

But it is not customary to give costs where a decision of the Court below is reversed.

May 17, 1816.

INSURANCE.
—SEA WORK-
THINESS.

Judgment of the Court below *reversed*.

Agent for Appellants, CAMPBELL.
Agent for Respondents, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MAXWELL and others—*Appellants*.
GORDON—*Respondent*.

ON refusal of the heritors of a parish to take the proper steps to rebuild the parish church found by the Presbytery to be ruinous, the Presbytery themselves advertise for and adopt a plan and estimates, and contract for the rebuilding, and assess the heritors for the necessary sums, but neglect to assess some feuars of a part of a small village included in the parish. Suspension presented by the adverse heritors against the charge for the sums, on the ground of irregularity in the proceedings of the Presbytery, but all objection abandoned as to the jurisdiction of the Presbytery to assess, in case of refusal by the heritors. Suspension refused by the Court of Session, and the judgment affirmed by the House of Lords, with a remit as to the feuars.

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June 19, 1816.

REPAIRING
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CHURCHES.

IN consequence of a representation and complaint made by Mr. McCulloch, of Ardwell, one of the heritors of the parish of Anwoth, to the Presbytery of Kirkcudbright, of the ruinous state of the parish

Complaint to
Presbytery of
ruinous state
of Anwoth
church.

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Meeting of
Presbytery,
October 1,
1810.

Meeting, No-
vember 7,
1810.

Objection to
the jurisdic-
tion.

Report of the
tradesmen ap-
pointed to ex-
amine the
church.

church of Anwoth, the Presbytery at its meeting, 1st October, 1810, appointed a meeting to be held on the 7th November then next, to take the state of the church into consideration; and the minister of the parish was directed to make intimation to the heritors, by citation from the pulpit and by circular letters, to inform them of the time, place, and purposes of the meeting, and to summon tradesmen to attend.

The Presbytery met at the time appointed, and most of the heritors attended personally, or by proxy, and two tradesmen summoned by the minister of the parish attended to report on the state of the church. An objection taken to the jurisdiction of the Presbytery, by the agent of Sir D. Maxwell, one of the heritors, was repelled; and the heritors, being asked whether they had any objection to the tradesmen, declared they had none; and the tradesmen, being put on oath, were directed to examine the church, and report as to its dimensions and its condition, and whether it was or was not capable of being repaired. The tradesmen reported the dimensions, and also the state of the church, from which it appeared that it was incapable of repair, and also that it was too small to contain the legal number, namely, two thirds of the examinable persons in the parish.

At the request of one of the heritors present at this meeting, the Presbytery, as there were no tradesmen present on the part of the heritors, agreed to delay proceedings till their next ordinary meeting, to give an opportunity to bring them forward; with certification that, if the heritors should then fail to bring forward a report of other tradesmen, the

Presbytery would proceed in the business on the evidence before them.

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The Presbytery met, and the agents of three of the heritors (Appellants) attended. No tradesmen appeared, and no report was produced on the part of the heritors. The Presbytery therefore proceeded to take into consideration the report of the tradesmen given in at their last meeting, and unanimously found "that the Kirk of Anwoth is ruinous, and ought to be rebuilt; and therefore did, and hereby do, ordain the heritors of said parish to procure plans and estimates of a new Kirk, sufficient to accommodate the inhabitants of that parish, and to lay them before the Presbytery, at their next meeting on the first Wednesday of January, with certification, that if they fail to do so, the Presbytery will themselves order plans and estimates, and stent the heritors in a sum sufficient for executing such a plan as may be adopted, as accords of law."

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CHURCHES.

Meeting, December 5,
1810.

The heritors neglect to produce a report of tradesmen named by themselves.

It was not stated, however, whether this sentence of the Presbytery was intimated to the heritors, and none of them appeared at the next meeting, which took place on the 2d of January; but Gordon the agent of Mr. McCulloch, of Ardwell, attended, and produced several plans, one of which was adopted. The Presbytery then appointed the minister of the parish to advertise for estimates; to convene the heritors by edictal citation from the pulpit and circular letters, and to lay before them the plan and estimates, to give them an opportunity of contracting with tradesmen for re-building the church; and they ordained the heritors to contract accordingly, on the plan adopted, with certification that,

Want of notice, afterwards complained of.

Meeting, January 2, 1811.

Plan adopted by Presbytery and heritors, ordained to contract upon it.

