a right of disposing of it as they pleased; not to holy uses only, but as a place belonging to the burgh, and employed by the magistrates as a school-house, as a publick office for collecting taxes, an ordinary Court for justices of peace, and a magazine for the said town.

The interlocutor of the 16th of December was duly signed, according to the custom of the Court of Session, notwithstanding what the petition of appeal untruly suggests.

Though the several interlocutors of the Court of Session, and Lords of Justiciary be warranted by all the rules of equity and justice, the appellants have appealed from them, under pretence that the said Little Kirk was no part of the parish church, but belonged to the magistrates of the burgh, and was at their disposal. But not only the situation of the Little Kirk pleads the contrary, but the jury have also found the contrary; and it appears plainly from the proof, that both before and since the revolution, the ministers of Elgin have been in a constant use of performing divine service as well in the Little Kirk as the other. And when Mr. Henderson in 1704 did intrude into this Little Kirk, the Lords of the Privy Council ascertained the ministers right to the same, and ordered them to be put and continued in the quiet possession thereof; and since the act passed last Session of Parliament expressly excepts parish churches from being used by any of the episcopal persuasion, they should have satisfied themselves with the indulgence so granted to them, and not have endeavoured to disturb the peace, and quiet of the church of Scotland, by dispossessing the said ministers of the Little Kirk, which they were possessed of.

1711. c. 7.

Judgment,  
3 July,  
1713.

*After hearing counsel upon the petition and appeal of George Innes Provost, and Kenneth Mackenzie, Alexander Falconer, and James Charles Baillies of the burgh of Elgin, in North Britain, and James Russell, beadle or sexton, from several interlocutory orders, or sentences of the Lords of Session of the 24th of July and 16th of December last; and the orders, sentences, or decrees of the Lords of Justiciary of the 9th of February and 2d of March last, founded thereon, made on the behalf of the plaintiffs and prosecutors in this cause, praying the reversal of the said orders, sentences or decrees; as also upon the answer of John Dundas, Esq. procurator for the church of Scotland, and Sir James Stewart, Bart. one of her Majesty's Solicitors for Scotland, for her Majesty's interest, and due consideration of what was offered thereupon:*

*It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the several interlocutory orders, or sentences of the 24th of July and 16th of December last, and other subsequent orders complained of in the said appeal, shall be and they are hereby reversed; and it is further ordered and adjudged that the said appellants be quieted in the possession of the Little Church in Elgin, it being no part of the Parish Church; and that the said respondents do repay to the said appellants*

*appellants the costs and fine adjudged by the said Lords of Justiciary to the said respondents.*

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| For Appellants,  | Rob. Raymond, | Tho. Lutwiche. |
| For Respondents, | John Pratt,   | P. King.       |

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This being the only instance of an appeal from the Court of Justiciary that has been decided upon in the House of Peers, it has at different periods met with much consideration. A short statement of the facts is given by Lord Kaimes in his law tracts, p. 276; and by Mr. Maclaurin in his collection of criminal cases, p. 582; but this last learned author mentions that he had not been able to get inspection of the appeal cases, though a search had been made for them.

It does not appear that any objection was stated to the *competency* of this appeal, at least no traces of such objection are to be found in the cases, or in the journals of the House of Lords. It is worthy of notice, on this point of the competency, that in the appeal of *Greenshields v. Lord Provost and Magistrates of Edinburgh*, (No. 5, of this collection,) the subject of which was very similar to that of the present appeal, an objection as to competency, though of a different nature from what might have been suggested on the present case, was then argued and over-ruled. 496.

The objection of the appellants relative to the alleged nullity of the interlocutor of the Court of Session, is not mentioned by Lord Kaimes or Mr. Maclaurin, and what weight it might have in the *ratio decidendi* no where appears.

It may be proper here to mention that in the Journals of the House of Lords, 26th November 1724, there appears an appeal from the Court of Justiciary; *Munro and others v. Bayne*, his Majesty's advocate, and others. This appeal seems to have been received without objection, but no further proceedings are to be found on the Journal relative thereto.