cord and a conjunct probation; and after the proof had been led, found that, in point of fact, the pursuer had failed to prove that the piece of ground referred to in the summons was included within the boundaries contained in the title set forth by him in said conclusions and in the condescendence for him, or that the same had been possessed by him for forty years; and therefore found and declared, in terms of the first conclusion of the summons only, and assoilzied the defender from the remaining conclusions. The Lord Ordinary, in a note to his interlocutor, explains, that after a careful examination of plans which were referred to, and with the aid of the parole evidence, he has come to the conclusion that the piece of ground in dispute is not embraced within the boundaries of the pursuer's title. He is quite satisfied that the boundary of his property did not extend in a direct line to the Glaisnock beyond the beech tree, which was situated at the extremity of the fence forming the western boundary of the feu, but that the boundary there followed the line of the hedge running eastward, or north-eastward, and which separated the garden ground of the pursuer from the angular piece of ground coloured red on the plan. The possession had by the defender, and those through whom he derives right, goes strongly to support the view which the Lord Ordinary here takes, and is indeed, looking to the character and peculiar position of subject in dispute, incapable of any other explanation.

The pursuer reclaimed.

SOLICITOR-GENERAL and CRICHTON for him.

WATSON and MONTGOMERY for the respondents.

LORD COWAN—This is a case of no great pecuniary value to the parties, and it is unfortunate that much expense has been incurred in the decision. I cannot but regard the case as important in reference to titles to land, and in this view I have given great attention to the able argument which was submitted to us, and to the proof which has been led in the case. I have come to be of opinion that the interlocutor of the Lord Ordinary cannot stand, and that the pursuer is entitled to decree in terms of the first conclusion of the summons. The pursuer there concludes to have it found that he has sole right to "that garden or piece of ground at the back of the Holm of Cumnock, sometimes possessed by James Kirkland, and which he conveyed to David Kirkland by disposition and deed of settlement dated 18th February 1824, and recorded in the Books of Council and Session on 4th January 1827, the same being described in the prior writs thereof as "All and whole these two roods and twelve falls of ground or thereby, being the fourth and fifth lots of the holm called the Bridgend Holm of Sharkstone, as the said was pitted off separately, as mentioned in a feu-disposition of the same, granted by the Right Honourable the Earl of Dumfries to James Johnstone, dated the 19th day of December 1767, and are now bounded by a lot of ground feued to James Perry on the east, by a ditch dyke and the high road upon the south and west, and by the water of Glaisnock on the north parts." This the defender resists, in so far as the pursuer claims right to a piece of ground described or coloured red on the plan, extending to four falls and eleven ells, and pleads a tack dated 1789, granted by the Earl of Dumfries to his author, by virtue of which he claims to have the pursuer's property limited by a hedge which has been there for a long time. Now, between 1767, when this feu-disposition was granted, and 1786, when the tack was granted, these estates had come under an entail, and hence it is that all the subsequent grants are in the form of ninety-nine years' lease under the Montgomery Act. Now, I find that in all the rights, whether feus or tacks, the subjects are always taken as bounded by the water of Glaisnock. The question is, What was the true boundary of this feu on the west in 1767, when it was feued out? It is described in the disposition by the Earl of Dumfries to James Johnston as bounded by the ditch dyke and the high road on the south and west. The way this ditch dyke ran is established by the proof to have been from the south-west corner of the feu in a straight line to the stream. This drain was covered up in 1851. Let us now see how the case was met by the defenders. The defenders led a great deal of evidence to show that the piece of ground has been for a long period in their own possession. That the pursuers acquiesced in the present state of possession, and allowed the defenders to erect buildings on this piece of ground. Now, I am not in a position to say that these facts have not been established by the defender, so that I take these facts as proved, and consider what is the legal effect of them. In the first place, as regards the hedge, I think it must have been erected at a very early period. The words "surrounded by a hedge," have got into the titles in a charter of confirmation obtained in 1843, and we have to say whether the direction of the hedge is to affect the feu-right. If this were a question between superior and vassal, it could not affect the vassal's right, for charters by progress are not construed to have the effect of limiting the feu-right. There is no doubt there has been possession on the part of the defender for a long period, and we have to consider what effect is to be given to this possession. Now, Erskine lays it down that possession of land without a title gives no right. But here it seems to me that possession was not only without title but against title. With regard to the plea of acquiescence, it cannot be supported simply by possession. Mere tolerance is not enough, and I do not think that the defender has proved anything more.

LORD BENHOLME and LORD NEAVES concurred with LORD COWAN.

The LORD JUSTICE-CLERK—This is a case of great hardship to one of the parties, who has possessed without challenge for upwards of forty years. But the question must be decided on principles of law. We have here one party pursuing another to deprive him of his possession, and I think the pursuer must make out a very clear case. The pursuer has founded his case on possession prior to the possession of the defender, and I think that he was bound to prove his allegation of possession, and as he has failed to do so, I think the presumption is that the possession was in other hands.