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Meeting of
heritors, Ja-
nuary 29,
1811.

if the heritors failed to do so, the Presbytery would contract, and stent the heritors in a sum for executing the work.

The heritors having been convened, entered objections on their minutes to the proceedings of the Presbytery; the grounds of which objections were, that the heritors ought to be allowed to have it ascertained, by tradesmen named by themselves, whether the church was capable of being repaired; and if not, the heritors ought to be allowed to give in and execute their own plan, and that the Presbytery had no power to approve or disapprove, except the church were to be too small to accommodate the legal number of persons (two thirds of the examinable persons in the parish), and they also objected to the proceedings of the Presbytery as illegal and irregular.

Meeting,
March 6,
1811.

These objections were laid before the Presbytery at its next meeting, at which the heritors, or some of them attended. The Presbytery however considered the application of the heritors to be allowed to prove, by tradesmen of their own nomination, that the church might still be repaired, &c. as coming too late, and refused the request. The Presbytery then ordered the plan of which they had formerly approved, to be rectified, so as to reduce it to the lowest dimensions, consistent with the accommodation of the legal number of persons; and then having at a subsequent meeting, approved of the plan as rectified, they again ordained the heritors to contract, &c. with certification as before. The heritors having refused, the Presbytery appointed their clerk to advertise for estimates, and an estimate having been given in, and, at the request of Mr.

Presbytery orders advertisement for estimates, and

M'Culloch, adopted, they pronounced the following sentence :

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“ The Presbytery, having considered the above
 “ statement and request of Mr. M'Culloch, exa-
 “ mined the estimates laid before them, and inserted
 “ in their minutes; heard parties at the bar, and
 “ reviewed the whole proceedings in the cause, and
 “ fully reasoned thereon, did and thereby do, una-
 “ nimously adopt the estimate of John Bodan and
 “ Andrew M'Dowal; and appoint a committee of
 “ Presbytery, along with the said James Murray
 “ M'Culloch, Esq. and such other heritors of the
 “ parish of Anwoth as choose to concur, and Mr.
 “ Robert Gordon, writer in Kirkcudbright, to pre-
 “ pare and execute a legal and formal contract with
 “ the said John Bodan and Andrew M'Dowal, and
 “ proper and sufficient cautioners, to rebuild the
 “ church of Anwoth, according to the rectified plan
 “ and specifications referred to in their estimate.
 “ The committee to consist of Dr. Muter, Mr.
 “ Johnston, Mr. M'Clellan, and Mr. Smith, with
 “ any other member of Presbytery who may choose
 “ to attend (any two a quorum), to meet in the
 “ King's Arms Inn, Kirkcudbright, on any day
 “ convenient, before the fourth Wednesday of Oc-
 “ tober current, Mr. Smith convener. Said com-
 “ mittee shall bind and oblige said contractors,
 “ with their cautioners, to have the church of An-
 “ woth roofed in before the 1st day of October,
 “ 1812, and the whole work finished before the 1st
 “ day of May, 1813. And farther, that the Pres-
 “ bytery did, and hereby do decern, against the
 “ heritors, life-renters, tenants, tacksmen, and all
 “ others liable for their respective proportions of

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 adopts one
 given in, and
 assesses the
 heritors for the
 sum necessary
 for the re-
 building of
 the church.
 October 2,
 1811.

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“ the sum of 710*l.* sterling, being the amount of
 “ the estimate of John Bodan and Andrew
 “ M'Dowal; and of the sum of three guineas to
 “ James Sharp, for plans and specifications; and of
 “ the sum of 3*l.* 11*s.* 6*d.*, being the expense of ad-
 “ vertising; and of the sum of two guineas, to
 “ Messrs. M'Clellan and Lawrie, for their trouble
 “ in inspecting and making a report on the church
 “ of Anwoth; and of the sum of 6*l.* 15*s.* for con-
 “ tract and stamp; amounting in toto to 725*l.* 11*s.*
 “ 6*d.* sterling, with factor's fee, at five per cent.
 “ thereon, and duties of extract. Appoint Mr.
 “ Robert Gordon, writer in Kirkcudbright, factor
 “ for uplifting said sum, by the following instal-
 “ ments, viz. one-third part thereof at the 1st of
 “ November next; another third part at the 1st of
 “ August, 1812; and the remainder at the 1st of
 “ February, 1813; and crave the Right. Hon. the
 “ Lords of Council and Session to interpone their
 “ authority to this decret, that letters of horning
 “ on six days, and other execution necessary, may
 “ pass hereon.

