No. 52. **Rev. Dr AULD, Appellant,—*Sir J. Connell—Keay.***
MAGISTRATES OF AYR, and HERITORS OF AYR AND ALLOWAY, Respondents,—*Wetherell—Adam—James Campbell—Wilson.*

Manse.—Stat. 1663, *c.* 21.—Found, (reversing the judgment of the Court of Session,) that the minister of a Royal Burgh, with a landward parish annexed, is entitled to a Manse under the statute 1663, c. 21.

June 13, 1827.

1ST DIVISION. Lords Gillies and Meadowbank.

THE united parishes of Ayr and Alloway are composed of the Royal Burgh of Ayr, with a landward district attached to it, and the landward parish of Alloway. Dr Auld, the incumbent of the first charge, presented a petition to the Presbytery of Ayr, setting forth, that although there was an extensive landward parish connected with the burgh of Ayr, and some land for a glebe to the minister of the first charge, yet there was no manse or glebe provided for him; and craved that a meeting should be held for taking the matter into consideration. The Presbytery met, and after hearing parties, 'found Dr Auld entitled to a manse and office-houses, as first minister of the 'united parishes of Ayr and Alloway; ordained the Magistrates 'and heritors to build the same; and plans, specifications, and 'estimates to be prepared;' which having been approved of, the Presbytery decerned and ordained 'the Magistrates of Ayr, in 'so far as their interest is concerned, and the other heritors of 'the united parishes of Ayr and Alloway, usually denominated 'the parish of Ayr, to pay their several proportions of a sum not 'exceeding L.1200 sterling, for building a manse and office-'houses for the minister of the first charge of the said parish, 'according to their respective valuations, as stated in the town's-'books, and according to which the land-tax is levied, or ac-'cording to any other mode which may be found authorized by 'law.'

A suspension of a charge on this decree was presented by the Magistrates of Ayr, and the heritors of the united parishes, on the ground that the ministers of Ayr, being ministers of a Royal Burgh, although with a landward district annexed, had no legal claim to a manse and office-houses.

The Lord Ordinary took the case to report to the Second Division, and the Court found, 'That the charger has no right 'to a manse under the Act of Parliament 1663, and decern; but 'before answer as to the specialties founded on by the charger,

'appoint him to give in a special condescendence, in terms of the act of sederunt, of the facts, which he avers and offers to prove, to instruct that he is entitled to a manse, independent of the said Act of Parliament.' Thereafter, on a reclaiming petition, the Court appointed parties to furnish the other Judges with copies of the pleadings, to obtain their Lordships' opinion on the point, 'Whether the charger, independently of all specialties, is by law entitled to have a manse assigned to him, as minister of the united parishes of Ayr and Alloway; reserving to him to be heard upon any specialties that occur in his case.' June 13, 1827.

The Magistrates lodged a note, stating that there was a specialty in their favour, which would supersede the determination of the general question, namely, that every part of the parish was burgal, being part of the old burgh of Ayr, and referred to the original charter of erection of the burgh, by William the Lyon. The Court, however, ordained their order to be obtempered, 'reserving to the parties to be heard upon any specialties that occur in this cause.'

Lord President (Hope), Balmuto, Balgray, Succoth, Pitmilly, Gillies, and Cringletie, stated that they were 'unanimously of opinion, that independently of all specialties, the charger is by law entitled to have a manse designed to him, as minister of the united parishes of Ayr and Alloway. In point of principle, the Judges cannot see any distinction between a burgh royal, having a landward parish, and burghs of barony and regality having the same.

'2d, They consider the point to have been fixed by the judgment of the House of Lords in the case of Dunfermline, which they have always understood proceeded on the general principle. Indeed, it appears to the Judges, that the specialties founded on all bore the other way.' The Second Division, however, on advising petition, answers, and the above opinions, and whole proceedings in the cause, adhered.'*

Dr Auld now gave in a condescendence of the specialties, which were, that Alloway parish, united to Ayr about 1692, was, prior to that year, a landward parish; that a large part of the parish of Ayr proper was landward, and the old parish of

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* Two of the Judges did not vote, one being an heritor, and the other Ordinary on the Bills, who was not consulted, so that, out of the remaining 13, ten voted in favour of the minister's claim, and three against it. But the three were a majority of the five sitting in the Division before which the question had come; and at this time the decision was carried by the majority of the Division before which the case depended.

