who by virtue of the Act have right to a ranking *pari passu* upon the arrested fund. Parties in the position of creditors of a notour bankrupt, if they have used the diligence of arrestment or poinding within sixty days before or four months after the constitution of the bankruptcy, are entitled to a *pari passu* ranking, but there is another class entitled to come in, viz., "parties judicially producing, in a process relative to the subject of such arrestment or poinding, liquid grounds of debt, or decree of payment within such period." Now, what Feld & Allan did was to raise an action in the Small-Debt Court against Ballantine, and after the manner of a Small-Debt Court action, their complaint was in itself a printed form, but along with it there was produced an account which contained the substance of the pursuer's claim, and also the view in point of law upon which that claim was supported. They produced an extract registered protest for £86, 8s. 3d. and a decree for £28, 9s. 11d. against Gallacher, both certainly liquid grounds of debt, and in respect of these they claimed to be entitled to recover the portion of the £8, 8s. 1d. which corresponded to their debt, in comparison with the debt due by the pursuer. This summons was opposed by Ballantine, but the Sheriff gave decree in favour of Field & Allan, and affirmed the proposition that they, in respect of their liquid grounds of debt and by the operation of the 12th section of the statute, were entitled to recover £7, 15s., under deduction of 2s. 7d. of expenses. That sum represented the share of the fund of £8, 1s. 1d. to which Field & Allan were entitled in a *pari passu* ranking with Ballantine. That decree decided the question raised under the 12th section of the statute, and the decree is now final, and cannot be opened up.

I am therefore of opinion upon the whole matter that this diligence of poinding must be allowed to proceed, and that the Sheriff's interlocutor should be affirmed.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

The Court adhered.

Counsel for Petitioner (Appellant)—M'Kechnie. Agent—William Paterson, L.A.

Counsel for Respondent—Thorburn. Agents —Wallace & Foster, L.A.

Thursday, June 1.

FIRST DIVISION.

Sheriff of Roxburghshire.

APPEAL—DUKE OF ROXBURGHE AND OTHERS.

(Before Seven Judges.)

Church—Allocation of Area—Quoad sacra *Parish—Heritors—Act* 7 *and* 8 *Vict. c.* 44, *secs.* 8 *and* 9.

The parish of E. was disjoined *quoad sacra* from the parish of J. In a petition to allocate the area in the reseating of the parish church of J.—*held* (*diss.* Lord Deas, *dub.* Lord Mure) that the heritors of the *quoad sacra* parish were not entitled to claim an allotment corresponding to the territorial extent of their lands, but their claim for family sittings reserved.

Question, whether the *quoad sacra* heritors would still be liable for the maintenance and erection of the parish church?

Observations on case of *Drummond* v. *Heritors of Monzie, &c.*, 1773, M. 7920.

The parish of Jedburgh includes within it the royal burgh of Jedburgh and a large landward district. The parish church was the Abbey Church of Jedburgh, but that structure having fallen into disrepair, and requiring renewal, the late Marquis of Lothian agreed to be at the whole expense of building a new church on the virgin glebe of Jedburgh, of such size as to satisfy the heritors and presbytery of Jedburgh, which church, when completed, was to be handed over to the heritors to be held as the parish church of Jedburgh, the old Abbey Church becoming the property of the Marquis, to be kept as a preserved ruin.

Accordingly in November 1874 a contract of excambion was entered into between the present Marquis of the one part, and the heritors of the parish of Jedburgh of the other part, whereby the Marquis conveyed the newly-erected church, and the piece of the virgin glebe which he had feued from the presbytery, to the heritors, and received in exchange the old Abbey Church, under the obligation of preserving it as aforesaid.

A petition was thereupon presented to the Sheriff praying him to allocate the area of the new church. The only question of general importance, and which gave rise to the present appeal, was, whether the heritors of the *quoad sacra* parish of Edgerston, which had been disjoined from the parish of Jedburgh, were entitled to any share in the sittings of the new parish church.

The finding of the Sheriff as regards that matter was as follows:—"Finds that by decree of the Court of Teinds, dated the 21st day of February 1855, the church of Edgerston, situated within the parish, was, under and in terms of the Statutes 1707, c. 9, and 7 and 8 Vic., c. 44, sections 8 and 9, erected into a parish church in connection with the Church of Scotland, and a considerable portion of what was then the parish of Jedburgh was disjoined *quoad sacra* from the said parish, and along with small portions of the parishes of Oxnam and Southdean, —the whole constituting a district about seven miles in length by about three miles in breadth— erected into a parish *quoad sacra* in connection with the Church of Scotland, to be called now and in all time coming the church and parish of Edgerston: Finds that, in so far as regards the dividing and apportioning of the area and seatings of the new parish church of Jedburgh recently erected, the heritors of the lands so disjoined and erected into the parish of Edgerston *quoad sacra* are not to be considered as heritors of the parish of Jedburgh."

His note as regards that finding was as follows:—"Now, what is the effect of disjoining lands from a parish *quoad sacra*, erecting them into another parish, and attaching them to another church? The church of Edgerston is declared to be a parish church, and the minister and elders are to have and enjoy the status and all the powers and privileges of ministers and elders of such. No doubt this is only *quoad sacra*.

But it was long ago decided in the case of *Drummond* v. *The Heritors of Monzie, Monadie, Crieff, and Others* (1773, M. 7920), that the heritors of the lands annexed *quoad sacra* are not liable to contribute for upholding 'the fabric of the parish kirks from which they are disjoined.' A decision to the like effect was recently pronounced by Lord Ardmillan in the Outer House in the case of *The Scottish North-Eastern Railway Company* v. *Gardner* (29th January 1864, 2 Macph. 537); and although that part of his Lordship's judgment was not affirmed in the Inner House, because it was held not to fall within the conclusions of the summons, Lord Ormidale expressed his concurrence in it. Reference may be also made to the views thrown out by Lord Neaves in the case of *The Duke of Abercorn* (17th May 1870, 8 Macph. 746). No authority contrary to these cases was quoted to the Sheriff. No doubt in the case of *Monzie and Crieff* the heritors of the new parish were found to be liable in the expense of upholding the church in the new parish, but the lands were only annexed *quoad sacra*, and only disjoined *quoad sacra* from the former parish. It was not a disjunction and erection in general terms or *quoad omnia*. It is therefore the same as in the present case. It is true that the heritors of the disjoined lands are under the statute of Victoria not liable to be assessed for the expense of repairing the church and manse of the newly-erected parish to which they are attached, and that the statute requires provision to be made otherwise for that purpose by obligation secured over the lands of the obligant. The statute and constitution of the church also provide that the rents of a portion of the seats of the church (but of a portion only) may be partly applied to that purpose in relief of the obligation. But this is just another way of throwing the burden of supporting the church on those for whom it is provided. For it seems not to make much difference in principle whether the heritor pays such expense for the benefit of himself and his tenants, recouping himself, so far as they are concerned, by the rents which he exacts from them, or that they and he pay it in the other form of seat-rents. The terms of the decree establish that the church and parish were erected for the accommodation of the inhabitants of the district, and it is to that church that they are expected and intended to resort to 'for the word and sacraments.' Accordingly, the lands are disjoined from the parish of Jedburgh *quoad sacra;* they are no longer parts of that parish. It may be difficult to define all that the words *quoad sacra* mean; but surely it cannot be doubted that the preaching of the word and administering the sacraments and partaking are *inter sacra*, and these are the very benefits contemplated by the law in respect of which there is laid upon the heritors the burden and duty of providing and repairing churches, and in respect of which there is given to them, as the counterpart, a right for themselves and the tenants and occupants of their lands in the area of the church. It would surely be an extraordinary thing that the law should provide two parish churches, two parish ministers, and two kirk-sessions for the inhabitants of the same district. It appears to the Sheriff that the disjunction of the lands *quoad sacra* from the parish of Jedburgh would have no meaning if things were to remain in this respect exactly as they were before, and if the heritors in these disjoined lands were still to be liable for the repairing and, if necessary, rebuilding the church of the parish from which they have been disjoined, and entitled to a portion of the seatings therein, and that for the benefit of the inhabitants of a district for whose convenience in *rebus sacris* a new parish church has been erected by decree of the Court of Teinds, in the terms and on the considerations therein expressed."

Against this judgment the Duke of Roxburghe, the Marquis of Lothian, and others, appealed, and argued—This is not the erection of a new church, but simply the substitution of one church for another; and therefore the rights that existed in the old church must be exactly given effect to in the new. The conveyance in the contract of excambion is in favour of all the heritors of Jedburgh, including some who have land only in the *quoad sacra* parish. The upholding of the fabric of a church is a civil obligation, and cannot be affected by a disjunction *quoad sacra*, and if that be so, then, on the principle of *cujus commodum ejus incommodum*, the heritors in the *quoad sacra* parish are entitled to a seat in the original parish church; they are not bound in any way to uphold the *quoad sacra* church, which must be otherwise provided for. A *quoad sacra* church is vested in trustees, and, in point of fact, has nothing to do with the heritors at all. No seats are appropriated to them therein, but everyone pays seat-rents.

Authorities cited—Session Papers of *Drummond*, in Arniston Collection, vol. 107; Erskine ii. 10, 64; *Park* v. *Maxwell*, Elchies and Morison, *voce* Manse; *Reid* v. *Commissioners of Woods and Forests*, 10th July 1850, 12 D. 1211.

