

No. 28. for two, and Watson for one; other nine shares were likewise taken; and the remaining thirteen were never filled up. The ship made two unsuccessful voyages, and the concern appearing unprofitable, the majority of the subscribers resolved to sell the ship by public auction. Against this measure Watson and Montgomery entered a formal dissent by protest. The ship was not sold, whereupon the majority resolved to fit her out as a merchant vessel, which was accordingly done. Watson and Montgomery, who had again entered their protest against this last measure, now brought action against Forresters and Company, and the other partners, for a breach of contract; and urged, That the society being entered into for the whale-fishery, and to continue three years, that agreement could not be departed from without the express concurrence of the whole partners; and that the clause in the contract stipulating that a majority of the partners should direct the employ of the vessel, applied only to the detail of operations in the course of the agreed trade, and gave no power to this majority to alter the trade itself, or to put an end to it altogether. The Lords were of opinion, That independently of the clause in the contract, it was essential to the nature of a society of this kind, that the majority of the partners should have a power to put an end to it. It was like a lottery, or an adventure to purchase stock upon time, and which, if unfortunate, no law could bind the majority to continue, to the hazard of their ruin; they therefore assoilzied from the action. See APPENDIX.

Fol. Dic. v. 4. p. 287.

1805. June 27. DAVIDSON and Others, *against* AIKMAN and Others.

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Property being held in trust for a seceding congregation, how is it to be managed or disposed of when the society becomes disunited?

Is it lawful to bestow property on a seceding congregation, subject to the discipline of a self-constituted, but tolerated, ecclesiastical body?

May such a condition be

THIS was a dispute concerning the property of a chapel at Perth, which had been for many years a place of worship for the sect of Protestant Dissenters known by the name of Burgher Seceders.

In the year 1733, several clergymen of the Church of Scotland having disapproved of an act of the General Assembly, with respect to the mode of collating to vacant churches by the heritors and elders of each parish, as inconsistent with the principles of Presbytery, protested against the determination of the General Assembly, and declared, that they should nevertheless be at liberty, upon all occasions, to hold their own doctrines regarding the right of congregations to choose their ministers. Having persisted in this opinion, notwithstanding the censures of their superior church judicatories, they were declared no longer ministers of the Church, and prohibited from the exercise of their ministerial functions. They immediately formed themselves into a Presbytery, after the model of the Church Establishment.

Mr. William Wilson, minister of Perth, was one of those clergymen who, upon this occasion, seceded from the established Church; and, being followed by a considerable number of his congregation, it was agreed, that a "convenient spot of ground should be purchased, and a house built thereon for public worship, that

all who adhered to Mr Wilson's ministry, might have access to hear the gospel preached by him therein."

A subscription was accordingly opened, and upwards of a hundred persons subscribed, many of them very small sums, for this purpose. Some of them, whose subscriptions amounted to one guinea, were elected managers, and directed to purchase a convenient piece of ground in the town of Perth, for building this chapel; and accordingly they acquired certain pieces of ground from the Tailor Craft, Thomas Gall, and John Faichney. The subscribers directed the conveyances to be made out in the name of four of their number, Bailie Davidson, Colin Brown, John Millar, and James Craigdallie, "for the use and behoof of the society, and managers of the house for public worship, for the Associate Congregation;" and at the same time a letter, declaratory of the trust, was granted by these trustees. The dispositions from the Tailor Craft, and from John Faichney, were taken simply in favour of these four persons, their heirs and assignees; but the disposition from Thomas Gall, was taken to them, as trustees for and in name of the whole subscribers and contributors to the building of a "meeting-house for Mr. William Wilson, minister of the gospel in Perth, and the congregation who submit to his ministry, and in name of the whole contributors towards a stipend for the said Mr. William Wilson, in the said congregation, and to the successors of the foresaid contributors."

Upon the ground thus acquired the chapel was built; but the sum which had been subscribed was insufficient for this purpose, and money was borrowed to complete the edifice. The funds of the society consisted of the seat-rents; of the surplus of the weekly collections at the church-door, after the maintenance of the poor; and of certain quarterly collections made among the congregation, under the authority of the session. Out of these funds the minister drew a stipend; the annual interest upon the borrowed money was paid, and the other expenses attending the institution, were discharged.