Charge for
the sums and
suspension.

The proportions were settled by the Presbytery clerk, and Gordon the factor, according to the valued rents; and Gordon then raised letters of horning, and charged the heritors for the sums respectively due by them. The Appellants presented a bill of suspension, in which they confined their objections to the alleged irregularity of the Presbytery's proceedings, without bringing the jurisdiction to assess at all into question. The Lord Ordinary by interlocutor 28th February, 1812, refused the bill, and the Court by interlocutors 11th March, and 16th May, 1812, unanimously adhered. In

their petitions to the Court the Appellant's expressly abandoned all objection to the jurisdiction. Feb. 16,
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Against the above interlocutors of the Court of Session, the Appellants lodged their appeal, in support of which, resuming the objection as to the jurisdiction, they stated the following reasons in their case.

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All objection
to the juris-
diction aban-
doned.

Appeal.

1st, If the Presbytery have any jurisdiction at all over the repairing and building of churches, their province is strictly limited to a declaration that the church is out of repair, and ought to be repaired; or is ruinous, and ought be rebuilt; or is too small for the parish, and ought to be enlarged; leaving it to those who are to bear the burden, that is, to the heritors, or the owners of lands and houses, to settle among themselves what shall be the plan of the repairs, or new edifice, as well as all the details both for the assessment of the necessary money and for the application of it.

This is recognized as a general rule, in the case of the Minister of *Tingwall* against the Heritors, decided on the 22d June, 1787.

The case of *Dunning*, 10th June, 1807, (the first which decided that Presbyteries have a jurisdiction in the building and repairing of churches, and which has not yet been brought under the view of this honourable House) is quite consistent with this rule: there the Presbytery had gone no farther than to find that the church was insufficient to accommodate the parishioners, and that certain additions ought to be made; it was with this proceeding, carried no further, that the heritors were dissatisfied, and applied against it to the Court of Session; and the Appellants cannot refrain from adding, that this case of *Dunning*, is quite a re-

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cent and single decision upon a very important question of law, as affecting the civil rights, of the subject in Scotland; and which, if it were brought to the last resort, the Appellants conceive it would be found very difficult to maintain.

2d, Even if the Presbytery could be admitted to have the power of imposing and assessing the parochial tax, their proceedings throughout this case have been highly irregular. They have also made the assessment irregularly, in point of form, and substantially contrary to the rule declared by this most honourable House, in the case of Peterhead, in Dom. Proc. 24th June, 1802.

3d, It was not necessary, that this church should be rebuilt; the repairs which the heritors had undertaken, and were proceeding to make, would have rendered it quite sufficient, in every respect, for the accommodation of the parish.

With reference to the non-assessment of some feuars in a village, part of which was included in the parish, the Appellants cited, besides the Peterhead case, the cases of Crief, 20th November, 1781; Campbelton, 1774; and St. Andrew's, 1791.

In the Respondent's case it was contended, that the Presbytery had jurisdiction to assess, and the case of Dunning, June, 1807, was cited; and that at any rate the objection had been abandoned; that it was absurd to object to the apportionment of the sums, as the Respondent might have charged the whole sum against any one heritor; that the proportions of the feuars was too minute for assessment; and that the whole of the proceedings were regular.

Sir S. Romilly and *Mr. Horner* (for Appellants). Feb. 16,
 This case involves a most important point of law, June 19, 1816.
 that is, whether a church judicatory in Scotland has
 power to tax the subject. There is not a single
 case, nor any authority in the text books for that
 proposition. The case of *Dunning* does not at all
 embrace it, for the point was not there raised, whe-
 ther a church judicatory could tax the subject. It
 only establishes this, that the Presbytery had juris-
 diction to find that repairs were necessary. (*Lord*
Eldon (C.) What jurisdiction has the Presbytery in
 this matter?) To find the fact that the church is
 out of repair and wants repair, or that it is ruinous,
 and ought to be rebuilt, and, if the heritors refuse
 the necessary sums for these purposes, then the
 Presbytery, or the minister of the parish, may apply
 to the civil Courts to compel them to pay. (*Lord*
Eldon (C.) The reason in the suspension is, that it
 is illegal in the Presbytery to assess, unless the he-
 ritors were previously called on, and refused to take
 the proper steps to build or repair the church, and
 your complaint below was, that you had not been
 regularly summoned to one of the meetings, so as to
 give you the proper opportunity. But, to use a
 technical expression, in one of your own papers,
 you went *slap-dash* at every thing.) The mode
 also in which the assessments were made was
 wrong.

