REPORTS

OF

APPEAL CASES

IN THE

HOUSE OF LORDS

During the Session, 1812—13.

53 GEO. III.

FROM SCOTLAND.

CRAIGDALLIE and others—*Appellants*,

AIKMAN and others—*Respondents*.

Dec. 21, 1812.
Feb. 5, 1813.

SCOTTISH SECEDERS (DISSENTERS.)

WHETHER the use of a chapel purchased, at the time of the secession from the Church of Scotland in 1737, by and for a body of men adopting the secession principles, and for that reason, adhering or submitting to the secession judicatory, was, merely on account of that act of adherence or submission, without any special contract on the subject, for ever after to be regulated and directed by the judicatory in question, notwithstanding a departure by that judicatory from the principles which led to the original adherence, and in opposition to the wishes of a great proportion of the purchasers, who still held their original principles.

THIS was an appeal from the Court of Session under the following circumstances.

Mr. Wilson minister of Perth, was one of the four clergymen who seceded from the Church of Scotland, and were consequently deposed from their

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livings in 1740. A considerable number of Mr. Wilson's congregation still adhered to him, and purchased a piece of ground on which they built a chapel, where he might continue to exercise his ministry. This was accomplished by voluntary contributions recommended at a general meeting of the whole congregation. Most of these were in very small sums, the highest not exceeding 21*l.* and many contributed by their personal labour, by the use of their carts and horses for so many days, weeks, and months; and the minister's stipend was paid, repairs made, and debts paid off, by contributions at the church doors.

Purchase of the ground and chapel in question.

The secession having arisen merely from a difference of opinion upon a particular point, the seceding clergymen still retained the plan of church government, by which the national church was regulated, and formed themselves into a church judicatory accordingly. The congregations which separated from the established church on the same principles submitted to this judicatory, and among these was the congregation at Perth.

The seceders retain the plan of the established church government.

Four of the money contributors, Messrs. Millar, Davidson, Brown, and Craigdallie, were chosen by the congregation as managers, and to them the ground on which the chapel was built, was disponed in the following words, "I, Thomas Gall, do hereby sell, alienate, and dispone, to, and in favour of, the said Colin Brown, James Davidson, John Millar, and James Craigdallie, for themselves, and as trustees for and in the name of the whole subscribers and contributors to the building of a meeting house for Mr. William Wilson, minister of the gospel in

Terms of the disposition of the ground.

Perth, and the congregation who submits to his ministry, and in the name of the whole contributors, towards a stipend for the said Mr. William Wilson, in the said congregation, and to the successors of the aforesaid contributors, who shall continue to contribute for the purpose before mentioned, and to the assignees of the managers and trustees, who shall be chosen and appointed as such, from time to time by a general meeting of the said contributors, heritably and irredeemably all and whole, &c. &c." A Bank bond or defeasance was executed by these trustees, by which they declared "that they claimed no further right, title, or property to the said dispositions and investments, or lands, or grounds therein contained, than the other subscribers according to their several proportions, &c. &c.

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The secession sect in 1745 split into two parts, in consequence of a dispute about the lawfulness of a clause in an oath imposed on persons elected into the magistracy in some of the royal burghs. A minority of their clergy held it to be unlawful, separated from those who still adhered to all the original principles of the secession, and formed a distinct sect known by the name of Anti-Burghers. Mr. Brown, who was then the clergyman of the Perth congregation, and a majority in point of number (as was alleged), joined the new sect, and gave up the chapel to the rest, containing a majority of the original money contributors, who adhered to the old Burgher sect and principles.

In 1745 the sect splits into two—Burgher and Anti-Burgher.

In 1795 another dispute arose among the Burgher-seceders, respecting the power of the magistrate to suppress heresy, and other points. The synod by a

In 1795 another division. The synod sanctions the

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majority sanctioned the new or innovating doctrines. Mr. Jarvie was at this time minister of the Perth congregation, and Mr. Aikman his colleague or assistant. A majority of the money contributors, along with Mr. Jarvie, adhered to the original principles of the sect. Mr. Aikman and a majority of the congregation adopted the new doctrine, and adhered to the synod.

new doctrine. A majority of the Perth congregation in point of number adhere to the synod. A majority of the money contributors adhere to the original principles of the secession.