In the mean time, the Secession increased rapidly, and congregations were formed in many parts of the country, upon principles similar to the congregation at Perth. In their ecclesiastical discipline, the form of the Church of Scotland was observed. Each congregation was under the spiritual direction of a kirk-session; a minister and elder from each session formed a presbytery, and the whole of the different presbyteries were subject to a supreme court, which was denominated the Associate Synod. This Synod came, in process of time, to have under its direction one hundred and thirty congregations in different parts of the country.

Some years after their institution, a difference of opinion arose, concerning the lawfulness of the burgh oath, which some of their number conceived was inconsistent with their religious principles. Finding that the majority were of a different opinion, and that the supreme ecclesiastical court declared the oath legal, they left the original secession, and formed a separate sect, denominated Antiburgher, while the original secession were known by the name of Burgher Seceders. Upon this occasion, Mr. Brown, who succeeded Mr. Wilson as minister of the congre-

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gation at Perth, embraced the opinions of the Antiburghers, and, with a part of his congregation, betook himself to a separate place of worship.

This chapel at Perth, however, remained in communion with the original Burgher Secession. The congregation was represented in the presbytery of the bounds, and acknowledged the authority of the Associate Synod in all religious matters. When a vacancy occurred, the ordination and admission to the charge was conducted under the authority of the Associate Presbytery, and proceeded in all respects according to the regulations of that society.

In the year 1795, another difference of opinion arose among the Burgher Seceders, which gave rise to the present question. It related to the nature of the obligation contained in certain clauses of the Solemn League and Covenant, and regarding certain parts of the Confession of Faith of the Established Church, which also formed a part of the *formula* or test required by the Burgher Seceders, in the admission of probationers for the ministry. It was the opinion of many, that the doctrines contained in the 23d chapter of the Confession of Faith, regarding the power of the civil magistrate to suppress heresy, could not consistently be recognized by a body of dissenters, who had separated from the legal establishment, and existed purely by toleration; and accordingly, an overture was brought forward in the Associate Synod, to have it enacted, that the acknowledgment of this power in the civil magistrate should no longer be a term of ministerial or Christian communion. This having been opposed by several members of the Synod, it was agreed to be withdrawn, and that the old formula should be retained; but, with a view of obviating the scruples which had been entertained regarding this doctrine, a preamble was prefixed, explaining, that the expressions in the Confession of Faith were not to be understood as acknowledging the right of using compulsory measures in matters of religion, and that the Synod were not to interfere with the controversy regarding the precise nature of the obligation of the Covenant.

This preamble, however, did not meet the views of the whole members of the Secession; and a proposal was afterwards made that it should be withdrawn. On this occasion, twenty-eight members of the Associate Synod voted, that the preamble should be set aside, and that the formula should be retained as formerly, without any explanatory declaration; ninety-two members, on the other hand, voted that the preamble should be retained. Seven of the minority protested against this decision, and three of the members of the Synod declined the authority of the court.

At this period, there were two ministers in the chapel at Perth. Mr. Jarvie, one of these ministers, with one member of the kirk-session, coincided in opinion with the minority of the Synod. Mr. Aikman, the other clergyman, with twelve members of the kirk-session, adhered to the majority. And, upon the 20th October, 1800, Mr. Jarvie presented to the Associate Presbytery, a declinature of their authority and jurisdiction; protesting, at the same time, in his own name, and in the name of all the members of the congregation who should adhere to him, that

the Synod had departed from the original principles of the Burgher Secession. Upon this, the Presbytery "dropped the name of Mr. Jarvie from the roll," declared, that he was no longer a member of their church, and that there was a vacancy in the collegiate charge at Perth, and appointed their sentence to be publicly intimated from the pulpit by one of their number.

Upon the day appointed for this purpose, an altercation took place in the church between the different parties; and Mr. Jarvie, with such of the congregation as adhered to him, at length left the church, and the sentence of the Presbytery was regularly intimated from the pulpit.

