SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DUKE OF HAMILTON and others—*Appellants.*
REV. J. SCOTT, D. D.—*Respondent.*

MANSE of Strathaven repaired in 1786—declared *sufficient* in 1790. Further repairs demanded, and resisted on ground that the manse had been declared *free* in 1790. Decided by the Court of Session, that the manse had not been declared *free* in terms of law. Affirmed on appeal.

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THIS was a question as to the repairs of a manse, Whether the expense ought, under the circumstances, to be defrayed by the minister or the heritors?

The Act 1663, cap. 21, contains the following clause:

Act 1663. cap. 21.

" And because, notwithstanding of divers Acts of " Parliament made of before, divers ministers are " not yet sufficiently provided with manses and " glebes, *and others do not get their manses free at* " *their entry:* therefore our Sovereign Lord, with " advice foresaid, statutes and ordains, that where " competent manses are not already built, the he- " ritors of the parish, *at the sight of the Bishop of* " *the diocese,* or such ministers as he shall appoint, " with two or three of the most knowing and dis- " creet men of the parish, build competent manses " to the ministers, the expenses thereof not exceed-

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" ing 1000*l.* and not being beneath 500 merks;
" and where competent manses are already built,
" ordains the heritors of the parish to relieve the
" minister and his executors of all costs, charges,
" and expenses, for repairing the foresaid manses;
" *declaring hereby, that the manses being once built*
" *and repaired, and the building and repairing sa-*
" *tisfied and paid by the heritors in manner afore-*
" *said, the said manses shall thereafter be upholden*
" *by the incumbent ministers during their possession,*
" *and by the heritors in time of vacancy, out of the*
" *readiest of the vacant stipends.*"

The Respondent became minister of the parish of Strathraven in 1782, and, in 1786, applied for repairs, which, to a certain extent, were granted. In 1790, upon application by some of the heritors to the presbytery, tradesmen were appointed to examine how the money which had been committed to the management of the Respondent had been expended. The tradesmen reported that the Respondent had " not followed the scheme of repairs

Manse declared sufficient, Aug. 24, 1790.

" that was laid down in the regulations, but has
" finished them in *a more elegant and better man-*
" *ner*;" and they reported that it was necessary he should still do some small things in order to put the manse into repair. The presbytery then pronounced a decree in these terms:—" Find the manse of this
" parish, and its offices, are sufficient, when those
" deficiencies specified in the report are executed;
" and the presbytery appoint Mr. Scott to have
" said deficiencies executed against Whitsunday
" next, and that the expense of the same shall be
" entirely on Mr. Scott."

A further demand was made in 1796, and the Presbytery gave a decree for a small sum (34*l.* 12*s.*) The heritors resisted this, on the ground, that the manse having been already repaired, and declared *sufficient*, the Respondent was not entitled to ask any additional repairs during his incumbency. The cause having come before Lord Glenlee, as Ordinary, his Lordship reported it to the Court upon informations. The Court were of opinion, that the previous repairs could not preclude the Respondent from an additional claim of repairs, in so far as they were necessary and just; and they remitted the cause to the Lord Ordinary, to hear parties further upon the amount of the repairs required.

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1796, 1797, 1798. Further repairs allowed by presbytery and Court of Session.

The cause having come again to be considered by Lord Glenlee, his Lordship was of opinion, that a considerable portion of the repairs decreed by the Presbytery should be allowed; and they were sustained accordingly by the following interlocutor:—

"The Lord Ordinary having considered the interlocutor of the Lords of the 7th February current, and resumed consideration of the process in as far as remitted to him, *finds the articles of repairs on the manse, decerned for by the decreet of Presbytery under suspension, which fall to be considered as not provided for when the former decreet of the Presbytery in* 1790 *was pronounced,* are articles second of the estimate decerned for by the Presbytery, being *rones* for the two sides of the manse; article 6th, for building and roofing a cart-house; article 11th, for paving the milk-house; article 12th, for shelves in ditto; article 13th, for one coat of plaster on the walls thereof; article 14th,

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" for lathing and plastering the ceiling of the manse " garret; and article 15th, for an open siver at the " back of the manse: *finds the letters orderly pro-* " *ceeded in as far as concerns the articles afore-* " *said;* but *quod ultra* of the repairs on the manse, " suspends the letters *simpliciter*, and decerns: " allows a decreet in the terms above-mentioned to " go out and be extracted, and finds the suspenders " liable in the expense thereof; but finds no ex- " penses of process due to either party, in as far as " concerns the matters remitted to the Ordinary."

The heritors stated, that the Respondent then rested his case on the *omissions* in the former estimate and award, and that the interlocutor of the Lord Ordinary proceeded on that principle. The heritors, however, acquiesced in that decision.

1803. 1809. Further repairs applied for.