At advising—

Lord President — This is an appeal against an interlocutor pronounced by the Sheriff of Roxburghshire in a petition presented to him by the heritors of the parish of Jedburgh for the division of the area of a newly-built church in that parish. The Sheriff, before proceeding to the actual work of dividing the area, thought it right by the findings in his interlocutor to clear away several difficulties that had presented themselves, or had been suggested in the course of the discussion before him. With most of these we are not concerned. But that part of his interlocutor which is objected to principally by the appellants is in these terms:—"Finds that by decree of the Court of Teinds, dated the 21st day of February 1855, the church of Edgerston, situated within the parish, was, under and in terms of the Statutes 1707, c. 9, and 7 and 8 Vict. c. 44, sections 8 and 9, erected into a parish church in connection with the Church of Scotland, and a considerable portion of what was then the parish of Jedburgh was disjoined *quoad sacra* from the said parish, and, along with small portions of the parishes of Oxnam and South Dean—the whole constituting a district about seven miles in length by about three miles in breadth—erected into a parish *quoad sacra* in connection with the Church of Scotland, to be called now and in all time coming the church and parish of Edgerston: Finds that, in so far as regards the dividing and apportioning of the

area and sittings of the new parish church of Jedburgh recently erected, the heritors of the lands so disjoined and erected into the parish of Edgerston *quoad sacra* are not to be considered as heritors of the parish of Jedburgh." But in a subsequent part of his interlocutor, after defining the portion of the area that is to be appropriated to the burgh, and leaving two-thirds for the landward part of the parish, he finds "that the remaining two-thirds fall to be allocated and divided among the other heritors of the parish (excluding as aforesaid) according to their valuations as appearing in said valuation rolls."

Now, the import and effect of this judgment is very clear. It settles that in dividing the area of this new parish church the heritors of lands which are no longer part of the parish of Jedburgh, but have been with other lands erected into a separate parish *quoad sacra*, have no right to claim any portion of the area of the parish church.

The question is one of some importance, and, it may be, of general application, although disputes regarding the division of the area of a parish church are by no means common; and, indeed, these things are, as we know, almost always settled by arrangement. But there can be no doubt that when a new parish church is erected, and where the nature of the work is not merely an extension of the old church or repairs of the old church, but the erection of a new church, the heritors, or any portion of them, are entitled to apply to the Sheriff to have that divided among the heritors according to their legal rights. Now, the legal rights of the heritors in connection with the parish church are, I think, very well settled. I do not think there can be any dispute about what they are. The heritors have the burden, which is imposed by statute, of building and maintaining parish churches, as well as other ecclesiastical buildings, and the buildings which they so build and maintain are in law the property of the heritors. But I need hardly add that they are only property in trust—in trust, that is to say, for the whole body of the parishioners within the parish; and when, in the division of the area among the heritors, the accommodation in the parish church comes to be appropriated, so much to one heritor and so much to another, I think, in like manner, each individual heritor becomes trustee for those of the parishioners that reside upon his estate. The portion of the area that is assigned to him is not his property in any sense of the word. The heritors are joint-proprietors of the parish church itself—in trust, as I said already; but the portion of the area that is assigned to each heritor is given to him, not to be occupied exclusively by himself and his family—not to be shut up, for that is illegal—not to be hired out for money, for that is equally illegal—but to be used for the benefit of the parishioners who are resident upon his estate; so that each individual heritor, after the division is made, is equally a trustee for a portion of the parishioners, as the whole heritors, before the division was made, were trustees for the entire parish. Now, I do not at all doubt that both the burden and the right of the heritors in this matter is civil burden and civil right, and falls to be adjudicated upon by civil jurisdiction only. All that is perfectly clear. The title of the heritors to the parish church is a title founded upon civil law, and their burden to maintain and uphold the parish church is a burden imposed upon them by public statute. But it does by no means follow that those for whom they hold the parish church in trust have civil rights in connection with it. That would be a most dangerous assumption. The parishioners other than the heritors, I apprehend, have no right or interest in the parish church except such rights and interests as are entirely *inter sacra*. They are entitled to attend the parish church to hear the word, and there to have the sacraments administered to them, and they are entitled to the pastoral superintendence of the minister of that church, and they are liable to the kirk-session of that church in all ecclesiastical discipline and censure; and, so far, there can be no doubt that the parishioners are exclusively interested in that church, and, I may say at the same time, exclusively attached to that church, for according to the ecclesiastical law of Scotland it is their proper church, and they have no other. But when a parish is erected *quoad sacra* under the operation of the Statute 7 and 8 of the Queen, and a portion of an old parish is cut off from that old parish and erected into a new parish *quoad sacra*, what is the result to the people of that district which is so disjoined and erected? For answer to that question I look to the case of *Hutton* v. *Harper*, and I really have nothing to add to what I there said, and in which I understood that all your Lordships who were present at that judgment concurred. I said then, as I am prepared to say more shortly now, that the people within the district that is so disjoined and erected have, after the disjunction and erection, no parish church but the new parish church *quoad sacra*. To it alone they are in law entitled to resort as their parish church. They are subject to the pastoral superintendence of the minister and of the kirk-session of that *quoad sacra* parish and church. They must resort there for the administration of the sacraments and the solemnization of marriage, and that is the proper place, as we also held in that case, for their banns to be proclaimed. Now, that being so, the question arises in the present case, *first*, whether the people who formerly were in the parish of Jedburgh, but are now in the parish of Edgerston *quoad sacra*, are not completely severed and cut off from all connection with the parish church of Jedburgh. I am speaking now of the body of the parishioners, not of the heritors, and to that, I think, there can be but one answer—that they are most effectually cut off from, and have no longer any right or interest in, the parish church of Jedburgh, and that their only parish church is the parish church of Edgerston, which, according to the judgment in *Hutton* v. *Harper*, is just as much a parish church as the parish church of Jedburgh.

Well then, if that be so, the question comes to be, whether the heritors, the proprietors of those lands which form the new parish *quoad sacra*, are nevertheless entitled to have a portion of the area of the old parish church of Jedburgh allocated to them in the same way as if the erection of the new parish had not taken place. It is said that they are not relieved from their liability to maintain the old parish church, and that it would be very strange if they were to be

subject to that liability, and not to have the corresponding privilege of having a portion of the area assigned to them. That is at first sight very plausible, but if you remark for a moment what is the purpose for which a portion of the area is assigned to those heritors, I think we shall find there is really no strength in the argument at all. The purpose of assigning a portion of the area to those heritors is that they may accommodate the tenants and residenters upon their estates. But the tenants and residenters upon their estates are bound to go elsewhere, and do not go to the parish church of Jedburgh, for it is no longer their parish church, and if these gentlemen, being, as I have said, trustees for the parishioners, find they have nobody for whom they can use the portion of the area they ask to have assigned to them, it would be very strange that they should still be entitled to have it. They are not entitled to shut it up; they are not entitled to let it out for money; what can they do? They cannot fill it with their own people, and therefore, even if it were assigned to them, they could make no use of it. Now, that seems to me to be a plain practical answer to the demand which is here made. It may very well be that, notwithstanding this, they may still be liable in the old burden of maintaining the parish church of Jedburgh. I am very far from giving an opinion upon that question, because it is not before us, and we could not decide it even if we were willing to do so.

But assuming that that is so—assuming that the heritors of the disjoined district are still liable to bear their share of the maintenance of the parish church of Jedburgh—I do not think it in the least degree follows that they are entitled to what they now demand. It might perhaps have been very properly provided in the Statute 7 and 8 of the Queen that they should be relieved of that burden, or it might very properly have been provided that they were not to be relieved of their burden, although they no longer had any interest in the division of the area, and I think it is to be regretted that the statute did not decide the matter the one way or the other. The truth is, that the legislation in that statute is in some of these respects rather imperfect legislation, and all that we can do is to say what is the natural and necessary legal consequence of that which the statute has done in those cases in which it has not itself provided for those consequences.

I do not at all agree with the view which the Sheriff takes of the case of *Crieff*. I think the authority of that case is questionable. There are a variety of reports of the case, and a perusal of the session papers has rather led me to the conclusion that there was no very general question decided there at all—that the case was one of a very special kind indeed—and therefore I confess I do not attach any importance to that authority. I proceed entirely upon what I conceive to be the direct, legitimate, and necessary consequence of the erection of a parish *quoad sacra* under the operation of the Statute 7 and 8 of the Queen.

My opinion therefore is, that the interlocutor of the Sheriff, so far as it is complained of here, is well founded.

Lord Deas—It is historically known that from a remote period, probably about the time when presbytery was first established in Scotland, down to the year 1874 or thereby, those of the parishioners of Jedburgh who adhered to the Establishment habitually assembled for the purposes of public worship in a portion of the nave of the old abbey of Jedburgh, which has ever since been considered and dealt with as the parish church. In order to adapt it for that purpose, great liberties were from time to time taken with the elegant architecture of the abbey, by roughly building up portions of the windows, introducing an intermediate ceiling, and other alterations, which, although made at much expense, greatly deteriorated the appearance of the venerable pile, as those of your Lordships who have had occasion, as I have had for many years, to hold Circuit Courts at Jedburgh, must often have seen. In the meantime the late Marquis of Lothian, the proprietor of the abbey, whose cultivated tastes, matured by study and improved by travel, naturally suggested to him such a task, had become desirous to remove the blots which hid or defaced the beauty of the building, and marred its effect as an interesting relic of antiquity. With this object the late Marquis in 1869 entered into an agreement with the heritors, including the burgal community of Jedburgh, and with the presbytery, to erect at his own expense a parish church on a different site, such as in all respects would satisfy the heritors and presbytery, and bound himself thereafter to enter with them into a contract of excambion, conveying that church in perpetuity to the heritors, in consideration of their conveying to him all right and interest they had in the existing church (which is therein recognised as being then the existing parish church), the Marquis engaging that after the materials thereof should be removed, so far as consistent with the stability of the ancient building, the abbey should be retained as a preserved ruin, accessible to the public under appropriate regulations in all time coming. After the death of the late Marquis, his brother, the present Marquis, desirous to carry out in all respects the designs of his predecessor, acquired the necessary ground, and erected thereon the handsome new church, the area of which is now sought to be divided, and commenced expensive operations, still in progress when I was on circuit there a few weeks ago, upon the abbey itself, besides erecting (what I do not observe to have been stipulated for) a new manse, in order to get quit of the old manse, as an obstruction to the view of the ancient ruins. On the new church being completed, the deed of excambion and agreement now before us, of 17th and 20th November 1874, stipulated for in the agreement of 1869, and embodying and giving effect to the purposes and conditions of that agreement, was duly executed by all the parties concerned. This deed of excambion formally dispones and conveys the ground on which the new church is built, and the church itself, to the persons therein named and their respective successors, "as trustees for the said heritors of the parish of Jedburgh," that is to say, for the whole heritors of the civil parish, "heritably and irredeemably," and, on the other hand, the committee of heritors appointed for the purpose, "as representing the said heritors of the parish

of Jedburgh, and duly authorised as aforesaid to execute these presents on their behalf," with consent of the presbytery of Jedburgh, disponed and conveyed to the Marquis, "and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole the present parish church of Jedburgh, situated within the abbey of Jedburgh and county of Roxburgh, together with the materials of the said church, and all right, title, and interest of the said parish of Jedburgh, and of the community of Jedburgh, in the said church and materials thereof," the Marquis becoming bound, on the terms already mentioned, as to the preservation of the ruin.