A petition and complaint was immediately presented to the Sheriff of Perth, in the name of Mr. Jarvie and his adherents, praying to be reinstated in the possession of the church; and the Sheriff pronounced an interlocutor, ordering, that the one minister should preach in the forenoon, and the other in the afternoon of each Sunday, until the dispute regarding the property of the building should be legally determined, and prohibited each of the parties from disturbing the other in the exercise of this rotation.

Upon this, a bill of advocation was presented by Mr. Aikman and others, his adherents, complaining of this sentence of the Sheriff, and, at the same time, two mutual separate actions of declarator were raised, one at the instance of Mr. Aikman and his adherents, and another at the instance of Mr. Jarvie and his adherents, the original pursuers in the action before the Sheriff.

The summons of declarator raised by Mr. Jarvie, concluded, "That it should be found and declared, that the pursuers are a great majority of the original contributors, or the heirs of original contributors, to the purchase of the said ground, and erecting the said building, and that, as composing such majority, and adhering to the original principles of the secession, the said ground, meeting-house, and other buildings erected thereon, are the property of the pursuers, and those who shall adhere to them, by concurring in this action, and their heirs and successors, for themselves, and the other members of the Society of the Associate Burgher Seceders of Perth, adhering to and professing the principles of the original Burgher Secession, and whose ancestors contributed to the purchase of the ground, and to the erecting of the buildings thereon; and that it ought and should be found and declared, that the defenders, the said Jedidiah Aikman, John Pirie, John Banks, and others who may adhere to them, have forfeited their right to the said subjects, and have now no title to interfere with the pursuers, and those who may adhere to them in the management of the said meeting-house, and session-house, or in the election, appointment, and ordination of any minister to preach in the said meeting-house, in all time coming."

The other summons of declarator pursued by Mr. Aikman, concluded, "That it should be found and declared, that the said piece of ground, meeting-house, and session-house thereon erected, having been originally purchased and built, and expressly appropriated as a place of worship for an associate congregation of Burgher Seceders, under the inspection and jurisdiction of the Associate Presby-

No. 29. tery and Synod, the pursuer, his elders and deacons, and the congregation adhering to his ministry, as coming under the above description, are entitled to dispense the ordinances of religion therein, to the exclusion of the defender the Reverend Mr. Jarvie, who has broken off his connection with and adherence to said Associate Presbytery and Synod; and also to the exclusion of the said defenders, who have departed with the reverend Mr. Jarvie from the Secession Church, and are no longer in communion or connection with Burgher Seceders." The summons further concludes, "That it ought and should be found and declared, that the Reverend Mr. Jarvie, and the said Matthew Davidson and others, have, by their disclaiming their connection with the Associate Presbytery and Synod, thereby amitted and lost any right or interest which they or any of them may have had in the foresaid subjects, and consequently have now no title to interfere with the pursuer, his elders, deacons, and congregation, in the use and exercise of the said meeting-house and session-house; so long as they shall maintain and preserve it, for the purposes of its professed destination, viz. a place of worship for an associate congregation of Burgher Seceders, in communion with, and under the inspection and jurisdiction of the Associate Presbytery and Synod.

These actions of declarator were conjoined; the bill of advocation was remitted to that proces; and the Lord Ordinary reported the whole cause.

Each party maintained, in point of fact, that they were really a majority in value of the heirs of the original contributors; but Mr. Aikman and his adherents resorted to the following general grounds; and

Pleaded: Every association for a lawful purpose being under the protection of the law, all donations made for the use of such a society, must be considered as legal, and civil courts must interpose to render them effectual, according to the intention of the donors. The only question, therefore, for a Court to determine, is, to ascertain the true purpose of the grant, and, if a lawful purpose, to enforce a faithful application to it of the subjects bestowed.