June 13, 1827. Ayr was anciently a parsonage; that from time immemorial a glebe had been annexed to the benefice of Ayr, and was still in possession of the minister; that when Alloway was a separate parish, a glebe was also attached to the benefice; and although now feued out, the feu-duty belonged to the benefice; that at one time there was a manse attached to each of the benefices of Ayr and Alloway; and that the Magistrates of Ayr had paid manse rent, for nearly two centuries, to the ministers of the parish. The Magistrates answered, that a claim for a manse must rest on statute 1663, or on private agreement and contract; and that payment of manse rent (the only important specialty) was, in the books of the town, expressly mentioned as a gratuity. The Court, on reconsidering the case, on the 11th February 1823, found the letters orderly proceeded. The Magistrates and Heritors then objected, that the Court could not entertain the question of specialties in this process, since the Presbytery had no jurisdiction, except under the act 1663; and as it had been finally declared that Dr Auld had no right under that act, the decree of the Presbytery must be suspended, as being pronounced in a matter in which they had no power to determine.

The Court being equally divided, Lord Cringletie was called in, and thereon their Lordships, on the 16th June 1825, altered 'the interlocutor complained of, suspend the letters simpliciter, 'and decern; reserving to the charger to proceed in any other 'manner which may be competent, for establishing his right 'to a manse; and to the suspenders their defences, as accords; 'find the charger entitled to expenses, so far as incurred since 'the 11th February 1823,* subject to modification.†

Dr Auld appealed.

Appellant.—In all countries where the Christian religion prevailed, tithes, manse, and glebe, were conferred on the parochial clergy. There is evidence that manses must have been known in Scotland about the middle of the 13th century, and that the Popish clergy enjoyed them, and suitable glebes, down to the Reformation, and, after that event, the greatest anxiety is shown by the legislature in protecting the Protestant clergy from the dilapidation of their predecessors, who had set in feu, or long tack, great part of the manses and glebes. During the

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* The date at which the suspenders first raised the objection to the jurisdiction.

† See 4 Shaw and Dunlop, No. 81.

usurpation, power was given (1644, c. 31,) to Presbyteries to design manses and glebes to ministers of every parish kirk within their several bounds, where no manses exist, out of kirk-lands, or, in default of kirk-lands, out of 'whatsomever lands,' —the whole heritors of the parish to contribute proportionally. At the same time, 'borrows-town kirks' are excepted; and much discussion has been created, whether, by these words, parishes, partly landward partly burgh, be or be not excluded. Their most probable interpretation, however, is, that they refer not to landward parish kirks in burgh, but to kirks in burgh not being landward parish kirks, *i. e.* a purely burgh kirk. And, therefore, under the general words of the statute, a minister of a parish, partly landward partly burgh, had right to a manse. No doubt, by 1649, c. 45, it was enacted, that burghs, and the landward parts of the parish, provide competent dwelling-places and houses for their ministers; and this has been represented as showing that previously the minister of a parish, partly landward and partly burgh, had not right to a manse. But the statute was passed, not to give ministers in that situation any new right, nor to let in borrows-town kirks, but to settle the *manner* of providing a manse, when the parish was partly landward and partly burgh, and thus preclude disputes that might otherwise arise between the magistrates and the landward heritors. In every other respect, the law remained as before. At the Restoration, both the statutes were rescinded; but, shortly thereafter, it was enacted, by 1663, c. 21, that where competent manses are not already built, the heritors of the parish, at the sight of the bishop of the diocese, &c. shall build competent manses to their ministers. These words comprehend every parish without exception, where there are heritors, *i. e.* landholders, and (as must be necessarily implied) where there is property fit to be designed for a manse. By its very words, a parish partly landward and partly burgh is included; and in its essence, and according to its spirit, it is only purely burghal kirks that are excluded. But it is said that this statute does not contain the clause as to burgh and landward parts of the parish, founded on the act 1649, c. 45; that this omission must be held to have happened ex proposito, and, therefore, the legislature did not intend that ministers whose parish was in this situation should have a right to claim designation of a manse. But this clause did not give ministers so situated a new original right. They had that by 1644, c. 31, which, indeed, was only the expression of the common law, and that statute (1644, c. 31,) supposed to except parishes partly landward and partly burgh, and the

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statute 1649, c. 45, supposed to wipe out that exception and let in parishes so situated, have both been repealed; and now it is only the statute 1663 that can be looked to as the original and substantive legislative provision for manses and glebes. But if, before the act 1649, it was at least doubtful how far the minister of a parish, partly landward partly burgh, was not entitled to a manse, as not falling under the strict meaning of the exception of 'borrows-town kirks,' how can it be maintained, that, when both the statute excepting, and the statute supposed to repeal the exception, are declared to be rescinded, the comprehensive terms of the statute 1663 can be controlled by the interpretation given to these rescinded acts? There cannot be a greater absurdity than to rule, narrow, or explain a subsisting statute by what has been erased from the statute-book. Besides, the mere omission of a clause is no declaration of the legislature either one way or other. It must also be recollected that a minister of a royal burgh, having a landward parish, is entitled to a glebe, and the rights to a glebe and manse are co-extensive. But, in point of fact, the question is no longer open. It was determined, in the case of Dunfermline, where the decision proceeded on the point of law, and not on specialties.* As to the question of jurisdiction, the objection ought to