Nearly twenty years before the date of the contract of excambion (viz. in February 1855) the lands now forming the *quoad sacra* parish of Edgerston had been disjoined from the parish of Jedburgh, and erected into a separate parish *quoad sacra*, under sections 8 and 9 of the Statute 7th and 8th of the Queen, c. 44; but it is not alleged that this had had any effect, or led to any change upon the previously existing allocation and possession of the area of the old church, as settled by voluntary agreements in 1793 and 1834, The decree of disjunction and erection was necessarily an echo of the 8th and 9th sections of the statute under which it proceeded. The individual contributors became bound and gave security for permanently repairing and upholding the previously existing fabric of the church, now called the church of Edgerston, manse, offices, and appurtenances, and for payment of the prescribed stipend to the minister. The whole sittings were directed to be specially appropriated in terms of the statute, viz., one-tenth to be free to all comers; a portion, not exceedtng two-tenths, to be let at rents not exceeding a rate to be fixed by the presbytery; a pew to be set apart for the minister, another for the elders, and the remaining sittings to be let in a manner to be agreed on by the ministers and the contributors for the endowment of the church, and the proceeds to be applied to the purposes specified in the statute. No right was conferred on the heritors of the *quoad sacra* district to seats in the church, unless they chose to pay for them. In their capacity of heritors they obtained no unconditional rights, and became liable in no burdens in connection with that church, or as the district assigned to it; and, on the other hand, nothing was said, or, so far as I see, could have been said in the decree, consistently with the statute, to deprive them of any rights of occupancy, or relieve them from any burdens connected with the then existing parish church of Jedburgh.

Matters had been in this position for nearly twenty years when the contract of excambion now under consideration was entered into, and to which no objection is taken as being other than a legal and binding contract. The conveyance in that contract is a conveyance of an heritable subject in favour of the whole heritors of the civil parish of Jedburgh, and the consideration given for it is, in like manner, a conveyance of an heritable subject which previously had been vested in the whole heritors of that parish. The question did not, and could not, arise—what would have been the respective liabilities and rights of parties if a new church had required to be erected at the expense of the heritors. It had not even been determined or ascertained that a new church had become necessary. Mr Bryce, with whose eminent qualifications we are all familiar, had reported that by expending £2700 in the way he pointed out, "the church will become fitted for public worship," with the same amount of accommodation as it then afforded, while Mr Bell, the only other man of skill employed, reported that by an expenditure of £2000 the church "would form an equally suitable and more noble place of worship than could be got beyond the walls of the abbey for ten or twelve thousand pounds." In short, it was not the necessity for a new church to accommodate the congregation, but the laudable desire of the noble Marquis to vindicate the dignity and beauty of the historic building, which led to the agreement under which the new church was erected, and to the contract of excambion subsequently executed.

The question at issue, therefore, rather appears to me to be limited to this—What is the fair and legal import and effect of the contract of excambion of November 1874? The old church accommodated about 1000 sitters; the new church, it was explained at the bar, accommodates about 150 more than that number. The one church has been excambed for the other, and the natural result of that excambion appears to me to be that the parties who were previously in possession of the one should now be entitled to possession of the other. The case is not varied by the fact that the Marquis had to build a church to be conveyed by the excambion, in place of being possessed of an existing church suitable to be so conveyed. It is still a case of excambion of one church for another, and nothing can be more expressive of the nature of the transaction than the word excambion itself, which is both the legal and the conventional name of the contract.

It is true that, although after enlarging the number of free sittings which are proper to be set apart in every parish church, the number to be allocated would have been the same as before, there would necessarily be a change of arrangement rendering judicial regulation necessary; but for this the Sheriff was just as competent where the question arose upon a contract of excambion as if it had arisen in any other way. It is true, as the Sheriff remarks, that the petition craves a division of the area "in terms of law," but that I take to be in terms of law applicable to the agreement which is expressly narrated and founded on in the petition. How far the Sheriff's judgment might or might not, in certain events, preclude a declarator in this Court, it is not necessary here to consider; but I am not, for my own part, disposed either to throw out the proceedings for want of jurisdiction, or to hold them conclusive as amounting to an arbitration. An arbitration certainly they were not, and were never meant to be. They are reviewable process, or they are nothing. It is on the merits that I am disposed to differ from the able judgment of the Sheriff. I think what he should have done was simply to have regarded the new area as substituted for the old—allocating it as nearly as might be as the parties themselves had immemorially allocated it before, and making no further changes than the different arrangement of the seats rendered necessary. There was no expense to be allocated either for building or for repairs. All that fell to be done was to modify and regu-

late the possession so as to give effect to the contract of excambion.

If, however, your Lordships do not think this limited view sufficient of itself for the disposal of the case, I am then of opinion that the first thing to be considered is, who would have been liable for the expense of the church if it had fallen to be built by the heritors themselves?

I cannot find any difference of opinion among the authorities that the two things go together—the liability for the expense of erecting a new church and the right to a share in the allocation of the area of that church.

It is upon this principle that questions between the burgal and landward portions of a parish have been settled. We have the weighty opinion, to this effect, of Lord Braxfield in the case of *Crieff* nearly a century ago (Hailes, pp. 892-3)—"They who profit by a church when built should naturally be at the expense of building it. Here the town must have three-fourths of the area of the church, because three-fourths of the inhabitants of the parish live in the town, and consequently it must pay three-fourths of the expense." In the same case Lord Monboddo said—"If the inhabitants of the town pay nothing, they can have no share in the division;" and the Lord President observed—"If the heritors build the church the area must belong to them." Accordingly the interlocutor of the Court expressly found that the expense of that portion of the church which was allotted to the landward heritors must be defrayed by them according to their respective valued rents, and their share of the area divided among them in the same proportion; and that the expense of the portion allotted to the burgal proprietors must be defrayed by them according to their respective real rents, and their share of the area divided among them in the same proportion (M. 7927).

The same principle, viz., that the burden of building and maintaining the church infers a corresponding right to a share of the area, is distinctly laid down in the late case of *Reid* v. *The Commissioners of Woods and Forests*, 10th February 1850, 12 D. 1211, and runs through all the cases.

It has been suggested that in the present case we are not called upon to consider whether the heritors in the *quoad sacra* parish do or do not remain liable to maintain the church of the old parish, and to rebuild it if that should become necessary. I cannot take that view of the matter. The immediate question, no doubt, is their right to a share of the area. There is no burden at present exigible, because the Marquis has agreed to relieve them of whatever is instantly payable; but their permanent liability either remains or does not remain, and upon that depends their having right or having no right to a share of the area in this process of division, if it is to be regarded, as your Lordship proposes to regard it, as a regular process of that description. To exclude them from all share in the division of the area of the church, without reference to whether they are or are not liable to contribute to the maintenance and ultimate re-erection of the church, would be to divorce two things which in their own nature are, and in the practice of the Court always have been, inseparably united. Such a course would neither be just nor judicial. It is in respect of the permanent liability or of the non-liability alone that our judgment can proceed, whether these words be used in the judgment or not, and that question is, therefore, as I have said, the first point to be considered.

Now, apart from the effect of the *quoad sacra* disjunction and erection, nobody will dispute that in a landward parish liability to build and maintain the parish church rests exclusively and equally on all the heritors in proportion to their valued rents. This is in substance matter of statutory enactment, because although the old Scotch statutes, which I need not go over, bear to lay the burden upon the parishioners, the word parishioners has been invariably construed as meaning heritors. In the present case there is no dispute between the landward heritors and the burgal heritors or proprietors. These two classes of parties are agreed between themselves, so that, for the purposes of this argument, the question is to be taken as arising in a purely landward parish. That question simply is, Does the Statute 7 and 8 Victoria, c. 44, when it is followed by a disjunction and erection of a *quoad sacra* parish, under sections 8 and 9, relieve the heritors in that *quoad sacra* parish from a liability which by the previously existing statute law lay upon them equally with the other heritors of the original parish, to maintain, and, if necessary, to rebuild the parish church.