The terms of the dispositions,—the letter of trust granted by the disponees,—the means by which the edifice and institution were supported, and the whole history of the Burgher Congregation of Perth, show, that this property was not held absolutely by the persons in whose names the rights were taken, but in trust for the use of the Associate Congregation. The ground was purchased, and the building erected, not merely by the original contributors, whose subscriptions amounted to an inconsiderable part of the whole expense, but principally by borrowed money, the interest of which was paid, and the principal gradually discharged by weekly and quarterly collections among the congregation. These collections were made, not with the view of increasing the patrimonial interest of a few original contributors, but for upholding the place of worship of a congregation of Christians, of a known persuasion, and subject to a known discipline tolerated by law.

The sect, for whose use this chapel was built, was not composed of independent congregations, but was framed upon the model of the Church of Scotland, with a subordination of ecclesiastical judicatories. It was a voluntary association of a

great body of men, possessing unity of sentiment in doctrine and discipline, and subjecting themselves to the controul of certain ecclesiastical bodies, whose authority they acknowledged in all spiritual matters. By the constitution of the sect, each congregation was under a session; each session was subordinate to a presbytery; and each presbytery to an associate synod, from whose decision, in spiritual matters, there lies no appeal. This church at Perth, ever since its first institution, formed an integral part of this religious community; and every donation for its support, was given to it in that character and capacity.

It is true, that the law cannot directly give effect to the sentence of the ecclesiastical judicatories; because they are not acknowledged, by the State, as invested with authority. But, according to the principles of toleration, there is nothing to hinder any individual from entering into a voluntary religious association, thereby subjecting himself to the religious discipline of such a society. This obedience is a condition of his right of admission to the society, and of his right to continue a member of it. Further, if he chooses to make any donation to such a society for religious services, which, according to the persuasion of the sect, must be exercised in subordination to the discipline of its ecclesiastical superiors, the provision is lawful; and it is the duty of courts of justice to give redress against the perversions of the donation to other purposes, so long as there are donees in a situation to claim the benefit of maintaining in exercise the objects of the donation. Such donees may plead *designative* the will of their ecclesiastical superiors as evidence, by which the enjoyment of the donation is to be regulated, though the ecclesiastical body itself has no *persona standi in judicio*. And though such a body cannot hold property, or appear in a court of law in a collective capacity; they may nevertheless hold property by the intervention of trustees, who may be called to account according to the uses and purposes of the trust, by any persons having an interest to insist in such an action.

Upon these general principles, the decision of the present case must depend. If the intention of those who contributed towards the building of this church be explicitly recognized; and if the purpose was lawful; the pursuers, even though a majority of the contributors, could not pervert the building to a purpose different from that for which it was originally intended. Mr. Jarvie, at his admission, voluntarily subjected himself to the religious discipline of the sect of Burgher Seceders, with which he remained for many years in communion. He received ordination as a member of this society; and he was entitled to hold his situation as a pastor of the charge, only so long as he chose to continue under its jurisdiction. He and his adherents may indeed think, that the determination of the Associate Synod, with regard to the formula, was wrong; and that they have departed from the original principles of the sect; but this is the case with every conscientious minority, who must necessarily think the determination of the majority erroneous. The original members of the secession from the Church of Scotland, gave out, that the General Assembly had departed from the true principles of the Church; the Antiburghers, in like manner, who left the original secession, maintained, that

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they adhered to the true principles of the sect, and that the Associate Synod had departed from these principles. But it was not pretended, that the ministers who left their church, had a right to continue pastors of their respective parishes, or that the minister of this church at Perth, when he chose to become an Antiburgher, was to occupy a charge, destined by the founders to remain under the inspection of the Associate Synod, whose authority he had renounced.

The right of the majority to bind the minority, must be the established rule of every society. The decision of the majority of the Associate Synod, with regard to this preamble, must be considered as the doctrine of the Burgher Seceders. It is impossible for civil courts to go further, and to inquire whether the Synod are right in this interpretation of their formula. Whatever they hold as the test of their sect, must be considered as such in every civil court where it is necessary to ascertain it. This is not bestowing authority on their ecclesiastical judicatories. Their decision is merely to be considered as a mark or designation of that sect of Christians, for whose use this church was intended by the contributors; and if the Court are satisfied with regard to this identity, it is quite unnecessary to make any further inquiry into the particular doctrines of the sect.