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* In the Case for the appellant, it is stated that the following notes of the opinions of the Judges in the Dunfermline case were taken by one of the counsel in the cause.—'*Lord Hermand.* A minister of a royal burgh, having a landward parish, is de jure 'entitled to a manse. The plea of res judicata is inapplicable to this case. The 'benefice is not to be injured by what was done by a former minister. The present 'charger does not represent him.—*Lord Craig.* The only difficulty is the res judicata; 'and it ought to be got over for the reason mentioned by Lord Hermand. The act '1663 restored the act 1649. A minister of a royal burgh, having a landward parish, 'is entitled to a manse. Besides, there is, in this case, clear evidence that the minister 'had once a manse.—*Lord Justice-Clerk.* Of the same opinion.—*Lord Meadowbank.* 'Cannot get over the res judicata. If it were not for that, I could have no doubt of the 'minister's right to a manse, both upon the general point and specialties.—*Lord President Campbell.* The act 1663 comprehends all prior enactments, 1592 among the 'rest. The judgment of our predecessors, with respect to manses in borrows-town 'kirks proceeded on a great mistake. Every parochial minister is entitled to his stipend out of the teinds; he is entitled to a glebe; and he is entitled to a manse. 'The act about borrows-town kirks has nothing to do with parochial ministers. It 'appears to be Mr Falconer's opinion, that the act 1663 did not injure the right of 'the minister of a royal burgh and landward parish to a manse. As to the res judicata, owing to the reservation, the question is still open on some ground or another; and it will be attended to, that "several (several only) of the Lords were of 'opinion that the act 1649 was left out of the act 1663 of purpose." The majority 'was of a different opinion; but "they agreed that the modification of L.40 Scots, 'and the minister's accepting of the same, made it no question." It is clear, however, 'that the L.40 Scots was only a temporary arrangement with the then incumbent; and 'at the time it was agreed to, that sum might be sufficient. Then, after some further

have been stated at an earlier stage of the case; and by their conduct the respondents have prorogated the jurisdiction, even if the objection were well founded. But the objection has no solidity. The Presbytery have a common law right, as well as by statute, to entertain questions and determine claims similar to the present. June 13, 1827.

Respondents.—The clergy have right to manses, not at com-

'remarks upon this point, he adds, if your Lordships cannot get over the res judicata, 'raise the house-mail to what is an adequate rent; make it L.40 sterling instead of 'L.40 Scots; but I think it would be much better to give him a manse in the ordina-'ry way. In the case of Linlithgow, the minister had also accepted of a manse-mail, 'and found entitled to a manse. The case there stronger against the minister.—*Lord* '*Bannatyne.* Clear for the minister on the general grounds, but cannot get over the 'res judicata.—*Lord Methven.* Of the same opinion.—*Lord Cullen.* Did not hear 'his reason, but of opinion that the res judicata should be got over.—*Lord Woodhouse-*'*lee.* Held the claim not barred by res judicata.'—In regard to what took place in the House of Lords, this statement was made by the appellant:—'The appeal cases, 'both for the heritors and the minister, argue the question generally. The only spe-'cialty founded upon, or seriously referred to in either of these pleadings, is the res 'judicata, which was a specialty against the minister. The Lord Chancellor, how-'ever, held, with the Court below, that this was no sufficient bar to his claim; and it is 'indisputable, that, holding it no such bar, that great authority decided entirely upon 'the general point arising on the terms of the act of Parliament. The late Mr Hor-'ner, though not present when the judgment was delivered, expressly states, in a let-'ter to one of the appellant's counsel, that the argument at the bar "turned wholly upon 'the general question." Mr Mundell, the solicitor who conducted the case for the mi-'nister, wrote to him at the time in the following terms, with regard to what passed 'when the judgment of the Court below was affirmed:—"In moving the judgment of 'affirmance, the Chancellor did not say much; he merely adverted to what he had 'said on the day when counsel withdrew from the bar—that he had examined the 'point of res judicata, and found there was no foundation for it. With respect to the 'merits, he adverted to a position made by Sir Samuel Romilly, who had contended 'that the right of a minister in your situation was so clear under the act of Parlia-'ment, that, even if it could be made appear that the cases relied upon by the appel-'lants did not import the contrary, nothing short of a judgment in the last resort 'could give a construction to the act of Parliament negativing that right. His Lord-'ship observed, that if there had been a train of decisions, finding a minister in such a 'situation not entitled to a manse, and the country had acted on these decisions, he 'must have abided by those decisions, even though there were no judgment in the last 'resort, whatever his own opinion might be on the act of Parliament. But there did 'not appear to be any such cases; and upon the act of Parliament, there could be no 'doubt that you were entitled to a manse."