If we are of opinion that this is the meaning and effect of these sections of the statute, we ought so to lay it down. But, for my own part, I cannot find this in the statute. There is a clear distinction, which was given effect to in the case just mentioned of *Reid* v. *The Commissioners of Woods and Forests*, between a disjunction and erection *quoad omnia*, under the earlier sections of this statute, and a disjunction and erection *quoad sacra*, under sections 8 and 9. That difference is not new. Every lawyer knows that long before the date of this statute the Commissioners of Teinds had and exercised the power in both ways, but the effect of the one was never confounded with the effect of the other. The provisions I have noticed in sections 8 and 9 of this statute relative to the stipends, seat-rents, and supporting the fabric of the new church, manse, &c., contrasted (as was observed in *Reid's* case) with the terms of the previous sections, and make it clear that as to these matters this statute does not destroy the distinction between the one kind of disjunction and erection and the other. Liability for the expense of maintaining and rebuilding the parish church is a civil liability. No ingenuity can plausibly represent it as anything else. It is precisely similar, in this respect, to liability for the stipend. The one is a burden on the lands, and the other a burden on the teinds, and it might just as well be contended that a mere disjunction and erection *quoad sacra* relieved the teinds of the one burden as that it relieves the lands of the other. On the same principle, the uniting of lands to a parish *quoad sacra tantum* does not render the lands so united liable to civil burdens in the parish to which they are so united; as was long ago found in *Park* v. *Maxwell*, 13th July 1758 (M. 8503, and Elchies, *voce* Manse, No. 3), where lands united *quoad sacra* to the parish of Carmunnoch were held not liable to contribute towards building a manse for the parish of Carmunnoch. Bankton accordingly (Book 2, tit. 3, sec. 50) lays down the law thus—

"Part of a parish on some occasions is dismembered from one parish and united to another *quoad sacra* only, *i.e.*, in respect of divine service. This is done where it is more commodious for the inhabitants of the dismembered part to attend the ordinances at the neighbouring parish church than at their own, and only subjects them to the care and charge of the minister of the adjacent parish; but in all questions of a civil concern it remains still a part of the same parish of which it was formerly before the annexation; and the heritors therein are not bound to contribnte to the repairs of the church or manse of the parish to which the lands are united in that manner;" and he cites the case of *Park* v. *Maxwell*, which I have just referred to. Erskine lays down the same doctrine, and says—"But such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish" (ii. 10. 64). The case of *Thomson* v. *Pollock and Others*, 17th Nov. 1808, F.C., which related to the maintenance of a pauper child, illustrates the same principle. The interlocutor of the Lord Ordinary, which was unanimously adhered to, expressly bore to be in respect that the lands which were annexed *quoad sacra* to the parish of Gorbals "are locally situated within the parish of Govan, and that the said act of annexation does not affect the civil rights of the parties."

There can be no distinction, in this respect, between civil rights and civil burdens. In the opinion of your Lordship (the Lord President), concurred in by the other Judges then present (six in number), in the late case of *Hutton* v. *Harper*, 7th July 1875 (2 Rettie, p. 893), your Lordship expressly mentions "the maintenance of churches" among the burdens which, subsequent to the Reformation, have been "naturally and even necessarily classed *inter civilia*." I quite concur in your Lordship's opinion upon that point, as well as in the soundness of the judgment pronounced in that case, which, indeed, has been affirmed by the Court of last resort. But that case stands in contrast to the present. The proclamation of banns there in question was an act performed within the church to satisfy not the civil law, but the rules of the church. It is one of the tritest principles of the law of Scotland that marriage is a civil contract perfected by consent alone. The marriage is just as valid in law without as with the proclamation of banns, which could not well therefore be regarded otherwise than as a *quoad sacra* act. The obligation to maintain in perpetuity the parish church of Jedburgh is an obligation *quoad civilia* attaching to the lands in the district, which have not been disjoined *quoad civilia* from the original parish, and the civil law consequently demands implement of that obligation. The case of *Hutton*, therefore, only illustrates the difference between a *quoad sacra* act and a civil liability or a civil right.

Holding that the heritors in the *quoad sacra* parish of Edgerston remain liable to maintain, and, if necessary, to rebuild the parish church of Jedburgh, I think it follows as a necessary consequence that in a process of division they are entitled to a proportion of the area, unless by prescription or agreement some different arrangement has been sanctioned, which in the present case is not averred.

The only authority which has been supposed to imply the contrary is the Crieff case of *Drummond*, 2d February 1773, F.C., and M. 7920. But that case, when carefully examined, will be found to be quite consistent with the rule *commodum sequiter onus*, and to have been intended in fact to carry out that rule. The reports, or rather notices, of it (for they cannot be called reports) give nothing but the judgment—the effect of which depends entirely on the circumstances, which are not given to any extent, probably just because they were so special that the case could not form a precedent for any other. I have attentively read the session papers so far as extant, and I have come to the conclusion that the judgment had reference to the views contended for by the respective parties in the very special circumstances of that case, and was not meant to disturb the general law as laid down by Bankton (ii. 8. 50) and Erskine (ii. 10. 64), and recognised in all previous decisions, both as to rights and burdens connected with a parish church.

The pursuer of the action was Mr Drummond, whose lands of Logiealmond were disjoined *quoad sacra* from the parish of Monzie, and annexed *quoad sacra* to the parish of Moneidie. The parties who appeared as defenders were—1*st*, The Duke of Atholl, whose lands of Glenalmond were disjoined *quoad sacra* from the parish of Crieff and annexed *quoad sacra* to the parish of Monzie; 2*d*, Certain heritors of the original parish of Monzie; and 3*d*, Certain heritors of the original parish of Moneidie.

The decreet of disjunction and erection referred to had been pronounced in 1702, and included portions of various other parishes, the ground assigned for that decreet of disjunction being distant from the parish kirks. Mr Drummond's lands of Logiealmond, for instance, were upwards of ten miles from the parish kirk of Monzie, but quite near to the parish kirk of Moneidie. The parties being at variance as to the possession which had followed by the tenants of Logiealmond of the kirk of Moneidie, it was agreed to hold certain declarations taken before the minister as evidence (Information for Heritors of Moneidie, p. 6, middle). From these declarations it appeared that from the date of the decreet downwards Mr Drummond's tenants of Logiealmond had been accommodated with seats in and attended the kirk of Moneidie in place of the kirk of Monzie—that up to 1722 they sat in a loft on the north wall of the kirk of Moneidie; that in that year a loft was built for them, at their own expense, on the west wall of that kirk, which was called Logiealmond loft; that they occupied this loft till it was broken down and removed in the course of some alterations being made upon the kirk; and that from that time forward they still continued to come to the same kirk and sat in it wherever they could find room. It was said there had been some formal division of the area of the kirk of Moneidie prior to the date of the decreet, but of this there was no evidence, and it was not alleged that there had been any subsequent division.

Before these declarations were taken, a supplementary summons had been brought by Mr Drummond against the heritors of Moneidie, which is not among the papers preserved. But

it is stated, *narrative*, in the information for the Moneidie heritors, that the leading conclusions of that summons were in these terms—"1*mo*, That he (Mr Drummond) and his tenants of Logiealmond had an undoubted and just title to a share of the area either of the kirk of Monzie or Moneidie in proportion to his valued rent, and that a division, either of the one kirk or the other, ought to be made and a seat set apart for him; and that he should be free in all time coming of the expense of repairing and upholding the church, churchyard, dike, manse, and school-house of the said other church. 2*do*, Or, in case it should be found that he was not entitled to a share of the area of either of the churches of Monzie or Moneidie, that in that case he should be free of any expense of repairing or upholding the same."

The same paper further bears—"These processes having afterwards been conjoined by the Lord Ordinary, it was contended for the pursuer at a calling of this date (6th Dec. 1770) that he was entitled to kirk-room in one or other of the kirks of Moneidie or Monzie, and was only bound to uphold one or other of them, and declared that if he was freed of all burden of the kirk of Monzie, he would, at his own expense, build and uphold an aisle to the kirk of Moneidie for accommodating himself and his tenants; but that if he was not freed of the burden of the kirk of Monzie, the heritors of Moneidie must find room for him."—(Information for the Heritors of Moneidie, p. 4 and 5.)

As regards the heritors of Moneidie, they "declared that they were willing to allow Logiealmond to build an aisle to the church of Moneidie at his own expense; but that, as they had peaceably enjoyed, past all memory, their possession of the body of the church, which was no more than sufficient for their own accommodation, they could not be obliged to give up those possessions in order to accommodate Logiealmond, or to lay any additional burden on themselves."

On the other hand, the heritors of Monzie pleaded in substance that the pursuer Mr Drummond must find kirk-room as he best could in the kirk of Moneidie, in which he and his tenants had been in use to be accommodated, but that he must remain liable to repair the kirk of Monzie. For the Duke of Atholl it was specially contended—"that as the tenants of his lands annexed to this parish had been in possession long past the years of prescription of the seats which they now possess in the church of Monzie, they could not now be disquieted by the pursuer, whose lands had been annexed to the parish of Moneidie, where his people have a right to seats and to attend divine ordinances."

It was in this state of the pleadings that the interlocutor was pronounced, which is said to have been in these terms—"The Lords find that the heritors of the lands annexed *quoad sacra* are liable in their proportion of upholding the fabric of the kirks to which they are annexed, and in no other parochial burden: Find that they are not liable to contribute for upholding the fabric of the parish kirks from which they are disjoined; but that they remain liable in all other parochial burdens in these parishes; and remit to the Lord Ordinary to proceed accordingly."

It is obvious from these quotations that it would be very unsafe, to say the least of it, to hold that the judgment in the case of *Drummond* was intended to alter or disturb the general law, as ruled in previous cases, and laid down by the institutional writers. That judgment rather seems to have been intended to give effect to the usage which for nearly double the period of the long prescription had followed upon the decreet 1702, and to the mutual concessions and express wishes of the parties, with such modifications only as were necessary to make the result arrived at a consistent result. But the principle affirmed after all was, the right to the area and the burden of supporting the fabric of the church must go together; and that is precisely the principle which the appellants seek to vindicate in the present case. They are bound to support the fabric of the church of Jedburgh, and consequently they claim a share of the area of that church. They have no right to any share of the area of the church of Edgerston, and they are admittedly not bound to support the fabric of that church. In both of these respects the case differs from the case of *Drummond*, which, whatever view may be taken of it, cannot form a precedent for the Sheriff's judgment in this case. There was, indeed, in the case of *Drummond* no *quoad sacra* church or *quoad sacra* parish at all. It was a case of prescriptive usage and special arrangement with reference to different parish churches, properly so called, and decided no question of general law. The existence of the judgment in that case could not be unknown to the Judges in the comparatively recent case of *Reid* v. *The Commissioners of Woods and Forests*, for besides being noticed in the Faculty Collection and the Dictionary, it was referred to in a note by the first editor of Erskine, who does not, however, seem to have looked beyond the interlocutor, which, as I have said, is all that is to be found in either of the reports. But the Judges in *Reid's* case obviously did not regard the judgment as disturbing the old doctrine enunciated by Lord Braxfield in the case of *Crieff*. On the contrary, the Lord Justice-Clerk expressly said in *Reid's* case that the disjunction and erection being only *quoad sacra*, the heritors "remain liable for the maintenance of the old church," the new being maintained from the rents of the seats, which the heritors might take or not as they chose; and Lord Mackenzie observed—"If the heritors are relieved from the maintenance of the church they have no right to a division of the area."

