No 42.
rights, without signing the submission.

it, who agreed to the same; in consequence whereof, the arbiter came to the ground, and asked the parties, if they had agreed to the submission? To which all the three *answered*, That they had bound themselves by mutual letters to stand to his determination, touching the marches and boundaries referred to him; whereupon the arbiter took the depositions of the witnesses adduced for each of them, and thereafter pronounced his decreet-arbitral, finding Cairntown and Brunton had a right to pasture on the muir, and ordaining Northtarrie to open a passage in his dyke, in order that they should have access thereto. After which, a decreet having been likewise obtained before the Sheriff against Northtarrie, to implement the decreet-arbitral, he suspended, insisting, amongst other grounds, on this objection, that the decreet-arbitral was void, as Colvill, one of the parties, had not signed the letter agreeing to submit; so that it could be considered, with regard to him, in no other view than a verbal submission.

THE LORDS sustained the objection against the decreet-arbitral in question, that it proceeded upon a verbal submission, as to the right of lands, in so far as concerned Thomas Colvill, one of the parties, and therefore is null.

But, upon a reclaiming petition, and answers, the LORDS found the decreet-arbitral was binding upon Thomas Colvill, in respect of his compearing and adducing witnesses before the arbiter.

C. Home, No 112. *p.* 181.

*** This case is reported by Kilkerran, *voce* LOCUS PÆNITENTIÆ.

1743. *February* 18.

DAVID LOGAN *against* GEORGE GLASGOW of Nethermains.

No 43.
The son of an heritor, had attended, for his father, a meeting of heritors, relative to a stent for repairing a manse, which had been imposed by decree of the presbytery. Found that the presence of the son, without objecting to the decree, barred suspension of it at the father's instance.

THE manse of Kilwinning needing repairs, the presbytery of Irvine imposed a stent on the heritors for repairing the same. Nethermains, one of the heritors, suspended the presbytery's decreet.

For the suspender, it was *observed*, That, at the transportation of the former minister in the 1718, he was burdened with the payment of L. 3 : 11s. Scots at his removal; and, upon payment thereof, the presbytery declared it sufficient; which they never would have done, if it had not been declared a sufficient manse at his entry, although the suspender can bring no direct proof thereof. In March 1721, the day before Mr Ferguson the present minister's ordination, sworn visitors were appointed by the presbytery to visit it, who reported, that it would take L. 87 Scots to repair it; upon this they applied to the patron for his assistance, who had three year's vacant stipend in his hands. Accordingly he laid out above L. 500 Scots on the repairs. These facts premised, it was *pleaded*, in point of law, That it was a natural burden on every possessor to uphold and repair the house he dwells in, where there is no paction to the contrary;

witness the case of liferenters and tenants, which must hold equally in the case of ministers. 2*dly*, Our statute law goes on that plan, as appears from the 21st act, Parl. 1663, which declares, 'That manses being once built and repaired, 'shall be upholden by the incumbent minister during his possession, and by the 'heritors in time of vacance, out of the vacant stipend.' From which it is plain, that if the vacant stipend is paid to the patron, the reparations must rest upon him. In short, the minister ought always to repair the manse during his incumbency, and the patron during the vacancy, until it is so deteriorated by time, as to make it necessary to rebuild it, which, no doubt, is a burden on the heritors. No 43.

From all which it was obvious, that as the manse was declared, or supposed to be sufficient, on paying L. 3 at the removal of the former minister, and that the patron laid out a great sum on it during the vacancy, Mr Ferguson, the present minister, ought to uphold it.

Answered for the charger, (who was collector appointed by the rest of the heritors), That the suspender's son was present at the visitation for his father, when he not only made no opposition, but even approved of the stent imposed on the heritors by the decreet, as did all the rest of the heritors; which was a sufficient answer of itself to all the defences against the stent's taking effect. And with respect to the grounds of law, it was allowed, that a manse ought to be kept in repair during the vacancy out of the vacant stipends, but during the incumbency, the minister is not otherwise liable, than in the case that he gets it in a sufficient condition; and that it be so declared by an act of the presbytery: It is true, that, by the clause of the act 1663, above quoted, the heritors must give the minister a sufficient manse at his entry; and custom, which is the best interpreter of laws, has always constructed it so as the same should not only be sufficient at his entry, but that it should be so declared. Nor can the special circumstances condescended on vary the question; for a manse may be repaired twenty times, and yet, after all, never be a sufficient house; which is really the case of the present one.

Replied, There was no foundation in any statute for freeing a minister from the natural obligation to uphold his manse during his incumbency, because there was no judicial declaration of its sufficiency the time of his entry. 2*dly*, By the act 1663, the heritors are not otherwise made liable to uphold the manse than out of the vacant stipends in their hands; and if the vacant stipends were not allowed to remain with them, but uplifted by the patron upon a legal title, there remains no longer any obligation upon them to uphold the manse during the vacancy. In a word, if the patron did his duty, the minister becomes liable for the sum decerned for reparations, or if there was any failure on his part, the heritors ought not to suffer by his fault, but he alone ought to be liable.

THE LORDS, in respect the suspender's son was present without objecting to the decreet, found the letters orderly proceeded.

 C. Home, No 230. *p.* 375.