In this state of things, the question arose to which of the parties the chapel belonged. Mr. Aikman and his followers claimed it, as being a majority of the congregation, but chiefly as submitting to their church judicatory, the associate synod; such submission being, as they alleged, the essential distinctive mark of the community for which the property was originally acquired. Mr. Jarvie and his adherents on the other hand, claimed the property as adhering to the original faith of their sect, but chiefly as constituting according to them the representatives of a majority of the original contributors *in money* towards the purchasing of the ground and the building of the chapel. The question came on first before the Sheriff of Perth, from whose Court it was in the usual manner removed to the Court of Session. Lord Armadale, Ordinary, after some preliminary steps, made *avisandum* of the cause to the whole court; which, on advising the same, on the 16th November, 1803, pronounced the following interlocutor: "*On report of Lord Armadale, and having advised the mutual informations in the cause, the Lords find that the property of the subjects in question is held in trust for a society of persons who contributed their money*

Question to which of the parties the chapel belonged.

Interlocutor of the court of the 16th November, 1803, in favour of the money contributors.

for purchasing the ground, and building, repair-ing, and upholding the house or houses thereon, under the name of the Associate Congregation of Perth; and so far repel the defences against the declarator at the instance of Matthew Davidson, and others; and find that the management must be in the majority, in point of interest, of the persons above described; and before farther answer in the cause, remit to the Lord Ordinary to ascertain what persons are intitled to be upon the list of contributors aforesaid, and whether the majority aforesaid stands upon the one side or the other, and thereafter to do as to his Lordship shall seem just."

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Against this interlocutor, a short petition was presented on the part of Mr. Aikman and the other Respondents, who joined with him in behalf of their party, and on advising it with answers for the Appellants, on the 1st February, 1804, the following interlocutor was pronounced: "The Lords having resumed the consideration of the petition, and advised the same with the answers and whole process, they alter their interlocutor of the 16th of November last, and find that the property of the subjects in question is held in trust for a society of persons who contributed their money either by specific subscriptions, or by contribution at the church doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes,—*such persons always by themselves, or along with others joining with them, forming a congregation of christians continuing in communion with, and subject to the ecclesiastical discipline of, a body of*

Interlocutor of 1st February, 1804, in favour of those abandoning the original principles of the sect, but adhering to the synod.

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dissenting protestants, calling themselves the Associate Presbytery and Synod of Burgher Seceders; and remit to the Lord Ordinary to proceed accordingly."

The cause being thus returned to the Lord Ordinary, he pronounced an interlocutor, "finding that Mr. Aikman and his adherents had the preferable and exclusive right to the ground in question, and to the church and other buildings erected thereon, and decerned and declared accordingly."

In pronouncing the interlocutor of 1st February, 1804, and another adhering to the same, on 28th June, 1805, the judges of the Court of Session then present were equally divided in opinion, seven, including the Lord President being for the Appellants; but as the constitution of the Court did not admit of the President voting, except when the other judges were equally divided, the question was necessarily taken as having been decided against the Appellants by seven against six.

Sir Samuel Romilly and *Mr. Grant*, (for the Respondents) argued that from the words of the instruments conveying the property, from the acts of the contributors and congregation, and from the trifling amount of the separate sums subscribed, it was clear that the contributors never intended to claim a right of property in the subjects in question for their own behoof, as separate from the congregation, and its subordination to the rules of the sect. That taking the original contributions in money, the contributions in labour of different kinds, and contributions at the church doors, the interests were

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a great deal too minute for calculation. It would be impossible to ascertain the persons in whom they vested, and if it were possible, it would be necessary to divide a farthing into various parts, in estimating the amount of each individual's interest. The property was designed as a permanent provision for a pastor and congregation, subject to a certain ascertained ecclesiastical jurisdiction. Mr. Aikman and his adherents clearly answered this description, and therefore were entitled to hold the subjects in question, while the Appellants, having refused obedience to the rules of the sect, had evidently forfeited all right to the property in dispute. The most perfect toleration had been established in Scotland by the acts of 1690, chapters 5, 27, and 28; and 10th of Anne, chap. 7, as far as regarded protestant dissenters: that every reasonable and necessary measure which the different systems of these dissenters might require for carrying the principles of their persuasion into effect was and must be lawful: that courts of justice must recognize and enforce the rules under which each sect of dissenters had chosen to be governed, and enforce subordination to the discipline which they had enjoined: that the only inquiry was, in the case of an individual congregation, by what rules it had consented to be governed; and in the case of a congregation belonging to a sect, by what general rules the sect was governed;—and these being found, courts of justice were bound to enforce them.