The Court (the Lord Justice-Clerk dissenting) recalled the interlocutor of the Lord Ordinary, decerned in terms of the conclusions of the summons, and granted decree against the defender for removal.

Agents for the Pursuers—Tait & Crichton, W.S.

Agents for the Defenders—J. & F. Anderson, W.S.

Friday, July 12.

ELLIOT AND OTHERS *v.* HUNTER.

Manse—Heritors—Repairs—Additions. A manse had been built in 1840, and occupied by the then

minister till 1857, and by the present minister down to 1866, without objection to its competency, but had never been declared a free manse, nor accepted by the Presbytery. The Presbytery then ordered the heritors to make certain repairs and additions. The heritors were willing to make the repairs, which were of trifling amount, but declined to make additions. Held (1) that as there was no structural defect, and the manse might be repaired at a small cost, the heritors were not bound to make additions or alterations; (2) that the manse must be held to be a competent manse from the implied acquiescence of the Presbytery and ministers, though it had never been declared such nor accepted by the Presbytery.

The respondent, the Reverend George Hunter, minister of the parish of Kirkton, applied to the reclaimers, Sir William F. A. Elliot and others, who are the principal heritors of the parish, to build an addition to his manse, and a stone and lime wall round a new garden beside the manse; and on their refusal to make these additions and repairs, he brought his demand before the Presbytery of Jedburgh. The Presbytery accordingly met at Kirkton on 1st August 1866, and had in attendance Mr Robert Falla, who examined the manse, &c., and made the following verbal statement, which was embodied in the minute of the meeting of Presbytery:—"Garden appears to be small, and at present surrounded with a hedge and partly with an upright railing, the latter fallen into decay. The garden should be enlarged and surrounded by a wall. There is only one good bedroom in the manse and two small ones; at least another requisite. I suggest the women-servants' bedroom be removed, part of it put into the present lumber-room, and it turned into a bedroom, the remainder being made into a bath-room adjoining the water-closet; and, to make up for the servants' room, I would suggest building an addition to the north, containing washing-house, larder, milk-house, coal-cellar, and servants' water-closet (all of which are wanting), and a women-servants' bed-room, &c., above, with a stair for access to them." The meeting of Presbytery was adjourned to the 29th of August, when the heritors intimated that they were willing to execute the whole repairs reported by Mr Falla as necessary, but that they declined to make the proposed additions to the manse, and to inclose the new garden with a stone and lime wall. The offer was rejected by the Presbytery, who thereupon pronounced the following deliverance:—"The Presbytery believing that the additions to and repairs upon the manse and offices, as reported upon by Mr Falla, are necessary to render the manse a suitable and sufficient residence for the minister, decern in terms of that report, and order, as additional erections, one bedroom, a servants' bedroom, washing-house, larder, milk-house, and coal-cellar. They also find that the manse garden requires to be inclosed with a wall of the usual kind and dimensions; and in the whole premises decern and decree accordingly; and appoint the heritors to procure the necessary plans, specifications, and estimates for the said works, to be laid before the Presbytery at their meeting to be held in the Parish Church here on 5th October next."

At the Presbytery meeting on 5th October the heritors tendered specifications of the repairs which were suggested by Mr Falla, but declined to build the additions to and alterations on the manse, or to erect the new garden wall. The Presbytery then ordered Mr Falla to procure plans, &c., for the erection of the works.

Against these findings of the Presbytery the heritors presented this note of suspension and interdict, and pleaded—(1) The deliverances of the Presbytery complained of, ordaining the complainers to build the additions to and make the alterations on the manse specified in the said deliverances, are *ultra vires* of the respondents; are illegal; and ought to be suspended, in respect that the same are unnecessary, and that the manse merely requires certain moderate repairs in order to render it thoroughly habitable and sufficient; and that the complainers are willing and have repeatedly offered to execute the same. (2) The said deliverances, in so far as they ordain the complainers to erect the wall round the small garden above referred to, are *ultra vires* of the respondents, and illegal, and ought to be suspended, in respect the said garden is not the manse garden, and that the proper manse garden is surrounded by a wall, which the complainers are willing and have offered to put in complete repair. (3) The proceedings of the respondent, in so far as complained of, are unwarranted, and the complainers are entitled to have the same suspended, and the interdict declared perpetual, in respect that the manse is a sufficient and competent manse for the minister of the parish of Kirkton; and that the same, when repaired according to Mr Falla's report to the Presbytery and specifications, ought to be declared by the Presbytery a free manse.