In 1803, the Respondent applied for further repairs; and, after the usual survey and estimate, the presbytery awarded 48*l.* for that purpose; but the heritors having intimated that they would resist payment, the matter lay over till 1809, when he applied for further repairs, and, upon survey and estimate, the presbytery awarded 95*l.* in addition to the former sum of 48*l.* From the report of the surveyors, the repairs appeared to be certainly necessary, or at least much needed. The heritors brought the cause before the Court of Session, by bill of suspension against a threatened charge for these two sums.

Allowed by the presbytery and Court of Session.

The bill having passed, and the reasons thereof having come to be discussed before Lord Robertson; his Lordship pronounced the following interlocutor:—" The Lord Ordinary having heard parties'

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" procurators on the grounds of the charge and " reasons of suspension, finds in the circumstances " of this case, *that the manse in question is not a* " *free manse in terms of law*, and therefore re- " pels the reasons of suspension founded on that " alledgance; but, before farther answer, allows the " suspender to give in special objections to the " presbytery's decree charged on, and that against " next calling." And, upon advising a representation for the heritors with answers for the Respondent, his Lordship adhered to his former interlocutor.

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the Lord Ordinary.

The heritors reclaimed against these interlocutors to the second division; but the interlocutors of the Lord Ordinary were twice unanimously adhered to: whereupon the heritors appealed.

The Appellants insisted on the benefit of the statute 1663, cap. 21, which, they contended, clearly enacted, that after manses had been put in sufficient repair, they should be upholden by the incumbent ministers. The presbytery had, in 1790, solemnly declared the Respondent's manse sufficient; and the words *sufficient* manse, *legal* manse, *free* manse, were used by the writers synonimously: (and they referred to Sir G. Mackenzie—Forbes on Church Lands—Bankton's Inst. vol. 2. p. 47. s. 21. —Erskine, 422.—Kilkerran, (*voc. Manse*,) 342.)— The Botriphney case, relied on by the Respondent, was one of very special circumstances, no way resembling the present. In that case, there was no declaration of sufficiency by the presbytery, no inspection by the appointment of the presbytery of the manse which was built, no plan of it approved

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by the presbytery, no order for its being built, and no application for such order.

On the part of the Respondent, it was contended,—

1st, That the proceedings in 1790 did not import that his manse was declared *free*, and that the declaration meant no more than that the repairs were sufficiently executed; but that, in order to have a manse declared *free*, the words must be introduced as *verba solemnia*; (and for the mode, Erskine, 422, was referred to;) that the proceedings before the presbytery in 1796, and those before the Court of Session in 1797 and 1798, proved decisively that the declaration in 1790 was not considered as conclusive, otherwise the further repairs would not have been decreed by the presbytery, nor would their sentence have been confirmed by the Court of Session, whose judgment had not been appealed from, and therefore this point was *res judicata*.

2d, That, though the manse had been declared free in 1790, it would not have protected the heritors against those repairs which became necessary by the natural decay of the building, as the clergy of Scotland were mere life-renters of their benefices, and the law in regard to life-renters was expressly applied by Erskine to their situation as connected with their manses: that the Act of 1663, cap. 21, was framed in the times of episcopacy, when many of the clergy were proper beneficiaries, and when the Act of 1612 was in force, which entitled the executors of a beneficed person who had repaired his manse to claim a portion of the expense

Erskine, b. 2. t. 9. s. 6.—b. 2. t. 10. s. 58.

from his immediate successor; that it was doubtful whether it was ever meant by the act that the incumbents should rebuild and repair their manses when they became uninhabitable by natural decay; that Mackenzie, who was contemporary with the Act of 1663, stated, that manses were to be built or repaired (by the heritors) when they were *wasted casu fortuito;* and, at any rate, that the construction contended for by the Respondent had now been established, that the general point of law had a few years ago received a full discussion in the case of the minister of Botriphney, which very much resembled the present. That case was stated as follows:—

Case of the minister of Botriphney.

"When the minister was inducted to this parish, "he received a manse entirely new; and some "proceedings took place before the presbytery, "which were held to import that the manse was "declared free. At the distance of thirty years, "the manse became uninhabitable, and the mi- "nister applied to the presbytery for having it re- "built or repaired. The presbytery issued their "decree for 120*l.* sterling of necessary repairs. "The heritors brought the cause to the Court of "Session by suspension, and pleaded, that the "manse having been declared free in the minister's "time, he was bound to uphold it during his in- "cumbency. The minister answered, 1st, That "the manse had never been properly declared a "free manse by the presbytery. 2d, Although it "had been declared free, that this did not prevent "him from asking for those repairs which became "necessary by the natural decay of the building.