These principles had been recognized and acted upon by the most enlightened Scottish judges, in the cases of Auchincloss and Paterson, 1790;—Bryson and Bain, 1752;—Wilson and Jobson, 1771.

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In order to show that the same principles were recognized by the English courts, Lord Mansfield's speech in the House of Lords in the case of the *Chamberlain of London v. Evans*, 4th February, 1767;—*Rex v. Barker*, 3d Burrow, 1265;—*Loyd's case (the King and Josham)*; 3d Term Reports, 575;—2d Burn's Ecclesiastical Law, 184; *(the King v. Francis)*, were also cited.

It was also argued, that the Appellants having never been enfeoffed in the subjects in question, had no right to pursue their action of removing against the Respondents who were in possession, (*Baton v. Macintosh*, 1757; *Sutherland v. Graham*, 1759.)

2d vol. Fac. Col. nos. 69, and 195.

Mr. Adam and *Mr. Horner* for the Appellants, on the other hand, contended; first, that by the true construction of the instruments of conveyance, the property was not intended to be mortified for the use of the spiritual congregation, but that it was intended to remain vested in a temporal society formed of the contributors, and distinct from the religious association, though subsisting along with it, and promoting its purposes; and that the property was to be managed and disposed of according to the pleasure of the majority of the temporal society. Secondly, that if unalienable endowments for a permanent ecclesiastical body such as this could be created and enforced, the system would be in effect a national establishment, acknowledged and supported by the law, like an established church: that the Seceders were entitled by law to the most perfect toleration, was admitted; but the Respondents claimed a great deal more—they claimed to have their system recognized by the law, and sup-

ported as an establishment, or in the manner of a regular corporation: that fallacious analogies were drawn in favour of the Seceders, from the resemblance of their church government to that of the established church, from which they had seceded: that the law could only recognize them in their individual capacity, and deal with the property as belonging to individuals whose rights would be protected as in other ordinary cases: that according to the principle contended for by the Respondents, the Associate Synod might convert the building in question into a Roman Catholic chapel, or deal with it in any manner they thought proper; and that to establish such a principle would be pregnant with the most absurd and dangerous consequences.

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In answer to a question by the Chancellor, it was stated from the bar, that the law of Scotland was not so strict as that of England, in requiring all parties interested to be brought before the court; but that all the adherents of either party in the cause, would be bound by the decisions of their Lordships as much as if they had been actually named in the pleadings, and had joined in the suit.

Lord-Eldon (Chancellor). The question here to be decided was the right to a certain meeting-house employed for religious purposes. The case appeared to have very much distracted the judges in Scotland, as the point had been repeatedly decided by the narrowest possible majority; viz. by calling in the President to give his casting vote, the rest of the Court being equally divided.

June 14, 1813. Judgment.

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Under all the circumstances, it seemed to him that the cause must be remitted to the Court of Session, as it was impossible to apply these interlocutors in their present state. He then read the interlocutors of the 16th November, 1803, and that of 1st of February, 1804, (vide ante,) and called their Lordships' attention to the difference. The first found that the property was held in trust for a society of persons, who contributed their money for purchasing the ground, and building, repairing, and upholding the house and houses thereon, under the name of the Associate Congregation at Perth. The second interlocutor varied the terms of the description, "finding the property of the subjects in question to be held in trust for a society of persons, who contributed their money either by specific subscriptions or *by contributions at the church doors* for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debts contracted for these purposes;" but the material variation was in the subsequent words, "*such persons by themselves, or along with others joining with them, forming a congregation of Christians continuing in communion with, and subject to the ecclesiastical discipline of, a body of dissenting Protestants, calling themselves the Associate Presbytery and Synod of Burgher Seceders.*" The case did not appear to him to bear upon the doctrine of toleration, as had been stated, but it was undoubtedly a case of very great importance.