'In confirmation of what is stated in these communications, Mr James Chalmer, '(whose accuracy is well known to some of your Lordships, and who was solicitor for 'the heritors in the House of Lords,) says, in answer to a question put to him on the 'subject, that although he had preserved no distinct note of the Lord Chancellor's 'speech, the affirmance went upon the general ground. "I understand (he states in his 'letter) the affirmance to be on the general ground, that the minister of a burgh and 'landward parish was entitled to a manse, the decision marked by Lord Kilkerran in 'this very parish being held erroneous. The minister of a parish purely burghal cer-'tainly not entitled."'

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mon law, but solely by statute. By statute 1644, the Presbytery has power to design manses to ministers at every parish kirk, 'borrows-toun kirks being always excepted;' and borrows-toun kirks are kirks in a borough, whether there may be landward parish attached or not. By act 1649, this exception was removed. These statutes fell under the act rescissory; and when the statute 1663, c. 21, was made, the provision in 1649 as to parish kirks was re-enacted; but the clause removing the exception as to burgh, whether with or without landward parish, is left out. It is therefore plain, that only ministers of parishes purely landward are entitled to manses. This doctrine is supported by a series of decisions. The case of Dunfermline, alleged to have decided the point another way, went upon specialties, and not on the law.

Master of Rolls.—Is it possible that the judgment in the Dunfermline case could have proceeded on any other than the general ground? I have read the papers in that case carefully, and I cannot see that it could have been decided on any other but the general point, and this House must be satisfied, that the judgment did not proceed on general principles, before it can allow the judgment to be shaken. The House of Lords affirmed the judgment of the Court of Session, that the Presbytery had a right, in the Dunfermline case, to design a manse; now, could the Presbytery have designed a manse on specialties?

Sir Charles Wetherell (for the Heritors).—There was an extremely important specialty in the Dunfermline case, namely, that the minister had once been possessed of both manse and glebe, and on this specialty the affirmance in this House proceeded.

Master of Rolls.—Your argument will just come to this—There are two grounds on which this House might have proceeded—one is agreeable to law—the other is against it; and you, in order to overcome the objection of res judicata, presume that the House went on the ground that is against all law. It is too conclusive, that either judgment went on the general grounds argued by the parties, or on a ground against law, and not hinted at by the heritors. You contend, that the Presbytery have no jurisdiction, except under 1663; but in the Dunfermline case the Presbytery designed a manse, and that designation was confirmed—Can we then, resist concluding that the House went on the general ground, and did not hold a jurisdiction to exist where none existed?

Sir Charles Wetherell.—But that is exactly a point as to which there may be a question. In the Dunfermline case the objection to the jurisdiction was not raised; it had been overlooked. We can make it plain, that, under the statutes, the appellant has no claim.

Master of Rolls.—You cannot go into them. We can't conjecture what ought to be the law, but what is the law.

Campbell (for the Heritors).—The present case certainly was not de-

cided on this ground in the Court of Session; and we understand that this Honourable House does not decide cases on grounds different from those originated in the Court below. June 13, 1827.

Master of Rolls.—The Roxburgh case was here decided on grounds which were not even touched upon or suggested in the Court below.

Sir Charles Wetherell.—If that be your Lordship's view, we need not proceed to the argument, as to want of jurisdiction; for if the appellant, in virtue of the Dunfermline case, comes under the statute 1663, the Presbytery clearly had jurisdiction.

Adam (for Magistrates of Ayr).—The appellant has no claim to a manse, seeing he is clergyman of a kirk purely burghal.

Master of Rolls.—The House having decided, that when a parish is partly burghal and partly landward, the minister has right to a manse, the decision cannot be permitted to be impugned directly or indirectly; but if you can take the case from the application of that decision, that is a different matter, and the House will most readily listen to you.