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"The Lord Ordinary found that the proceedings "before the presbytery did not import that the "manse had been declared free and *separatim*, "'found, that although the manse had been de-"'clared free *debita opera*, the present condition "'of the manse and offices, as ascertained by the "'presbytery, is such as ought, especially after the "'lapse of so many years, to subject the heritors in "'reasonable repairs.' To this interlocutor of the "Lord Ordinary the Court adhered, upon advising "a petition and answers.

July 3, 1805. "Against the judgments of the Lord Ordinary, "and of the Court of Session, the heritors ap-"pealed; but when the cause was about to be "heard, the heritors withdrew their appeal, and the "judgments became final."

Messrs. Brougham and *Mackenzie* for Appellants; *Sir S. Romilly* and *Mr. Thomson* for Respondent.

Observations and Judgment.

Lord Eldon (Chancellor.) This case had been six years depending in their Lordships' House, and had been represented as one of general importance to the heritors of Scotland. But it did not appear to him that this representation was well founded. The case did not necessarily involve any important general question of law as between the heritors and clergy of Scotland, but rested entirely on its own peculiar circumstances.

Case rests on its own peculiar circumstances.

Much had been said by the parties on both sides respecting the litigious disposition of each other. But with that their Lordships had nothing to do.

It was their duty, when a question was brought before them, to decide upon it according to law, without regard to the motives by which the parties might be actuated in bringing it under their consideration.

This was a case in which all further litigation might easily be prevented. If Doctor Scott had a *free* manse, there could be no dispute about repairs, as the heritors could only be called upon for those repairs which were rendered necessary by the waste of time. If, on the other hand, there had been no judgment that this was a *free* manse, it was competent for the heritors to do the proper repairs, and then to procure a declaration that this was a *free manse*, and thus to secure themselves from any obligation to repair in future during the incumbency of Doctor Scott.

Heritors might do the proper repairs, and then procure a declaration that this was a free manse.

The real question, under the circumstances of this case, was this, Whether the heritors were liable to do such repairs, or to any part of them, as were now claimed by Doctor Scott? The Lord Ordinary had pronounced two interlocutors in favour of Doctor Scott upon this question. The Court likewise pronounced two interlocutors unanimously in favour of Doctor Scott; and unless he very much misconceived the proceeding of 1796, 1797, and 1798, that too bore a judicial character in favour of Doctor Scott.

The Act of 1663, cap. 21, from which it appeared that the ministers had met with some difficulty in procuring their stipends, such as ministers met with in other places, recited—(*vide ante.*) The statutes 1563, cap. 72, 1572, cap. 48, and

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1592, cap. 116, contained a variety of provisions for securing to the parochial clergy *sufficient*, *commodious*, and *reasonable* manses and glebes; but these words were used as applicable to the size of the house and acres, and not to the quality of the house as to repairs. He found nothing in them on the subject of repairs.

Meaning of the legislature in Act 1663, cap. 21, was, that manses should be *upholden* by incumbents when *once* built or repaired; but the Act was differently construed, and construction now the law.

He agreed that the legislature meant, by the Act of 1663, that when the manses should have been once built or repaired, the burthen of upholding them should rest on the ministers. But it had not been so construed; and when a different construction had been for so long a time put upon it, and acted upon, especially considering the effect of desuetude, as connected with the Scotch Acts, they were not now to go back nearly two centuries to give it a new construction. The statute as it had been construed was now to be taken as the law. The heritors might relieve themselves. The mode of doing it was by ordering a new manse to be built if necessary, or the existing manse to be repaired in such a manner as entitled them to call for that species of declaration which discharged them; not merely a declaration that the manse was for the time sufficient, but a declaration that it was *free* in this sense, that they were liable for no future ordinary repairs during the incumbency. It was then insisted that the manse had been pronounced *free* in 1790 by the decree of the presbytery, "Finding that the "manse of the parish and its offices were sufficient." But if the proceeding of 1796 could not be considered as *res judicata*, it was impossible to look at it without taking it as evidence that the presbytery

itself did not consider the manse as having been declared *legally free*. These proceedings, under the circumstances, he could not help considering as an additional judgment in favour of Doctor Scott.

He did not rely on the Botriphney case; but there it was clear that the manse was held not to be a free one, and that the repairs were decreed.

If, then, it was proper that the judgment of the Court of Session should be affirmed, the question arose as to the matter of costs. This was a case involving no general doctrine, but resting upon its own particular circumstances. The proceedings on both sides had probably been carried on at a greater expense than would uphold competent manses for two or three of the clergy of the kirk of Scotland; and if it appeared that through all this course of litigation, the judgments had been uniformly in favour of Doctor Scott, although it might be perfectly fair in the heritors to take the opinion of their Lordships, it was also fitting that they should pay for the experiment.

Interlocutors of the Court of Session affirmed, with 150*l.* costs.

Agent for Appellants, CHALMER.
Agents for Respondent, SPOTTISWOODE and ROBERTSON.