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Mr. Leach and *Mr. Brougham* (for the Re-
 spondents). The Lords, as the Court of Appeal,
 could look only at the grounds taken below, and
 would not go on other grounds first suggested here.
 It never entered into the minds of those who drew

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this suspension, that the mode or manner of assessment was irregular; and if that had been stated as a ground of complaint, the papers show that it could not have been maintained a moment. Then they deny the power of the Presbytery to assess at all. That point was never insisted upon below, and, in their own papers, they make admissions which entirely exclude the objection. (*Lord Eldon (C.)* I take them to have, in their suspension, admitted the jurisdiction.) We are not called upon, then, to show that it is the general law, that Presbyteries have this power, because it is admitted to be the law of the case. But suppose the point could be opened, there is not a shadow of foundation for their denial of jurisdiction as applied to this case. All the requisites of the act of 1572 have been followed. The Presbytery did not proceed upon the assumption of an unqualified power to assess, but only claimed and acted upon the jurisdiction to assess, after the heritors had been called upon and refused to assess themselves. They say, the Presbytery ought not to assess at all, but to apply to the civil power; how are they to apply, and to what part of the civil power? They called upon the heritors to assess themselves, with a clear notice that unless they did the Presbytery would do it. The heritors refused, and the Presbytery proceeded to stent them. As to the Peterhead case, the objection there was not taken here, and though it had been taken, the circumstances were different. The effect of the decision in that case was, that the heritors, as well as feuars, should be assessed, not according to their nominal or valued rent, but according to their real rent. That is not the question here. The town

proprietors were there assessed, but the parish included a large sea-port town, and the church was principally occupied by the town population, and it was but just that the town proprietors should pay part of the expense. But this was strictly a land-wart parish, including only a very small part of a small village, and the smallest coin was not small enough to represent the proportion of each of the twelve or fifteen feuars belonging to the parish.

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Sir S. Romilly (in reply). The important question, it seems, is not open to us, as it has been waived on our part. But if we have admitted the jurisdiction, it was only on failure of the heritors to contract and rebuild; and no opportunity was given them for that purpose. Then the feuars were not taxed, and it was quite clear from the Peterhead, and other cases, that the feuars ought to be called upon to pay their proportions. (*Lord Eldon* (C.) This case, I believe, turns on the facts whether the church was capable of being repaired, or sufficient for the congregation.)

Lord Eldon (C.) I am of opinion that the judgment in this case ought to be affirmed, but subject to a remit to the Court of Session, to consider whether, having regard to what this House did in the Peterhead case, the judgment requires any alteration with respect to the feuars. I understand it will not, as the proportion of these feuars must be so very minute, that the Court did not ill advise themselves in overlooking it. But *we* cannot with propriety omit to notice that point, though the remit may have no effect.

June 19, 1816.
Judgment.

June 19, 1816.

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Judgment *affirmed*, subject to a remit as above, in case the Appellants chose to bring the question as to the feuars before the Court within four months.

Agent for Appellants, GORDON.
Agent for Respondent, RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SPROTT (Procurator Fiscal of Edin- } *Appellant.*
burgh)..... }
Scott and others—*Respondents.*

Feb. 21, 1816.

TRADERS AND
MANUFAC-
TURERS IN
NEW TOWN OF
EDINBURGH
EXEMPTED
FROM PAY-
MENT OF EN-
TRY MONEY
TO THE MA-
GISTRATES.

Builders in
New Town,
Edinburgh.

Refuse to pay
entry money,
and why.

ANY master trader or manufacturer exercising his trade or calling within the new town of Edinburgh only, without exercising it in the old, is, by the proviso in the act 7 Geo. 3. c. 27. exempted from the payment of the tax called entry money, exacted by the magistrates of Edinburgh from those who enter as burgesses.

THE Respondents are master builders in the new town of Edinburgh, who refused to pay to the magistrates the entry money which each master trader or manufacturer who establishes himself in the city and exercises his craft within its limits or royalty is called upon to pay. The ground of the refusal was, that the act of 7 Geo. 3. c. 27., by which the royalty was extended over a great of the