No 19.

and the Commissioners, at that time frequently on consent, determined things they would not otherwise have been competent to.

Several of the Lords were of opinion, that the second clause of the act 1649 was left out of the act 1663 of purpose; so that the pursuer had no title to a manse; but they agreed that the modification of L. 40 Scots, and the minister's accepting of the same, made it no question.

The Lords, 19th June, found that the minister in this case was not entitled to a manse, and that the presbytery had no power to design him one; and this day, on a bill insisting that he was entitled to a house within the precincts of the abbey, adhered, with this explanation, that he was not entitled to have a manse designed him on the act of Parliament 1663; reserving him to claim to be furnished with a house on any other ground as accorded.

Reporter, *Elchies.* Act. *Lockhart et Dalrymple, sen.* Alt. *Ferguson.*

D. Falconer, v. 2. *No* 144. *p.* 169.

1751. *December* 3. M'Aulay *against* Auchinleck and Kid.

No 20.
A private party had left by settlement a house in a burgh, for the residence of the minister. Having gone into disrepair, the present incumbent brought an action against the executors of the former one, for the expense of refitting. Assoilzied.

Edward Little skipper, burgess of Queensferry, in the year 1650, mortified, gave, and granted to Mr John Primrose, then minister of the gospel at Queensferry, and his successors in office, as a constant manse, his tenement of houses in the said burgh, which he declared to be in satisfaction of his bond of L. 8 Scots yearly, which he had granted for augmentation of the minister's stipend.

Mr Kid was ordained minister at Queensferry in the year 1710; and upon his death, Mr Archibald M'Aulay was ordained in the 1749 or 1750, who finding the said house ruinous at his entry, brought a process against the Representatives of Mr Kid the former incumbent; concluding that they should be decerned either to put the tenement in a tenantable condition, or to make payment to the pursuer of L. 150 Sterling, or such other sum as might be necessary to put it in repair.

Upon advising a proof, which in this case had been allowed by the Ordinary upon the present condition of the tenement, and the condition it was in at Mr Kid's entry, it was by several of the Lords doubted, whether in this case there lay any action against the Representatives of Mr Kid; and parties were appointed to give in memorials upon that point; and no great light having been got from these memorials the Lords reasoned the matter among themselves, to the following effect.

That if any action lay, it must either be at common law or upon statute law; but that it could lie upon neither; not at common law, for that before the statutes made in the time of James VI. if the minister had let his manse fall down about his ears, his executors would not have been liable to repair it, more than an heir of entail would be liable to the next heir for letting his house go into disrepair; and indeed if such action could have lain, the statutes concerning

wardatars and liferenters being obliged to keep up houses had been unnecessary. No 20.
And if on statute law, it behoved either to be on the statutes about manses, or on that concerning liferenters; but that it could lie on neither; not upon that concerning liferenters; as a minister is no liferenter, he may, many other ways than by death, cease to have right to his stipend and manse; not upon the statutes concerning manses, as this was no manse, but a mortification of a tenement to the minister and his successors, which did not make it a manse.

It was *separatim* observed, as concerning proper manses, that unless a minister is proved to have got a sufficient manse, (and which by custom is commonly ascertained by its being declared a legal manse by the presbytery, which at the same time is not a necessary requisite by law, but is only introduced by custom for the more certainty) he is under no obligation to repair. And lastly, suppose a minister to be bound to keep his house up in the same condition in which he got it, which some of the LORDS pointed at, though the plurality were of a different opinion, unless he had once got it a sufficient, or as it is usually called, a legal manse, even in that view there lay no action against the defenders, as there was no proof of the condition it was in at Mr Kid's entry in 1710.

THE LORDS 'sustained the defences, and assoilzied the defenders.'

Fol. Dic. v. 3. p. 399. Kilkerran, (MANSE and GLEBE.) *No 2. p. 342.*

*** D. Falconer reports this case:

EDWARD LITTLE, skipper in Queensferry, mortified to the minister of that burgh a tenement therein, which was from that time possessed by the minister, but fell into great disrepair, being set to tenants in five small houses.

Mr Archibald M'Aulay minister of Queensferry, pursued the Executors of Mr James Kid his predecessor, who entered to the benefice in 1710, and who, he alleged, during his incumbency, suffered the houses to go to ruin, to put them in repair.

The claim was laid on equity, as the incumbent received the profits; and no other person was obliged; and on analogy of liferenters and wardatars.

Answered, Liferenters and wardatars are obliged by statute.

Observed, It did not appear the houses were in repair at Mr Kid's entry; that of old the clergy, who were titulars of their benefices, were not bound to repair their houses, any further than their conveniency induced them; that there was no law concerning this matter, until the statutes for building manses; that this was no manse.

THE LORDS found that there lay no action against the executors.

Act. *J. Dundas.* Alt. *A. Macdowall.* Clerk, *Forbes.*

D. Falconer, v. 2. No 240. p. 292.