But to award this chapel to the representatives of the majority of original subscribers, would be attended with manifest injustice, both as diverting it from the purpose for which it was intended, and as bestowing upon those subscribers a property much more valuable than that to which they have any right in consequence of their subscriptions, which only amounted to a very small part of the sum expended on the subject. It would be in fact to bestow upon the heirs of those subscribers, the surplus of the collections made at the church-doors ever since the erection of the chapel, to which they can have no sort of claim. These collections were bestowed on the faith of the edifice, and all connected with it, being held for the service of a congregation under the arrangements of the Burgher sect.

These principles are not only consistent with justice in this case, but highly expedient. The Burgher Seceders now form a great body of Christians. If these were split into a number of independent chapels, the pastors of which were under no subordination to any church-judicatories, and bound by no fixed principles, there would be much less security for the propriety of their moral, civil, and religious opinions.

There is nothing more questionable, in a donation of property for the behoof of a congregation of Christians, while they remain governed in ecclesiastical matters by a body calling themselves an Associate Presbytery, than in a donation for behoof of educating boys or girls, or any other charitable purpose, according to the direction of a certain description of persons. All exercise of discipline, whether for religious duty or education, or the administration of medical aid, or even the economy of an hospital, in a certain degree implies a dependence on the judgment and discretion of individuals; and it cannot therefore be any objection to the condition of a trust, that the benefit is qualified with subjection to such a discretion as is essential to the exercise of ecclesiastical discipline.

In support of their argument, the defenders referred to the following authorities: Blackstone, B. 4. C. 4. p. 53; Burrow's Rep. vol. 3. p. 1265; Durnford's Rep. vol. 3. p. 575; Bryson *contra* Wilson, 1752*; Morrison *contra* Struthers, 1757*; Auchinloss *contra* Paterson, 1792*; Wilson *contra* Jobson, December 13, 1771, No. 5. p. 14555.

Mr. Jarvie and the other pursuers, who likewise gave themselves out as a majority in point of value of the heirs of the original contributors,

Answered: This is altogether a question of civil right, and must be determined without any regard to religious doctrines or opinions. Whenever any dispute arises with regard to the possession of a subject belonging to a community of persons, who do not possess the privileges of a corporation, no principle but that of numbers can be adopted. The right of the property of this chapel must belong to the majority of the contributors, whatever may be their religious opinions, and whether they acknowledge the jurisdiction of an Associate Synod, or deny its authority.

There is a great difference between a church established by law, involving in its nature various legal rights, and a religious sect, which is merely tolerated, and exists entirely in consequence of the voluntary act of its members. The one is a public endowment, permanent in its nature, possessing property which cannot be diverted from its original purposes by those who contribute to the support of the establishment: But a private association of dissenters, is nothing more than a society of individuals, connected by a voluntary and transient compact; and though they may copy the forms, and assume the appearance, of a religious establishment, erecting places of worship, and providing funds for the support of their ministers, this cannot give them any additional privileges; and the civil courts, when determining upon the state of such property, must be governed exactly by the peculiar transactions and compacts of those to whom it originally belonged.

By the doctrine of the defenders, the right of property is made to depend, not on the will of the original owners and contributors, nor even upon the will of the majority of the congregation, for whose use the subjects were intended, but upon the self-created authority of a band of clergymen, who give themselves the name of the Associate Synod; who might, upon the principles of the defenders, convert it into a Roman Catholic chapel, against the will of all the contributors, and the whole congregation. The defenders' whole argument proceeds upon the hypothesis, that there exists a permanent trust, appropriation, or endowment, for the use and behoof of what they call an Associate Burgher Congregation, under the jurisdiction and control of an Associate Synod. But the fact is, that there was no trust created, except simply for the use and behoof of the trustees themselves, who have the only title to vindicate the property.

* These cases have not been reported.

