No. 2.

"rent, may have a seat in the church for himself and family, distinct from the "share of the area to be allotted to their tenants; but that in dividing the "whole area of the church, the area of each heritor's seat must be taken "*in computo* in making up his share of the whole area corresponding to his va- "lued rent; and, with this variation, they refuse the desire of the petition."

Both parties differing about the precise meaning of this interlocutor, petitions were given in on both sides, and some farther procedure took place. The Earl of Home craved that the interlocutor might be so explained, as to give all the heritors a preference to the principal and most commodious seats in the first instance, leaving the tenants and other inhabitants upon the estates of the principal heritors to be provided for by a second choice. The Earl of Marchmont craved that it might be found, in express terms, that the heritors were entitled to make choice in their turn according to their valuations, not only of family seats, but of their whole allotments, whether lying together or distinct, as should be most convenient.

The Court adhered to their interlocutor; but they so explained it from the Bench, that every heritor should be first provided in a family seat, according to his valuation, and afterward by a second choice, and according to the same rule, should make his election of as much more as made up his share, conform to his valuation.

Lord Ordinary, *Gardenstone.* For the Earl of Marchmont, *Dean of Faculty Dundas,*
Pat. Murray. For the Earl of Home, *Crosbie.*

J. W.

1805. *February* 16. BELL *against* The EARL of WEMYSS.

No. 3.

The proprietor of a coal-mine is not liable for any part of the expense of building a new parish-church.

The church of Inveresk having become ruinous, it became necessary to build a new one, of sufficient dimensions for the accommodation of the parish. Application was accordingly made to the presbytery, who approved of the plan proposed by the heritors, and decerned for payment of the estimated expense. It was agreed, that the real value should be the rule for proportioning the expense.

Part of it having been laid upon the Earl of Wemyss, as proprietor of extensive coal-mines within the parish, this mode of assessment was objected to, by presenting a bill of suspension, which was passed.

The Lord Ordinary reported the cause.

The collector of the assessment

Pleaded: Since the establishment of the reformed religion, and the passing of the acts 1690, C. 23. 1693. C. 25. by which the clergy were rendered stipendiary, the original rule as to the expense of building parish-churches,

No. 3. has been completely changed. The whole expense is now laid upon the heritors of the parish, according to their respective interests; and each obtains a share of the area corresponding to his quota of the expense. The rule adopted by the heritors, among themselves, has been to lay on the assessment according to the valued rent, which being fixed and determined, affords no room for dispute or controversy. But this rule cannot apply to the case of a burgh of barony, or populous village, situated on the property of perhaps a small heritor, who pays but a trifling proportion of the expense, while a large extent of area is requisite for the accommodation of the inhabitants. In such a case, the burgh acquired a share of the area, and paid a proportionate share of the expense divided among them, according to the real value. The houses and feus in villages also have been made to bear their share of the expense according to the same rule; Sinclair against Magistrates of Kinghorn, 6th February 1761, No. 11. p. 7918; Case of Crieff, 20th November 1781 (not reported;) Ure against Carnegie, 16th May 1791, (not reported). In the present case, the number of inhabitants is greatly increased by their employment in the coal-mines; and the rent arising from a colliery being of the nature of a real estate, as much as the rent of a house in a burgh of barony or village, it ought, in the same manner, to be assessed for the expense of building the parish-church. So much is it a real estate, that one may be infeft in mines and minerals, while another is proprietor of the surface; and no good reason can be given for distinguishing one kind of real estate from another, so far as regards this parochial burden. The proprietors of these estates are liable for supporting the poor; Sir Archibald Hope, 28th May 1794, No. 17. p. 10585. The rent of a colliery may indeed be a little more precarious than that of an estate in land, still it is rent; and a proportional deduction may be made on account of the circumstance of its being precarious.

Answered: The general rule by which the burden of building and repairing the parish-church was fixed and proportioned, was according to the valued rent of the respective properties within the parish. Those properties alone were subject to this burden, the rent or income of which was stated in the cess-books of the county. When it was found, that the rule of estimating by the valued rent led to inequality, as in the case where there was a town or large village in the parish, which had arisen during the progress of improvement, and since the valuations were made, a more equitable rule was introduced, by making a town bear its share of the burden. But no attempt was ever made to burden any species of property, or of annual produce, excepting what would have been valued for the payment of cess, had they existed at the period of valuation. The rent and value of houses is one of the subjects of such valuation; but the produce of coal-mines is expressly declared to be exempted from valuation; Stat. 1681, Wight, App. No. 32.

The only sources of permanent income are land and houses: Such only ought to be burdened with a tax for a work of permanent utility. The profit

from minerals is of a very different nature: The subject is irretrievably exhaustible, and the profits are of the nature of a price for a commodity sold, not that of a rent for the mere use of the subject. Hence, no terce is due out of the mines of an estate; Lady Lamington, 14th February 1628, No. 15. p. 15840 Belchier aganst Moffat, 30th June 1779, No. 40. p. 15863. No. 3.

The Court were nearly unanimous in opinion, that the profit derived from a coal-mine, being of the nature of casual rent, should not be made to bear a share of a permanent burden. It was held to be very different from the payment of assessments for the maintenance of the poor, which are annual, and levied according to the rent really derived during the year; and if the rent ceases, the assessment will cease also. But it is impossible to ascertain the value of a coal-mine, or what proportion it ought to pay along with the real estates in the parish. Two of the Judges, however, held, that the proprietor should pay a share for his coal: The population of the parish is increased by the operation of working it; and though the rent is casual, they thought that a value proportioned to the risk might be fixed upon it.

Lord Ordinary, *Armadale*. Act *Solicitor-General Blair, Robertson*. Agent, *Tho. Cranstoun*, W. S. Alt. *Hay, Thompson*. Agent, *Jo. Anderson*, W. S. Clerk, *Pringle*.

F. *Fac. Coll. No. 84. p. 144.*

1807. *June* 10. MINISTER of DUNNING *against* The HERITORS.

No. 4.
Building and repairing churches is under the jurisdiction of the presbytery of the bounds.

THE Minister of Dunning, finding that the parish-church was not sufficient to accommodate his parishioners, applied to the presbytery to take the matter into their consideration. The presbytery cited the heritors to attend their meeting, received the report of tradesmen, and pronounced a judgment, finding that the church was insufficient, and that certain additions should be made to it.

The heritors being dissatisfied with these proceedings, presented a bill of suspension, which was refused by the Lord Ordinary. Upon advising a petition against this judgment, a doubt was started on the Bench with regard to the jurisdiction of presbyteries in such cases. The bill was accordingly passed, and the Lord Ordinary took the case to report on informations. The minister

Pleaded: The jurisdiction exercised by Presbyteries in all questions concerning the building and repairing of parish churches, has been acquired by inveterate usage, and has devolved upon them, as coming in place of the archbishops and bishops, and as exercising many of the functions which belonged to them during the period of Episcopacy. The act 1563, cap. 76. gives full powers to the Lords of the Secret Council, to advise and consult about "re-"parrelling and uphalding of kirks." In virtue of these powers, the Council ordained the expense of repairing churches to be defrayed, two-thirds by the parishioners, and the remaining third by the parson; which act was confirmed by 1572, cap. 54; and by this statute, on account of the unwillingness of the