" for while she is used as a warehouse no cargo can be " bought for her. This is the law. The fact is, that though " this was not a regular *thatched* factory ship, yet she was " used as a thatched factory ship is used. This being clear, " it follows that the risk is different in point of length from " that which is generally understood in the trade, and, con- " sequently, from that which was insured."

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *J. A. Park*, *David Douglas*, *Geo. Jos. Bell.*

For the Respondents, *M. Nolan*, *Alex. Maconochie.*

HIS GRACE THE DUKE OF HAMILTON AND BRANDON, and other Heritors of Avondale, ... } *Appellants;*

REV. JOHN SCOTT, Minister of the said Parish of Avondale, . . . } *Respondent.*

House of Lords, 14th July 1813.

FREE MANSE—REPAIRS.—A manse had got into disrepair, and certain proceedings had been instituted before the presbytery with the view of having it repaired, which was ordered and done accordingly. Thereafter the heritors applied to have the manse declared a free manse. The presbytery declared the " manse and its offices are sufficient" as to the repair *then* ordered. The question was, Whether the manse, under this finding, was declared a free manse, so as to throw the burden of subesquent repairs on the minister during his incumbency? Held that the manse had not been declared a free manse, and that the heritors were liable in further repairs.

Opinion given, that even supposing the manse had been declared free, that this would not bar repairs arising from the waste of time.

The respondent's manse having been found in such disrepair as to compel him to leave it, he applied to the presbytery to order, in due form, his manse to be repaired, who appointed persons to inspect it, and report on its condition, Feb. 1787.

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and to give in to the presbytery "their written and subscribed "report, containing a plan and estimate of sufficient repairs."

In terms of this remit, the manse was surveyed, and a report given in, stating that the necessary repairs might be completed for £69. 8s. 4d. and the presbytery accordingly pronounced decree for the sum of £75. 14s. 4d., and ordered the repairs to be executed to that amount, and these repairs were executed accordingly.

1790. In June 1790 thereafter, application was made by the heritors to have the manse declared a free manse. The presbytery appointed persons to inspect the manse and offices, and report. This report bore, that the respondent had not followed the scheme of repairs that was laid down, and had finished them in a more elegant and better manner, and that some repair still remained to be done; and the presbytery "find that the manse of this parish, and its offices, "are sufficient, when the 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 on Mr. Scott."

In 1796 the minister applied to the presbytery for a visitation of the church and manse. An estimate was given in by persons appointed by the presbytery, and £200 was awarded, £34. 12s. 2d. of this sum being for the repair of the manse.

And the present question here is, Whether the heritors are bound to be at the expense of this additional repair, after the findings of the presbytery in 1790?

The minister stated, that the repair in 1790 was a mere patch up, and temporary in its nature; and it was not of that thorough and permanent nature to warrant the presbytery to declare it a free manse. The manse and offices were old and ruinous, and it was unreasonable to suppose that £69 could be an adequate sum for a sufficient repair; and it was in this sense, namely, that the former repairs were temporary, that the presbytery ordered six years thereafter the additional repair to the extent of £34. 12s. 2d.

The heritors having brought the decree of the presbytery, as to these additional repairs, under the review of the Court by suspension, and the cause having come before Lord Glenlee, his Lordship reported the case to the Court. The Court were of opinion that the previous repairs did not preclude the respondent from claiming additional repairs, in so far as they were necessary and just; and they remitted to the Lord Ordinary to hear parties further upon the amount of the