The ground was purchased, the meeting house built and repaired, the debts were discharged, and the minister's stipend was paid by subscriptions;

several of them by persons who did not join the society, but who wished well to it as a religious institution, by contributions of materials, labour, and contributions at the church doors. From this statement their Lordships would see the extreme difficulty of applying these interlocutors.

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With respect to the law of the case, the property might be in individuals, though the trust were carried on for their use in communion. But the Court differed here, for by the first interlocutor (16th November, 1803,) the property was declared to be in those who advanced their money, and by the second (1st February, 1804,) the property was also declared to be in those who advanced their money, but with this material difference, that they should lose their right to it when they ceased to be members of the society. Now, upon the first interlocutor, it would be extremely difficult to find out after the lapse of nearly a century, from 1733 to 1806, when this cause was decided in the Court below, who were the persons who originally advanced their money; with this additional difficulty in the second interlocutor, that the contributions at the church doors and subscriptions had been going on through the whole of the period above mentioned, the interlocutors saying nothing about heirs or representatives.

His Lordship here stated some of the principal facts before mentioned, and which it is unnecessary to repeat, and then proceeded thus: The gentlemen who had separated as above mentioned considered themselves as the only genuine Presbyterians, and resolved to demand from the candidates for the ministry an acknowledgment of the national covenant

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of Scotland and the solemn league and covenant of which their Lordships had heard a great deal as matter of history, and this constituted a principle of distinction between them and the established church. But a difference arose as to the nature and extent of the acknowledgment, particularly as to the power of the civil magistrate in the suppression of heresies; and in 1795, a proposition upon this point was submitted to the Associate Synod of Burgher Seceders, which led to a second division of the sect.

When the congregation acceded to the Associate Presbytery, it was under the persuasion that the Presbytery would retain the original principles of the Seceders.

About the year 1737, this congregation of persons adhering to Mr. Wilson; the seceding minister, was formed at Perth, and the building in dispute was at first prepared for a minister and congregation holding a particular description of religious opinions. The congregation acceded to the Associate Presbytery and the ecclesiastical discipline of the sect; but, when it did so, it was clear that this was under the persuasion, on the part of the congregation, that the Presbyteries and Synods would continue in the same principles which formed the ground of the secession.

He had before stated, that a difference took place in or about the year 1795, relative to the acknowledgment of the power of the civil magistrate in religious matters, and the nature and kind of the obligation of their covenants; and it was at length determined by a majority of the Synod, that a declaration should be prefixed to their *formula*, that they did not require an approbation of it in its offensive sense. Some protested against this decision, and a few declined the authority of the Synod altogether. Among these was Mr. Jarvie, minister of the Perth

meeting-house, to whom Mr. Aikman had been appointed assistant or colleague. Mr. Aikman and a majority of the congregation continued in their adherence to the Synod, while a considerable portion of the congregation, including, as was alleged, a majority of the contributors, adhered to Mr. Jarvie, and hence arose the present question; to which of the two parties the meeting-house belonged?

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Here then were a number of persons contributing by money, labour, and materials towards the purchasing a piece of ground, and building a meeting-house to continue to be enjoyed in common as long as they could agree in the same religious persuasion, and adhering to a synod and certain church judicatories, as long as these judicatories continued to maintain their original religious principles. But a difference of opinion having taken place, and the congregation having divided, one party said, "We are the majority, and the house belongs to us; while the other party said, "The house belongs to us, as we are a majority of the contributors." The mere money contributors insisted in their suit, that they ought to have the power of directing the use of the house when a difference arose. Mr. Aikman and his party insisted that *they* had the right to direct the use of the building as they adhered to the Synod and the ecclesiastical authorities to which the congregation had acceded in 1737, since which time the Perth meeting was not a separate congregation, but one of many associated congregations subject to the ecclesiastical judicatories to which they had submitted.

The chapel to be enjoyed in common by the contributors of every description as long as they agreed in their religious persuasion, these contributors adhering to certain judicatories as long as these judicatories adhered to their original principles.