It is not because I expect that your Lordships will think the case of *Drummond* to any extent, or in any view of it, a precedent for the Sheriff's judgment here, that I have thought it right to analyse that case thoroughly, but because the imperfect notice of it in the books is calculated to mislead, and the session papers, even to those who have access to them, being diffuse and voluminous, the true nature of it is not easily ascertained. Laying it aside, I venture to say that the authorities are uniform to the effect that at the date of the passing of the Act 7 and 8 Vict. cap 44, the law was that the heritors were bound to build and maintain the parish church, and were entitled to participate in the division of the area in proportion to the valued rent (or real rent, as the case might be) on which they were assessed.

The statute in question does not say that when a disjunction and erection applicable to a por-

tion of the parish takes place, under sections 8th and 9th of the statute, this shall affect either the burden of maintaining the parish church or the right to participate in the area. It is said that this is done by implication. Or rather it must be said (and the current opinion among your Lordships seems, accordingly, now to be drifting to that) that the right is taken away by implication, but the burden remains. This is attributed to imperfect legislation. I can understand that if the Legislature had expressly abolished the right to participate in the area of the parish church, and said nothing about the burden, we might have had to give effect to the abolition, although we thought the legislation imperfect in saying nothing of the burden. But I can find no implication here which, if it applied to the one, would not apply to the other. Nor have any grounds been suggested for such implication which I think a court of law can give effect to, either as to the one or the other. The legislation may very possibly be imperfect; but if so, it is an imperfection which the Legislature alone can supply. If we were to attempt to deal with it we should be legislating and not judging.

None of your Lordships, I presume, will say that the right of an heritor to sittings in a parish church for himself and his tenants is a *quoad sacra* right. I never heard that suggested either at the bar or on the bench, and if there be any authority for it I am ignorant of where it is to be found. It is nearly two centuries ago since the Lords found, in the case of *Lithgow* v. *Wilkieson* (15th January 1679, M. 9637), "that both seats in churches and burial-places were not *res sanctas et religiosas* so as to be *extra commercium*, but were conveyable by infeftment and affectable by creditors,"—that is to say, that they were adjudgeable by creditors along with and as pertinents of the lands; or, where there was a right to a particular aisle or seat secured by infeftment followed by prescriptive possession (of which there are rare instances), that right might be adjudged from the owner. The case of *Lithgow* seems to have been a competition for a family seat between the purchaser of a few acres of the lands, whose disposition made no mention of the seat, and the purchaser of the mansion-house, whose disposition expressly conveyed the seat; but the merits of that competition do not enter into the purpose for which I mention the case.

I may observe, however, that the allocation of a family seat to a principal heritor is simply a subdivision between himself and his tenants of the portion of the area corresponding to his whole valued rent, as was found in the case of *The Earl of Marchmont* v. *The Earl of Horne and Others*, 17th December 1776, M. 7924; so that there never can be a good claim to a family seat unless there be a good claim to a share of the area corresponding to the whole valued rent.

Nor can I see the consistency of holding the right of the heritor to be a civil right, and the right of his tenants to be a *quoad sacra* right. The heritor may farm his own lands—many heritors do—or he may farm a portion of his lands, sometimes larger, sometimes smaller. Is the right to vary from civil to sacred, and sacred to civil, according to circumstances, which are constantly varying? That would be very anomalous, and equally so that the same act of sitting in the church which was *quoad sacra* in the tenant should be *quoad civilia* in the landlord—in other words, that the right to the same seat should be civil or sacred according as an heritor or a tenant happened for the time being to occupy the seat. The only consistent view is that the right must be the same whoever exercises it. If it were a *quoad sacra* right the minister and kirk-session might be expected to have control over it. But it is a century and a-half since it was determined that they have none.—*Heritors of Falkland* v. *The Minister and Kirk-Session* (20th February 1739, M. 7916).

The right to a portion of the area of a parish church is a pertinent of the lands. It is comprehended in the infeftment, and is just as much a civil right as the right to the lands themselves. It is not only a civil right, but it is an heritable right. It descends to the heir-at-law along with the lands, and it passes to a purchaser or other disponee of the lands as part and pertinent, although not mentioned in the disposition. So much is this the case that it cannot, unless under very peculiar circumstances, be separated from the lands, nor even from the occupancy of the lands—the tenant's claim to the sittings corresponding to the valued rent of the lands he occupies, being a claim in his own right, to vindicate which nothing is necessary but production of his lease of the lands, although the lease may be silent on the subject of these sittings. These very restrictions on the power of the proprietor in the use and disposal of the right afford the strongest illustration that can well be given of its being an inherent pertinent of the lands, and never to be held disjoined from them by implication.

In the case of *Duff* v. *Brodie* (29th June 1769, M. 9644) the report bears—"The question was, whether a seat in a church was understood to be carried by a disposition of the lands without being expressed in the disposition?" "The Lords found the pursuer (the disponee) entitled to the seat."

In the case of *Peden* (21st November 1770, M. 9644) a rural estate was purchased by the burgh of Paisley at a judicial sale, without any mention being made of the church-seat. A house and garden in the town of Paisley were at same time purchased by a lady, Mrs Cochrane, who took possession of the seat, and used it undisturbed for several years. The magistrates having then objected to her disponee, Mrs Peden, retaining the seat, Mrs Peden applied to the Sheriff to vindicate her possession. The Sheriff found she had no right to the seat. The Lord Ordinary remitted *simpliciter*, and the Lords unanimously adhered.

Mr Erskine accordingly says (ii. 6. 11)—"The right in the area of the parish church, though it cannot properly be called part of the lands contained in the charter, is yet so closely connected with them that it is carried to the purchaser as pertinent in virtue of the natural right that every landholder has in such a proportion of it as corresponds to the valuation of his lands in the parish;" and he cites the case of *Duff* which I have just referred to.

But it is suggested (and this seems the view mainly relied on) that there are no longer any parties connected with the lands to occupy the relative seats in the parish church.

This, however, depends upon the pleasure of

the heritors in the *quoad sacra* parish and their tenants. There is nothing that I know of to prevent any or all of them continuing to attend the parish church as formerly if they think proper. They may prefer to occupy their free seats in the parish church to paying for seats in the *quoad sacra* church, or they may choose sometimes to attend the one church and sometimes the other. There is happily no thirling of those who adhere to the Church of Scotland to a particular clergyman or a particular church. It is common enough for those of us who have town houses and country houses to take the benefit of the only ordinances known in the Scotch church, viz., baptism and the Lord's Supper, sometimes in the town church and sometimes in the country church, whether it be a proper parish church or a *quoad sacra* church. And there may be those who do not care to take the benefit of the ordinances of either church, but who are not thereby disqualified from occupying the seats appropriated for them in either church, or for delegating their right to do so, temporarily and gratuitously during pleasure, to any friend or friends in the parish, although they cannot let the seats or make them in any way a source of profit. The jurisdiction which a clergyman of the Church of Scotland has over members of his congregation is purely ecclesiastical, and of the slightest possible description. The ordinance of baptism may be duly administered, and marriage may be celebrated quite consistently with the rules of the Scotch church by any ordained clergyman at any time and in any place. Baptism in private houses by established and dissenting clergymen are common, and marriages in Scotch churches, in modern practice at least, are all but unknown. Admission to the sacrament of the Lord's Supper is refused only on the ground of objectionable life or doctrine; but even this refusal does not affect the right of the party, where he has that right, to sit in the church, or any of his other civil rights.

Moreover, in this question of division of the area of a parish church, the law does not inquire whether the heritor and his tenants will attend the parish church or not. It is enough that they are capable of attending—that is to say, that they are examinable persons, which they are held to be if twelve years of age. In allocating the area of a parish church among the heritors no distinction falls to be made between churchmen and dissenters, whether Roman Catholics, Episcopalians, Free Churchmen, United Presbyterians, or dissenters of any other class. The right, as I have said, is a pertinent of the lands, and does not depend on the religious views either of the heritor or his tenants for the time being, or the churches which they habitually attend. Accommodation falls to be provided for two-thirds of the whole examinable inhabitants upon these lands, whatever may be their creeds, of which accommodation they may or may not avail themselves at their pleasure.

It was so decided in the case of *Tingwall*, 22d June 1787, M. 7928. The Lord Ordinary found "that when it becomes necessary to build a new church the heritors of the parish are bound to provide one sufficient for the accommodation of the parishioners capable of attending public worship; and that this is the burden under which they acquired and held their estates." The Court made this judgment more definite by finding that the heritors "are obliged to build a church capable of containing two-thirds of the examinable persons in the parish not under twelve years of age, and remitted to the Lord Ordinary to proceed accordingly."

The report also bears that "this was laid down as a general rule to be observed in all time coming."

The rule has accordingly been held fixed and enforced ever since wherever it has been sought to be enforced. It was commented on and considered in that view in the comparatively recent case of *M'Leod* v. *Carment*, 9th February 1830, 8 S. and D. 475. The direct question in that case was, whether the large portion of the population of the parish of Rosskeen who spoke the Gaelic language fell to be taken into account in building a new church. The practice of the clergyman was to preach in Gaelic on one part of the Sunday and in English on the other. Lords Glenlee and Cringletie, without impugning the general doctrine, raised a doubt at first whether the fact of two services being provided, at neither of which could it be expected that both the Gaelic and the English population should attend, did not make the case distinguishable from the case of dissenters. The Lord Justice-Clerk (Boyle) said that the question was one of the most important of the kind which could occur—"whether in providing additional accommodation we are to look to the language spoken, and because one-half is Gaelic and the other half English, we are only to provide for half the population. This certainly has the merit of novelty. The principle would just lead to this—that if the heritors can show that part of the population are Catholics or dissenters who will not attend, they are to be left out of view. This doctrine was never entertained in regard to difference of religious opinion, and it should not be listened to on account of difference of language."