repairs required. These proceedings ended in a judgment, with which the heritors acquiesced; and the presbytery then proceeded of new to order tradesmen to report, who reported that £44. 11s. 2d. would be necessary to cover the necessary repair. The heritors opposed this judgment, and threatened that, if the decree were carried out, they would take it to the Court of Session. The matter was allowed to drop for five years, and again revived in 1809, when, on a new application, the presbytery, after a report by persons of skill, gave decree for £95. 14s. 1d. On a suspension being brought, the Lord Ordinary pronounced this interlocutor:—"Finds, in the circumstances of this case, Dec. 8, 1809.
"that the manse in question is not a free manse, in terms of
"law; and therefore repels the reasons of suspension
"founded on that allegation; but, before farther answer,
"allows the suspenders to give in special objections to the
"presbytery's decree, charged against next calling." On reclaiming petition the Court adhered; and another reclaim- Dec. 6, 1810.
ing petition was refused. Jan. 17, 1811.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The act 1663 declares that, after a sufficient repair of the manse is given to the incumbent, "the manse shall thereafter be upholden by the "incumbent ministers during their possession." The presbytery are appointed by the act to judge in this matter. They did so accordingly, in this case, on the application of the respondent, and, by their decree in 1790, declared, when the deficiencies then ordered were executed, the "manse and its "offices are sufficient." The respondent maintains, that because the word "free" is not here used, that therefore the manse has not been declared a free manse, but Mr. Erskine, in his Institutes, uses the words "sufficient or free," in treating of this subject, and all the other authorities use the terms "*free manse, legal manse, and sufficient manse*," as synonymous; and there is not one word in the statute which can lead to the inference that the presbytery must use any particular word, such as the word "free," in declaring the manse to have undergone a thorough repair; far less does the statute countenance the proposition that a manse is to be three or four times, perhaps twenty times, repaired during one incumbency.

Pleaded for the Respondent.—The proceedings of the presbytery, after it received the trifling repair alleged, do not

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import that the manse was declared a "free manse." These words, in the law of Scotland, have a fixed and definite meaning, and must be introduced in their decree before the heritors are free from further repair. That this was the sense of the presbytery by their decree in 1790, is evidenced by the subsequent proceedings in 1796, when the presbytery ordered additional repairs to be made. 2. But even supposing the manse had been declared a free manse, this would not have barred the presbytery from ordering further repair, if they saw that repair was rendered necessary by waste of time. Such was actually the nature of the repairs here ordered by the presbytery, as may be seen by reference to the tradesmen's report, and, accordingly, the decree now brought under review was a decree for repairs rendered necessary by the decay of the building, arising from the

July 3, 1805. waste of time. In the case of Botriphnie the minister, when inducted, received a manse entirely new. Afterwards proceedings took place before the presbytery, which were held to import that the manse was declared free. But, at the distance of thirty years, the manse became uninhabitable, and the minister applied to the presbytery to have it rebuilt or repaired. The presbytery issued their decree for £120 of necessary repairs. The heritors brought the case to the Court of Session, and pleaded, that the manse having been declared free in the minister's time, he was bound to uphold it during his incumbency. The Lord Ordinary found, "that "although the manse had been declared free, *debita opera*, "the present condition of the manse and offices, as ascer- "tained by the presbytery, is such as ought, especially after "the lapse of so many years, to subject the heritors in "reasonable repairs." On reclaiming petition, the Court adhered, and, on appeal to the House of Lords, the heritors, when the cause was about to be heard, withdrew their appeal.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,

"This cause has kept its place in the roll for five or six years, and has been represented as being of considerable importance, in its general consequences, to all the heritors of Scotland. In my opinion this is a misconception. I think this case must be decided on its own merits, without affecting any general question.

"With the allegations of litigiousness which have been made your Lordships have nothing to do; and, when parties choose to

bring legal questions regularly before us, we are bound to deal with and to decide upon these alone.

" This is a case, in which all further litigation might be prevented if the parties themselves felt so inclined. If Dr. Scott has got a *Free Manse*, then the heritors are relieved of the expense of all repairs during his incumbency, except those which may become necessary from total decay, arising from the lapse of time. If Dr. Scott has not got a *Free Manse*, the heritors know that there is a mode of proceeding by which they can get it declared free.

" But here the question is, Whether the heritors are liable for all or any of the repairs claimed? We have two judgments of the Lord Ordinary, and two unanimous judgments of the Court of Session, in favour of the respondent. The proceeding in 1796 also has about it a judicial character which is much in favour of Dr. Scott.