There appeared to have been a good deal of argu-

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ment below, respecting the English law on questions of this nature; but he would venture to say, that the English law had been much misunderstood. Some of the Scotch Judges who pronounced for the Respondents appeared to have divided, not so much according to former cases, as according to what was considered as the more liberal opinion, while others said that this opinion was in strict conformity with former decisions. It appeared to him, however, from the early cases, that the Scotch Judges would not permit a suit for the execution of a trust to be carried on in the name of an associate congregation of this description, and had refused to recognize the Associate Presbytery and Synod, as a permanent body; but they had endeavoured to relax this principle, till they came the length of the last interlocutor pronounced by this narrow majority. Suppose the whole of the contributors or congregation had altered their opinions, could the Synod have altered the property? The only answer of the judges to this was, that when that question arose they would dispose of it, but he was afraid it must be disposed of now, as it seemed to be involved in the principle of their decision. Suppose the contributors or congregation were equally divided, how could these interlocutors be applied in that case? The very principle of majority was then gone. Suppose $\frac{99}{100}$ had altered their opinions in respect to adherence to this Synod, would they by this means have forfeited, not only their right to form a part of the congregation, but also their property? He should therefore respectfully submit it to the judges below to review their opinion, not merely as to the principle of their decision, but also as to the practicability of applying

their own interlocutors. Mr. Hope, (now Lord President,) and Mr. Maconochie, who had drawn a very able paper on this subject, had contended that a share of the property belonged to all who had contributed at the church doors towards the minister's stipend, and Hope afterwards insisted upon it in judgment, and yet there was nothing about this in the interlocutors. But when it was considered that this society had been formed in 1733, and subscriptions soon after entered into for purchasing the ground and building the house; when it was considered that the contributions had been going on quarterly for nearly a century, and applied through the whole of this space of time to repairs and to the payment of debts connected with this property, contracted 40 or 50 years ago, he would ask again, who were the persons entitled under these interlocutors? Who were the majority of them who were to direct the use of this property? Independent of any other consideration then, the extreme difficulty, if not impossibility, of applying these interlocutors as they stood, rendered it highly desirable that the matter should be reviewed. But if the judges below still adhered to the principle, it was *this* principle, that, because in 1737 a society then agreeing in their religious opinions adhered to a Presbytery or Synod then holding the same opinions with themselves, the property belonging to that society should be held in trust, not for those who adhered to their original principles, but in trust for those who adhered indeed to the Synod, but who did *not* adhere to their original principles; that was a proposition very difficult to be maintained in law. But,

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The principle of the decision of the Court of Session was, that a trust created for a society agreeing in certain religious opinions should remain not for those who *did* adhere to their original principles, but for those who did *not* so adhere.

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Courts of justice may take notice of particular religious opinions as facts pointing out the ownership of property.

Doctrine of the English law upon this subject.

if the Court below should still adhere to that principle, then the objection arose, How could the principle be applied in practice? It was true the court could not take notice of religious opinions, with a view to decide whether they were right or wrong, but it might notice them as facts pointing out the ownership of property.

With respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C, &c., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts*, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorised him to say that the court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights.

If it had been intended that the Synod should direct

If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the court

might act upon it; but there must be evidence of such a contract, and here he could find none. He proposed therefore that the cause should be sent back with two findings, of this nature:—"1st. That the ground appeared to have been purchased and the house built for a society united, and proposing to continue united, in religious opinion. 2d. That it did not in point of fact appear how this property was to be applied, in case the society should happen to differ and separate."

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the use of the property, that ought to have been matter of contract.

He was the more anxious to have this judgment reviewed, as some of the Scotch Judges who acceded to it admitted that it was contrary to former decisions, and also on account of the difference of opinion that prevailed in the Court below, and the very important nature of the case; and this case was peculiarly important because it must be deeply interesting to the feelings of great numbers, a circumstance which rendered it highly desirable that it should be finally settled in the most distinct and satisfactory manner.

The cause was accordingly remitted for review with the above findings.

Agent for Appellants, J. CHALMER, Abingdon-street.
Agent for Respondents, A. MUNDELL, 45, Parliament-street.