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At the time this church was built, there was no Associate Synod in existence; so that it never could be the intention of the contributors to erect a congregation to exist under its inspection. The only object which the original contributors had in view, in building this house, was to erect a place of worship for themselves and the other adherents of Mr. Wilson, who had been ejected from the parish church. There is no reason for thinking, that their intention was to divest themselves of their property, and place it under the control, and at the disposal of an Associate Presbytery or Synod, which was not then in existence.

A distinction is to be made between the society of contributors and the congregation at large. The temporal interest in this church was vested altogether in the former; and, accordingly, when the former division took place among the dissenters, and Mr. Brown, the minister of this congregation, adopted the principles of the Antiburghers, the majority of the congregation adhered to his opinion; but as the majority of the contributors were of opposite principles, the majority of the congregation were obliged to yield the possession of the church, to be disposed of according to the will of the majority of the contributors.

In determining all questions of this nature, the only simple and invariable rule is, to award the civil property to the majority of the contributors. If any other principle were to be adopted, the civil courts would be obliged to enter upon a wide field of polemical discussion, and determine controversies among religious sects, in order to ascertain the rights of the parties. The pursuers, as a majority of contributors to this chapel, are entitled to vindicate their property; though, if the question were made to depend upon adherence to the principles of the original secession, there can be no doubt, that they would also be entitled to it under that character; since the ground of the present difference of opinion has arisen from an attempt, sanctioned by a majority of the Synod, to explain away certain original doctrines of the sect; which attempt the pursuers have resisted, and adhered to the original formula. The majority of the Presbytery and Synod have changed their opinion and their principles. They have become seceders from their original sect; whereas, the congregation of Perth, or at least a majority of those who acquired this property, or contributed to it, remains the same as before, and rejects all innovation. This being the case, they are at a loss to know why they should forfeit their property, or why it should now belong to a different class of men, who never paid any value for it.

In support of their argument, the pursuers contended, That hitherto the majority of the contributors had been the rule adopted by the Court to ascertain the right of property, when any difference arose in such religious societies, and quoted the following authorities; 13th December, 1771, Wilson against Jobson, No. 5. p. 14555.; 25th May, 1791, Allan against Macrae, No. 27. p. 14583.; 26th May, 1797, Smith against Kidd; 13th May, 1801, Dun against Brunton. (The two last cases not reported.)

The Lords, upon the report of the Lord Ordinary, (16th November, 1803), pronounced the following interlocutor: "Find, That the property of the subjects

in question is held in trust for a society of persons who contributed their money for purchasing the ground, and building, repairing, 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 further answer in the cause, remit to the Lord Ordinary to ascertain what persons are entitled 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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A reclaiming petition against this interlocutor was presented by the defenders; upon advising which, with answers, the Court (1st November, 1804) altered their interlocutor, and found, "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 contributions at the church-door, 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 dissenting Protestants, calling themselves the Associate Presbytery and Synod of Burgher Seceders; and remit to the Lord Ordinary to proceed accordingly."

Against this interlocutor, a reclaiming petition was presented by the pursuers, which was followed with answers.

Counsel were heard in presence.

The Court, by the narrowest possible majority, adhered to their last interlocutor.

Lord Ordinary, *Armadale*. For the Pursuers, *Solicitor-General Blair, W. Erskine, Thomson*.
Agent, *R. Sym, W. S.* For the Defenders, *Erskine, Robertson, Hamilton, Bruce, Maconochie, Jardine*.
Agent, *M. Linning, W. S.* Clerk *Ferrier*.

J. *Fac. Coll. No. 216. p. 481.*

1799. June 25.

JAMES BUCHANAN *against* MICHAEL MUIRHEAD and Others.

ROBERT CORSE, Michael Muirhead, and others, entered into a contract of copartnership for foreign trade and insurance, for twenty-one years, from May, 1795.

By a clause in the contract, it was agreed, that all disputes relating to the affairs of the company, which should arise among the partners or their representatives, ("unless submitted to other arbiters named by the parties,") shall be and are hereby referred to the final determination of the chairman, deputy-chairman, and secretary, for the time being, of the Chamber of Commerce and Manufactures of the City of Glasgow, or any two of them."

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A clause in the contract of a mercantile company constituted for twenty-one years, by which all disputes which should arise among the