" The act 1663, c. 21, declares—(Here his Lordship read that part of the act which relates to manses.)—In this act, the term '*competent manse*,' certainly refers to the size and accommodation of the manse—a manse, according to the term used, '*where competent manses are already built*,' might be *competent*, but not be in repair. The term *upholding*, in this act, will well bear the sense put upon it in the case of Botriphnie, when we consider what is incumbent in the way of repair upon a liferenter as contradistinguished from what in some cases he is liable to.

" I have been looking into the act of Queen Mary 1563, c. 72, and those of King James the Sixth, 1572, c. 48, and 1592, c. 118, and I do not find in them any thing relative to repairs. They only relate to the size and quantity of house and land.

" Mr. Brougham says very truly, that in these acts the term competent must relate to size; but he says also, that it is not so in the act of 1663.

" I incline strongly to the obvious construction of the act 1663, viz. that after a competent manse has been once built and repaired, it was never intended that any expense should afterwards fall on the heritors but in time of vacancy. Yet, by the construction put upon this act, I hold the law of Scotland to be, that if the heritors of a parish wish to free themselves from all future *ordinary repairs*, they must cause the manse either to be built or repaired, so as to warrant a declaration that the manse is free, and that when they have so done, and have got a declaration of the presbytery that the manse is sufficient and free, they will be exempt from all future repairs, except in the special cases of total decay arising from the lapse of time.

" In this case, it is said that, in 1790, there was a legal declaration that the manse was a *free manse*:—it was declared by the presbytery that 'the manse and offices of this parish are sufficient.' I do not think this a sufficient declaration that the manse is *free*; but, farther, I think it is impossible to look at the proceedings in 1796, and say that the parties could have thought that the declaration 1790 was a final bar to a claim for repair in future. The Court

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did not consider it so, unless you could say that the Court only ordered those repairs arising from total decay by lapse of time. You cannot consider the proceedings of 1790 to have been conclusive, for, looking at the items of the repair ordered, it is clear that some of them are those which a minister in a free manse would have been bound to execute himself.

" The proceeding in 1798 is an additional judgment in favour of Dr. Scott to the previous interlocutor.

" I do not rely on the case of Botriphnie, but it goes to say, that in this case the manse has not been declared free ; and also to say, that after the lapse of many years, heritors may again become liable to some repairs, even though the manse should have been declared free. But I rely on the words of the act, and on the proceedings in 1796, as explaining the understanding of parties in 1790.

" As to the matter of costs—here there is no general doctrine in question. If the case had involved the interest of all the heritors in Scotland we should have had to lament that all the heritors were on one side, and all the clergy on the other, but with different means of supporting the expense of the suit. But if your Lordships think as I do, that the proceeding in 1796 is an additional judicial proceeding in favour of the respondent, and consider that the judgment of the Court of Session, in this case, is unanimous, though you may not blame the heritors, you will not think it unreasonable that they should pay for their experiment. I therefore move that the judgment of the Court of Session be affirmed, with £150 costs."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed, with £150 to the respondent for his costs.

For the Appellants.—*Henry Brougham, J. H. Mackenzie, John Jardine.*

For the Respondent.—*Sir Samuel Romilly, John Connell.*

LIEUTENANT-COLONEL HERCULES SCOTT of Brotherton, and JAMES SCOTT, Writer to the Signet, Proprietor of the Mills of Morphy, situated on the river Northesk, } *Appellants;*

THOMAS GILLIES of Balmakenan, DAVID LYAL of Galry, DAVID CARNEGIE of Craigo, JOHN TAYLOR of Kirkton Hill, and the Representatives of Patrick Cruikshank of Stracathro, . . . } *Respondents.*

House of Lords, 20th July 1813.

DAM DYKE—INJURY TO FISHINGS.—The proprietors of certain mills had, in process of time, altered their check dyke so as to prove