Lord Pitmilly observed—"We can have no difficulty that we are not to take into view that the one-half is English and the other half Gaelic, any more than if they were dissenters. We are to hope all will be able to attend. No doubt the objection has the merit of novelty, but that is a demerit in a court of law; and as there is no authority or dictum to support it, we must hold that the church should be built to accommodate two-thirds of the whole examinable population."

The case was allowed to stand over till a subsequent day, when both Lord Glenlee and Lord Cringletie stated that on consideration they concurred with the opinions of the Lord Justice-Clerk and Pitmilly, so that the judgment was unanimous.

Having regard to these undoubted principles of law, I am not able to see grounds for depriving the heritors in the *quoad sacra* parish of the pertinential right inherent in their lands simply because there is a *quoad sacra* church in which they may obtain seats by paying for them. It is true they and the other heritors did not build this church, but they gave the former church in excambion for it, which was substantially the same thing. If they have been benefited to any extent by the generosity of the noble Marquis,

the heritors of the original parish have equally been so. They would be equally liable with these other heritors to rebuild the church if it were burned down to-morrow, and they are equally liable with them to repair it so soon as it requires repair, whether by natural decay or by dry-rot getting into it, or by a storm destroying the windows, removing the slates in whole or in part, or from any other cause.

On the whole, I am of opinion—1*st*, That, taking the case upon the contract of excambion, the one church must be held to come in place of the other, and the heritors generally should be held entitled to continue in possession of the one as they were of the other. 2*d*, That, taking the case in a more general view, the result is to entitle the whole heritors to participate in the division of the area of the church in the same proportion in which their lands are liable for its support.

Lord Neaves—This case is one not unattended with difficulty. It comes before us in peculiar circumstances as regards the facts, and in a peculiar form as regards the pleadings.

A new parish church for Jedburgh having lately been erected, it became necessary to have a division and allocation of its area. In 1855, now twenty years ago, a considerable portion of the parish of Jedburgh was disjoined from the rest, and erected into a parish of Edgerston *quoad sacra*. In the division and allocation of the proper parish church, now in course of being made, the question has arisen whether the heritors of lands in the *quoad sacra* parish of Edgerston are to be admitted to, or excluded from, the division. That question having come before the Sheriff, he has decided that the *quoad sacra* heritors are to be excluded, and against that judgment an appeal has been entered by the excluded heritors. No appearance has been made by the other heritors, or by any one to support the Sheriff's judgment.

In ordinary circumstances perhaps this Court might be justified in altering the judgment complained of, in respect that it is not supported by an appearance on the part of those in whose favour it was pronounced. But the view has been taken, and in that view I cannot refuse to concur, that this allocation being a matter of public and permanent interest, we ought not to dispose of it merely as a case in absence and *causa incognita*, but ought to consider it upon the merits, and support the Sheriff's judgment if we think it right. At the same time, it cannot be doubted that the non-appearance of those who ought to have been respondents has placed us at considerable disadvantage.

On the merits, it must be confessed that the case is attended with a good deal of difficulty, and suggests ulterior matters that may possibly occur in this or other causes of the same kind, which require very grave consideration. The difficulties thus suggested are mainly owing to the defective and unsatisfactory or incomplete nature of the provisions of the Act of 7 and 8 Vict., under which mainly the erection of the new *quoad sacra* parish was carried out.

The basis of that erection necessarily was that the original parish was too large for its due ministerial administration by the existing ecclesiastical arrangements, and that the inhabitants of a specified portion of it should be detached from the old parish and placed under the spiritual and ecclesiastical control and discipline of a new and separate minister and kirk-session. The necessary effect of such a step was to remove a large portion of the existing congregation of the original parish, and to that extent to diminish the parties adhering to it, and not only liberating the new district from attendance on the old parish church, but actually excluding them from it, and ordering them to worship and attend ordinances in the new parish church, under the new minister. The logical accompaniment of that change should have been that if not the whole area, yet at least a large portion of the area hitherto occupied by those who were now extruded should be allocated among those who remained, thus making room for the assumed increase of the parishioners, and disposing of the sittings thus left vacant. But from a fear, probably, of going beyond the strict limits of a *quoad sacra* arrangement, no such measure seems to have been adopted—at least, no express enactment on the subject is made—and I cannot help thinking that if the old parish church had still stood and been available there would have been great difficulty in finding any warrant or power to alter the existing allocation of the area, and a large portion of it might still have been appropriated to the use and service of absentees. It is certainly an anomaly in the case that now, at the distance of twenty years, we are called upon and considered competent to make a new allocation, which was just as necessary and proper, but which may not have been held competent, at that early period as it is now.

Had the new church of Jedburgh come into existence in the ordinary and usual way, we should have stood face to face with one of the chief difficulties that attend this case. The church would have been built by the heritors, and the double question would at once have arisen, whether the whole heritors were bound to contribute to its erection, and if the *quoad sacra* heritors were so bound, whether they could be excluded from the allocation of area in the church which they had thus concurred in erecting. That same question occurs here, not practically but speculatively, as bearing upon the general position of parties, and it is impossible to deny that its solution has an important influence on the practical point which now occurs. None of the heritors have been put to the expense of building the new church, which has been erected and presented to them by the liberality or generosity of the Marquis of Lothian; but even now questions will hereafter arise as to the maintenance of the church, and ultimately even as to its reconstruction if it should be injured or destroyed. I cannot, however, hold the arrangements thus made amount to an excambion in a proper legal sense of the old church so as to make the old allocation to be transferable to the new church. Physically and literally it is impossible to do so, and the new church and its area must be divided of new, nor do I see any specialties in the case to prevent or exempt us from looking upon the present as a new allocation as at the date at which it is now made.

With regard to the question as to the liabilities of parties as to maintaining of the old church, the Sheriff in his note has very summarily and

very easily got over these difficulties. He lays it down as being quite fixed as a general rule that heritors of lands annexed *quoad sacra* are not liable to uphold the parish church from which they are disjoined. But I cannot concur in this positive opinion. The case of *Drummond*, on which it is rested, does not appear to me to rule a case like the present. The annexation there, which occurred more than one hundred years ago, was not identical with that which was effected here under the modern Act.

One difference is suggested—and a very essential one—by the very first finding of the Court in the case of *Drummond* referred to, viz., "that the heritors of the lands annexed *quoad sacra* are liable in their proportion of upholding the fabric of the kirks to which they are annexed." This being found, it was reasonable, if not inevitable, that the other and correlative finding should be "that they are not liable to contribute for upholding the fabric of the parish kirks from which they are disjoined." But no such combination of findings could here be pronounced, and therefore the supposed parallel between the cases is destroyed. It cannot here be found that the annexed heritors are liable proportionally in upholding the *quoad sacra* church, for no such liability is or could be imposed upon them, it being a statutory condition of the erection of such a *quoad sacra* parish, not only that a church shall be provided at first, but also that "due provision shall be made for the future maintenance of the fabric of the said church"; and this accordingly appears to have been done in the present case, it being expressly set forth that the petitioner Mr Rutherfurd "had undertaken and was ready to make provision for the maintenance of the fabric of the said church."

It seems plain in this way that the annexed heritors could not bring themselves literally under the case of *Drummond*, and could not maintain that they would have a double burden to bear if they were still to maintain the original parish church. There may be other grounds for their claiming exemption from maintaining the old church, but the result of such a claim must be considered as doubtful, and cannot be anticipated as a certainty in the way laid down by the Sheriff, and upon this point I offer no opinion.

If the annexed heritors are virtually secured against the expense of maintaining the *quoad sacra* church—and they seem undoubtedly to be so to some extent—there is not the same equity in their demanding a cessation of their liability for maintaining the old church, and that burden might conceivably be incumbent upon them without injustice and without its entitling them to a share of the old area. The contribution of heritors to maintain a church and a minister in every parish is not a mere counterpart of their sharing the area and having sittings. Their obligation out of their tithes to contribute to the support of the ministry is quite independent of that, and is the essential idea of an established church—that the land of the country should provide the means of general Christian civilisation. An heritor cannot escape from such liability by being a dissenter or a papist or a Jew. We live in a Christian country—a Protestant country—and where Christianity is to be taught and upheld for the national benefit throughout all parishes, and no parishioner, *i.e.*, heritor, can escape the liability by declining to go to church, or going to another church which he may prefer, either from cheapness or any other reason.

Prima facie, all the heritors of a parish are bound to bear this tax, just as their teinds are due to the minister. The annexation of lands to another parish, whether new or old, *quoad sacra tantum*, does not *prima facie* infer a change of liabilities *quoad civilia*, which money payments undoubtedly are.

Neither can it be said that the denial of seats in the proper parish will extinguish the liability to contribute—more especially when the arrangement stands as it does here; that the annexed heritors have no similar contribution in their own parish. They may have other inconveniences to balance their general conveniency, but they are not liable in more than once and single payment of the expense of maintenance.

Coming to the point immediately before us, it is this—A new parish church of Jedburgh has been obtained, and it is necessary to divide and allocate its area. Such a step is inevitable, for, as I said before, it is impossible to transfer the old allocation to the new area, which is not likely to correspond with it either in shape or extent. The conflicting views are these—Shall we divide the area among all the heritors of the original, and still legal, parish, or only among those heritors who are not disjoined? This question drives us to the consideration, What is the practical object of the division. Except for practical uses, the division might stand over indefinitely and the general right of the heritors in the area remain *pro indiviso;* still some question of importance arises in connection with the matter. But it seems difficult, and impossible in my view of the case, to resist the view that it is for occupation that the division is made—it is with reference to sittings in the church during public worship that the process of division is to be gone through. Now, on that basis the practical and all-important question comes to be, shall we include in this occupational division—this allocation of sittings—those who cannot, or cannot legally, occupy or sit there, to the exclusion of those who can and ought to be there; for a want of room may thus be the result, the common case of a new parish being that there is an increase in the population of the whole. The rateable allocation of the area among the whole heritors would virtually ignore or render useless the new erection of the church *quoad sacra*. It seems difficult to adopt or reject the Sheriff's view without holding either that the *quoad sacra* heritors may hold sittings which those who need them are excluded from, or that they may turn those sittings to profit by letting them to whom they will. In the one case they would be playing the part of the dog in the manger; in the other they would be making the transfer of their seats a matter of merchandise, for they themselves are under a perpetual ecclesiastical *alibi*, being bound to be at their assigned post elsewhere on all days of public worship.