Adam.—The burgh of Ayr extends over the united parishes of Ayr and Alloway. The original charter of erection of the burgh of Ayr was granted by William the Lion. The boundary specified in the charter includes the whole extent of what was the old parish of Ayr. The lands, contained in the old parish of Alloway, were granted to the burgh by Alexander II., by charter, in the year 1236—were erected into the barony of Alloway by Robert I. 1324—to be held of the town by the same tenure, and under the same administration, as the original patrimony of the burgh. By these two last charters, the town is appointed to pay L.10 Scots of burgage-duty for the barony of Alloway. In a charter of confirmation granted by Robert III., in 1400, the burgh is appointed to pay L.10 Scots more for the whole of their other possessions (Baronia de Alway tantum excepta). By a charter of James VI. all these subjects are consolidated, and a burgage-duty of L.20 Scots appointed to be paid for the whole. Thus, the whole territory of Ayr and Alloway, that is the whole united parish, was held in burgage by a proper burghal tenure, and constituted one burgage tenement. Any subinfeudations which afterwards took place, were allowed only by special grant of the crown. Being therefore a burghal parish, the appellant has no right to a manse. At all events, none of the burden can be thrown on the Magistrates, for they are not 'heritors,' in the proper sense of the word.

The House of Lords ordered and adjudged 'that the interlocutors complained of be reversed; and it is farther ordered, 'that the cause be remitted back to the Second Division of the 'Court of Session, with an instruction, that it is fixed by the 'judgment of the House of Lords in the Dunfermline case, that 'the minister of a royal burgh, having a landward district annexed, is by law entitled to have a manse assigned to him.'

Appellant's Authorities.—Forbes's Treatise on Tithes. Hailes' Annals of the Church; 1563, c. 72; 1572; c. 84, 1592, c. 118; 1594, c. 202. 2 Ersk. Inst. 10.

June 13, 1827. 2; 1644, c. 31; 1649, c. 45; 1663, c. 21. Anderson, 17th Dec. 1664 (5121.) Fullerton, Dec. 1779 (5123). Williamson, March 26, 1685 (5121). Dunfermline (1), 30th June, 1750 (8504). Linlithgow, March 5, 1802 (in a note to report of Dunfermline, infra). Dunfermline (2), 19th Nov. 1805. (N. 1. Ap. Manse). Barclay, 15th Feb. 1795 (F. C.) Boyd, 24th Jan. 1769 (7617).

Respondent's Authorities.—Hailes's Canons of the Church, 13; 1563, c. 72; 1572, c. 48; 1612, c. 8; 1644, c. 31; 1649, c. 45; 1663, c. 21. Dunfermline (1), 30th June, 1750 (8504.) Elgin, Feb. 28, 1769 (8508). Muttar, June 16, 1784. Linlithgow, 5th March, 1802 (see Dunfermline (2). Dunfermline (2), 19th Nov. 1805 (No. 1, Ap. Manse). Ersk. Inst. 2. 10. 56; 1. 2. 29.

RICHARDSON and CONNELL—J. CHALMER—MONCRIEFF and WEBSTER, *Solicitors.*

No. 53. STEPHEN ROWAN CRAWFORD, Esq., Appellant.—*Wilson—John Campbell.*
WILLIAM BENNET, Insurance-Broker, Glasgow, Respondent.—*Adam—Keay—Kaye.*

Minor.—A minor, in trade, having given a receipt for L.3000 sterling, but which was not a trade transaction, having been found liable in repetition for the whole amount, although he alleged that truly he had not received L.3000 sterling, but only certain items and orders, some of which had been paid, and others not; the House of Lords (reversing the judgment of the Court of Session, except as to an admitted sum,) ordered an inquiry as to the amount de facto received, or what might, without the party's wilful default, have been received, in respect of the receipt.

June 19, 1827.

1ST DIVISION.
Lord Alloway.

JOHN CRAWFORD, Esq. of Broadfield died, leaving a large heritable and moveable property, which, by his deed of settlement, he divided among his family,—enjoined his eldest son, as heir-at-law, to make up titles to the heritage, and convey as directed; and appointed his three eldest sons, and his widow, executors. In this succession, Stephen Rowan Crawford, the fourth son, was entitled to a money provision of L.3000; heritage, valued at L.9600; and personal funds, amounting to L.2434, 13s. 4d., to equalize his share,—in all L.15,034, 13s. 4d.

Shortly after his father's death, Stephen R. Crawford, then about seventeen years of age, went to Lisbon to attend the mercantile counting-room of his brother Joseph, then carrying on business under the firm of Joseph Tucker Crawford and Comp ny. The partners of that house, the three eldest sons, had also a house at Port-Glasgow, under the firm of John Crawford and Company.

Unexpectedly, the house of John Crawford and Company failed, bringing down with it the house of Joseph T. Crawford