I have not much more to add to what I have said, except to notice that I think the decision lately pronounced as to the proclamation of banns, though a very important one, does not bear upon the particular question here at issue. I hold that the meaning of that was, that the pro-

clamation of banns was to be made in the church where the parties about to be married, and those of their neighbours more immediately connected with them, were most likely to be, and by law expected if not bound to be; and that there was the proper and appropriate place for announcing their intention to their neighbours, and giving an opportunity to those neighbours who knew them best to forbid the banns, if the banns should be liable to be forbidden. But that does not in the least touch the question now before us.

Upon the whole, although I do not concur in all the views of the Sheriff, and in particular would most studiously avoid anticipating many of the difficulties that may arise as to the erection of a church and other questions, I cannot do otherwise than concur in adhering to his interlocutor. I may mention that, even with the prospective views of liability, I cannot think it clear that, although under the general law heritors erecting a new church are bound to erect it sufficiently to provide for the whole examinable persons in the parish,—if the parish church were to be destroyed and another to be erected, and if the examinable persons in the old parish remaining were not increased, but there was an immense increase in the examinable persons in the *quoad sacra* parish,—I cannot think it a clear point (I can scarcely venture to say I think it clear the other way) that the increase of the examinable persons in the *quoad sacra* parish would make it incumbent upon the heritors to rebuild the parish church upon the footing of meeting the expansion that took place elsewhere in a legally recognised church with which they had no sacred connection. Without going into detail, I think that the views urged so ably by Lord Deas would come to this, that the erection of a parish church *quoad sacra* may be nullified in the manner that is now proposed by leaving the old church as crowded as ever. As to the choice of a church, that is another thing; but we must look to the law. The law is, there ought to be a new church; it is there that they are to be amenable to discipline, if discipline is to be used; it is there that they are to receive the sacraments—and to continue to make provision for them in the old church is to say that the parishioners who remain are to be cramped and inconvenienced, which appears to me to be inconsistent with the object of a *quoad sacra* church, viz., to relieve the crowded parishioners by carrying off a portion of them, and making a vacuum which will admit of the expansion of the others.

Lord Ardmillan—The newly erected parish disjoined from Jedburgh, and now called Edgerston, affords an accommodation which the law holds to be the legal and appropriate accommodation for the inhabitants of the new district forming that new parish. I quite agree with your Lordship in the chair that the law, without compelling attendance, assumes the attendance of all within the district at that new church. The parishioners are provided with accommodation, and are legally held to be there accommodated. But the heritors in the parish of Edgerston have undoubtedly rights of property within the old church, within the parish church of Jedburgh. I think the right of each heritor is divisible on principle into two parts. So far as his personal right to attend in his place in that old church goes, it is a proper right of property for his own benefit. In so far as for the benefit of tenants, cottars, and dependants, it is a territorial right of the nature of a trust for them; and I adopt what I think your Lordship in the chair has most clearly explained,—the distinction between the two. We have no question here raised about family sittings. I wish at present to give no opinion about that. A claim for family sittings may be much stronger than any claim now made; but the claim now made is for territorial sittings, and I think that while the right of the heritor is a civil right, the right of the beneficiaries for whom he holds in trust the territorial right is a right *inter sacra*. It has been decided that the proclamation of banns is *inter sacra*, and that being decided, effect is given to the principle in the case of *Hutton* v. *Harper*. But if the proclamation of banns be *inter sacra*, is the proclamation of the gospel not *inter sacra?* Is the hearing of the gospel not *inter sacra?* Is the worship of the church not *inter sacra?* To use the words given in the old Act, is the having recourse to it "for word and sacraments" not *inter sacra?* I think it is in every one of these respects; and therefore I view the decision in the case of *Hutton* v. *Harper* as having great weight on the question now before us. I think that, whatever may be the claim—on which I do not at present venture to adjudicate—of the heritor to a right to a family sitting in the new church at Jedburgh, which has now been erected by arrangement, through the generosity of Lord Lothian,—whatever may be the extent of the heritor's right to family sittings there, I do not think he has a right there, as a civil right, to the territorial trust for the benefit of those who dwell in the *quoad sacra* parish of Edgerston. These parties themselves are not thirled so as to be compelled to attend, but they are regarded in law as attending appropriately and legally that church at Edgerston, and I think they attend it in the exercise of a right which is in them *inter sacra*. Upon that view I think the Sheriff has rightly decided. I think his judgment is a very complete and clear judgment, though I do not agree with all the terms and varieties of opinion, some of which are not quite relevant to this; and on the whole matter I think we should adhere to the judgment of the Sheriff, very much—indeed, almost entirely—on the views so well explained by your Lordship in the chair.

Lord Ormidale—In this perfectly novel case, as it appears to me to be, the question for the decision of the Court is, Whether the appellants, whose lands are situated within the recently erected *quoad sacra* parish of Edgerston, are entitled to have allotted to them a portion of the area or sitting accommodation in the new church of the parish of Jedburgh, commensurate with their lands.

It does not appear to me that this question can be affected by the circumstance that the new church of Jedburgh has been built in consequence of, and in accordance with, the transaction referred to in the record of the nature of an excambion between the Marquis of Lothian and the other heritors of the parish. The proceedings now in question, which have been taken for a division of the area or sittings of the church, do not depend on any such specialty. The peti-

tion is presented to the Sheriff by, and in the name of, the Marquis of Lothian, "as the principal heritor of the parish of Jedburgh," and of William Millar, solicitor, Jedburgh, as "clerk of the heritors of said parish, for and as representing said parish." And after setting out that a new church had been completed, and handed over to, and received by, the heritors, and is now the church of the parish of Jedburgh, and that it was ready for occupation, but that it was necessary before occupying it that it should be "divided amongst those having right thereto in terms of law," the petition prays the Sheriff to proceed with the division accordingly.

There being, therefore, nothing special in the case arising out of the transaction between the Marquis of Lothian and the other heritors of the parish, I proceed to consider the question as if it had related to a new parish church built in consequence of the decay or insufficiency of one which had previously existed. And in so dealing with the question, I am disposed to think that it must be answered adversely to the appellants, and in conformity with the Sheriff's judgment.

The lands belonging to the appellants and the parishioners residing in these lands are within the newly erected *quoad sacra* parish of Edgerston. The district, or the greater part of it, comprehended by this newly erected parish, was disjoined from the parish of Jedburgh, and erected into a new one in virtue of the Act 7 and 8 Victoria, cap. 44, entituled, "An Act to facilitate the disjoining or dividing of extensive or populous parishes in that part of the kingdom called Scotland." It is true that the disjunction and erection was only *quoad sacra*, but it cannot be doubted, I think, that the right to the occupancy of a church for the purposes of Divine worship and the dispensation of religious advances, are of the nature of *res sacra*, and, if so, it necessarily follows that the connection of the parishioners, including the appellants resident within the new *quoad sacra* parish, is now, in regard to church accommodation, with the new *quoad sacra* church, and that their previously existing connection for that purpose with the parish church of Jedburgh has been severed. It would be very anomalous, and I think most unreasonable, and contrary alike to the terms and objects of the statute, to hold that the appellants, in respect to their lands which are within the newly-erected parish—the church of which has been substituted by statute as their proper place of worship instead of the church of Jedburgh—should nevertheless be entitled to accommodation in the latter as well as in the former. Supposing they were held to be so entitled, they and their lands could not be said to be disjoined from the old and annexed to the new church and parish even *quoad sacra;* and in this way the statutory disjunction and erection of the *quoad sacra* parish of Edgerston might be in a great measure, if not entirely, rendered nugatory and unmeaning—a result all the more startling when it is kept in view that it would be brought about by the very individuals who took a leading part in getting the new *quoad sacra* parish of Edgerston disjoined and erected.

Nor am I able to understand for what legitimate object the appellants can desire to have a portion of the area of the parish church of Jedburgh allotted to them and the parishioners resident on their estates, seeing that they have such accommodation more conveniently in the church of Edgerston. They cannot use at the same time sittings in both churches. And they are not entitled to dispose of to others, as if they belonged to them in property, the seats in either church, or to insist that they should remain unoccupied. The area or sitting accommodation in a parish church does not belong to the heritors, and cannot be disposed of by them like the rest of their property. It pertains to them merely, and at most in trust, for the parishioners residing on their estates, who again have no right to them except for religious purposes. But as for all such purposes the appellants' estates have been disjoined from the parish of Jedburgh, and annexed to the newly erected parish of Edgerston, there are in truth and reality, no parishioners for whom the appellants can claim sitting accommodation in the church of Jedburgh, and consequently the appellants' right and interest to maintain the present controversy entirely fails.

These are the grounds upon which my opinion has been formed—that the Sheriff's judgment appealed against is right, and ought to be affirmed. And in coming to this conclusion it does not appear to me to be necessary to determine whether the appellants, if they are to have no accommodation in the church of Jedburgh, are bound to contribute towards the expense of maintaining the fabric of that church.

There are, indeed, no *termini habiles* for determining that question in the present case; and for myself I desire to reserve my opinion in regard to it. I may remark, however, that the case of *Drummond* v. *the Heritors of Monzie, &c.*, 1773, Mor. 7920, seems to have been different in some important particulars from the present. There no new parish, even *quoad sacra*, was erected as here—the portion disjoined from an existing parish having been annexed to another already existing parish. There, also, differing from the present case, the heritors of the disjoined lands, while they were, on the one hand, held "not liable to contribute for upholding the fabric of the parish kirk from which they are disjoined," were, on the other hand, held liable "in their proportion for upholding the fabric of the kirk to which they were annexed." But here, as in every case of the erection of a *quoad sacra* parish in terms of the statute, provision is otherwise made for keeping up the fabric of the church. Neither can I very well see how the observations of the Judges in the case of *Drummond*, which was raised and decided under essentially different circumstances from the present, and, of course, long before the passing of the Act under which the disjunction and erection now in question took place, can have much, if any, application to the present case. A similar remark may be made in regard to the *dicta*—some of which have been referred to—of the text writers and other authorities, who did not and could not deal with such a question as that we have been here called upon to dispose of.

For the reasons I have now stated, I am of opinion that the judgment of the Sheriff ought to be adhered to, and the appeal dismissed.

Lord Mure.—There are two very important questions raised here. The first is, whether the heritors in the disjoined parish *quoad sacra* of

Edgerston are entitled to share in the area of the new church built in the parish from which they have been disjoined? And the second is, whether, if they are not so entitled in the ordinary case, there are any specialties connected with the excambion upon which this new church of Jedburgh was built which can give them that right?

Now, neither of these questions is raised in a satisfactory shape, but very much the contrary, because they have been argued to us entirely *ex parte*, and I am free to confess I have had very considerable difficulty in forming an opinion upon either of them.

The solution of the first of the two questions depends on whether these heritors are still liable in the expense of repairing or rebuilding the church of the parish from which they have been disjoined. Are they still burdened with this, or are they freed from it? Because it is, I apprehend, a settled rule that when a party contributes to the erection of a church in respect of his having property in the parish in which the assessment is raised, it is that fact which gives him a claim to a share in the area of the church. Now the Sheriff has held that these heritors are freed from this claim, and on that ground are not entitled to any share in the seats in the area of this new church; and if that were so—if the effect of this disjunction was to free them from that burden—I should have little doubt in expressing an opinion in favour of the result at which the Sheriff has arrived. I think there is a great deal to be said in favour of that view, and in favour of this, that the rule which the Court applied in the case of *Drummond* might upon consideration be applied to a case of this description. But that is by no means clear; and if these heritors still remain subject to the burden of supporting the old church, on the grounds so strongly stated by Lord Deas in his opinion, it is very difficult to say that they are not to be entitled to the correlative right to a share of the area of that church in the old parish, although by force of the new erection they may be declared to be heritors in that new parish, and in that view have now no property in the parish from which their property has been disjoined. The effect of the Act of 1844 is in some respects remarkable, because it makes distinct provision for the building of the church in a *quoad sacra* parish, and the repairing of that church, which tends to show, I think, that the Legislature meant to leave the burden with reference to the old parish where it was before. The lands, by force of that statute and the decreet and proceedings of this Court following upon it, have been taken out to a certain extent from the parish of Jedburgh, and the appellants, in that view, are no longer heritors of the parish of Jedburgh with reference to the church to which the people on their estates are required to go. But these main questions, I take it, cannot be satisfactorily decided here just now. They have not been argued to us, and they cannot be authoritatively settled by any decision we pronounce in this case. Now, that being so, I wish to be understood as not giving any decided opinion upon the point one way or another; and, upon the whole, the result of my opinion rather tends to this—that the Sheriff may be right in the view he takes, or at all events is not wrong, as to the application of the principle in the *Drummond* case, and that on this ground he is right in his judgment. I am not prepared to differ from his result on that ground.

But upon the other point—the effect of the excambion—that is to say, the specialties of the case, which were put to us very strongly by the Dean of Faculty—I am inclined to take the view which has been expressed by Lord Deas. I have no doubt it might have been made a matter of express arrangement at the time that the rights of the parties to the area or the seats in the new church were to be precisely of the same description as those they had in the old. I think it was a very natural arrangement to have made; but no such express declaration appears to have been made. But notwithstanding that, looking to the nature of the transaction, which was not the building of a new church in the ordinary sense of the matter by the heritors of the parish, but the exchange of the old church which they were in the course of proposing to repair, I am disposed to hold it was fairly implied in the transaction which took place between them at that time, that although certain of them have had their lands disjoined *quoad sacra* from that parish, they were to have rights in the new church similar in substance to those which they had in the old. Giving the fullest effect to the statute of 1844, although their lands have been disjoined from the parish, and several of them, I believe, have no property in what was the united parish of Jedburgh, looking to the authorities in the book (there are several cases noted in Dunlop, such as the *Dunroy* case, and that of the *St Andrew's College Church*) where the Court held that heritors who had no property in the parish, but who had acquired a certain civil right in the old parish church, were entitled to retain that right in the division of the church. I am inclined to hold there was an implied contract in the present case to that effect, and I should adopt the views of Lord Deas upon that point. I think the fact that the body of heritors do not appear here to oppose the application tends to show there was some such understanding among them at the time the excambion was entered into.

Lord Gifford—I concur in the opinion expressed by your Lordship in the chair, and in the result arrived at by the majority of your Lordships.

I am of opinion that the heritors of lands in the disjoined *quoad sacra* parish of Edgerston are not entitled as such to any share or allocation of the area of the newly-built parish church of Jedburgh, but that the area of that new church, after setting apart one-third thereof for the community of the burgh of Jedburgh, must be allocated and divided among the heritors of the existing landward parish of Jedburgh, excluding the district forming the *quoad sacra* parish of Edgerston.

The disjunction and erection of the *quoad sacra* church and parish of Edgerston was effected on 21st February 1855 by a decree of the Commissioners of Teinds, pronounced in terms of the Statute 7 and 8 Vict. cap. 44. The decree bears that the church of Edgerston is erected into a parish church, and that the district therein specified is erected "into a parish *quoad sacra* in connection with the Church of Scotland, to be

called now and in all time coming the church and parish of Edgerston." The minister and elders of Edgerston Church are declared to have and enjoy the status, the powers, rights, and privileges of a parish minister and elders of the Church of Scotland, and provisions are made for the patronage of the church and parish of Edgerston, and for various other incidents attending the erection of a *quoad sacra* parish. It is clear, therefore, that the new district marked out as Edgerston parish is no longer *quoad sacra* a part of the original parish of Jedburgh, although it is still a part of the original parish *quoad civilia.*

The question then arises—What rights, duties, and privileges are included under the expression *quoad sacra* in the sense of the Statute 7 and 8 Vict. cap. 44? What parochial or ecclesiastic rights, duties, or burdens are transferred from certain parts of the old parish of Jedburgh to the new parish of Edgerston, and what rights and duties are to remain as before?

Now, it may be, and I think it is, extremely difficult accurately and precisely to define abstractly what are *inter sacra* and what are *inter civilia*, but into that wide and intricate region I do not need to enter, for the question is limited to the special meaning and intention of this particular statute—What are *inter sacra* in the sense of this Act? Now, keeping in view the purpose for which the *quoad sacra* church and parish have been erected, I cannot doubt that it was intended that the inhabitants of the newly-erected district should resort for worship and for the ordinances of religion to the newly-erected *quoad sacra* church; indeed, under the old practice in disjunctions, there used to be a decerniture to that effect, and if so, then they are no longer expected to worship in the church of the original parish, and that no seats will require to be provided for them in any new parish church erected for the original parish. Indeed, the very purpose of providing a *quoad sacra* church is that by reason of the increase of population in, or the local situation of, the disjoined district, or for some similar reasons, it is judged expedient that the population of a particular district shall no longer be under the ecclesiastical superintendence of the minister of the original parish, nor have accommodation provided for them in the original parish church; but in things ecclesiastical—for this, I think, is the true meaning of the word *sacra*—they shall be held to be parishioners of the newly-erected district. The right of sitting in a church to hear preaching, or to join in worship, or to partake of ordinances, is clearly an ecclesiastical privilege or duty, and not in the sense of this statute *inter civilia.* The property of the seat itself—that is, either the ground it occupies or the materials of which it is constructed—may be the subject of a civil suit or of civil question, but the use and enjoyment of the seat is an ecclesiastical privilege—that is, in the sense of this Act is *inter sacra.* In this view it is quite as much *inter sacra* to hear preaching or to receive sacraments as to preach or to administer sacraments. In the provision of this statute surely preaching and prayer are *inter sacra*, and hearers and worshippers, as much as those who conduct the service, are engaged in a sacred duty. It seems to follow that whenever a new allocation of the area of the original parish church becomes necessary it shall be confined to the parishioners residing within the limited district, and shall not include those within the newly-erected territory.

It is true that although the area of the church is intended for parishioners, it is in point of form allocated to heritors, but this seems to be a mere mode of arranging the use of the area, the heritors being trustees for the parishioners, who are often a more fluctuating and changing body.

It is also true that the expense of providing a new church is laid upon the heritors; but this has been introduced by custom, for originally the burden both of providing and of maintaining the fabric of the church was laid upon the parishioners of the parish.

The question of the expense of the new church does not arise in the present case, for the new church has been provided under a contract of excambion, instead of the old one; but I am not prepared to say that it follows from the decision now to be given that the heritors of the disjoined or *quoad sacra* district would not be liable to be assessed for the expense of the original parish church. It might very well be that the use of the area of the fabric might be held *inter sacra*, at least so far as religious ordinances are concerned, and yet the expense of providing the fabric might be held a civil burden, which is not removed by a mere *quoad sacra* disjunction. The simple payment of money, or the simple obligation to pay money, is always a civil matter. But this question does not arise in the present case.

If it were to be held that notwithstanding the disjunction the heritors of the disjoined district were still entitled as such to a share of the sittings in the original church, it could only be for the purpose of occupying them by themselves and by the residents upon the lands, but this would be to defeat the very purpose for which the *quoad sacra* church and parish were erected. I am therefore of opinion that the judgment of the Sheriff should be affirmed, and the appeal dismissed.

The Court pronounced the following interlocutor:—

> "The Lords having resumed consideration of this cause, with the assistance of three Judges of the Second Division, and heard counsel on the appeals and proceedings, after consultation with the said three Judges, and in conformity with the opinion of a majority of the seven Judges present at said hearing, Refuse the appeals, but without prejudice to any claim which may be made by any of the appellants to a family seat in the parish church of Jedburgh, and to the other heritors their answers thereto as accords, and decern."

Counsel—Dean of Faculty (Watson)—Kinnear. Agents—Mackenzie, Innes, & Logan, W.S.