The respondents pleaded—(1) The minister of the parish of Kirkton is entitled to be provided with a suitable manse and offices. Not being so provided, and the heritors refusing or delaying to interfere, the Presbytery are entitled to proceed as they did; (2) The manse and offices of Kirkton being in a state of great disrepair and insufficiency, the Presbytery were entitled, on the heritors' refusal and delay, to decern for the necessary repairs and additions; (3) The repairs and additions or accommodations reported by Mr Falla, and decerned for by the Presbytery, being indispensable for the comfort and accommodation of the minister, the decree is unobjectionable, and the suspension should be refused; (4) The manse never having been declared a free manse, and never having been accepted by the Presbytery, and the manse, offices, and garden never having been completed, but being in fact still imperfect and incomplete, the Presbytery were entitled to decern for the reasonable completion thereof, and their decree is unobjectionable.

The Lord Ordinary (Kinloch), before answer, remitted to Mr Matheson to report—1st, What is the fairly estimated cost of the repairs proposed on the manse, as specified in Mr Falla's report, and the deliverance of the Presbytery? 2d, What is the fairly estimated cost of the additional erections specified in said report and deliverance? 3d, What is the condition of the garden, and how the same is enclosed, and the fairly estimated cost of inclosing the same as far as unenclosed? The Lord Ordinary, in a note to his interlocutor, explains that the heritors of the parish moved to allow a proof under the Evidence Act, but that he considered it more advisable to make the usual remit to a man of skill. The inquiry in the first instance was not historical, but statistical.

Against this remit the heritors reclaimed.

A. R. Clark and John Marshall for reclaimers.

Cook and Spens for the respondent.

Lord Justice-Clerk—The question before us arose out of an application made by the Rev. Mr Hunter, minister of the parish of Kirkton, in the Presbytery of Jedburgh, in July 1866, craving an order from that reverend court upon the heritors for repairs and additions to his manse and offices, and the building of a wall round the garden to be made near his manse. The Presbytery remitted to a tradesman, Mr Falla, who appears to have had the confidence both of the Presbytery and of the heritors, and who reported as follows [reads the report quoted *ante*]. The heritors intimated their willingness to execute the repairs, but declined to alter the manse as proposed, by adding to the accommodation which it already afforded; and they also declined to build a wall round the garden. The ground of declinature was substantially that the manse was in a sound condition, requiring only some repair of no great amount to make it right, and that they could not be called upon to add to the accommodation of a manse in such a condition. They stated objections to the building of a wall to the garden, on the ground that there was a garden enclosed by a wall, which they say they are willing to repair, and that the new garden was, in truth, a portion of the glebe laid out by the minister, but without authority, as a garden. By a deliverance of the Presbytery, of date 29th August 1866 [reads the deliverance quoted *ante*]. The Lord Ordinary has, in the interlocutor under review, remitted to an architect to report, before answer, upon certain points suggested for his consideration. To this it is objected that there is no room for the application under the circumstances in which it is made, and consequently that the remit should be recalled. If it appears to the Court that there is no room for the application under the circumstances in which it is made, it is obviously for the interest of all parties that no further expense should be incurred. We must therefore consider the circumstances, and address our minds to the consideration of the very important general question involved.

The heritors, in reference to the leading point in dispute, maintain that there is no room for an order to enlarge and add to a manse which is in a state capable of being put into a sound condition by an inconsiderable outlay on repairs; and they say that such is the state of this manse. The minister affirms that where it is necessary to make a manse sufficient and suitable for the residence of the minister, the heritors are liable, unless when the manse has been declared free and the structure remains, and is in a sound condition at the time of the application. The parties are agreed as to the extent of repairs required, and these are to be taken separately from the question of additions. The repairs are capable of being executed at a small cost. It is obvious that there is no essential defect in any important part of the building, that the structure is not unsound, that no renovation of any part of the building is required. Cement, slates, refitting of window fastenings, repairs of plaster, relaying of front steps, are what are required. On the other hand, the extent of accommodation is, according to the minister's averments, such as must, I think, be admitted to be more limited than the proper requirements of a manse exact. The number of rooms is not such as that, if a manse were to be built *de novo*, it would satisfy the demand of a Presbytery. The suggestions of additions bear no trace of extravagance about them. If it be relevant to say that heritors must in every case, irrespective of the sound condition of the manse, and where the manse has not been declared free, make additions as shall render the manse suitable and sufficient as a proper residence for the minister, there is certainly enough in the present case to justify inquiry. The obligation of heritors in reference to manses is to be found in the Act 1663, c. 2. The heritors are to build competent manses; when built, they are to put them in repair; when built and repaired, the incumbent is to maintain them. There is nothing in the statute as to any process or declaration of free manses, but the custom has prevailed, and is necessary to be observed, when the heritors propose to throw the burden of maintenance on the incumbent. The process has this transferring the *onus* of repairs in view. I am not able to perceive any authority for holding that the heritors are to apply to the Presbytery when they have built a manse, to have a finding of the Presbytery on the subject of the sufficiency of accommodation contained in it. The application, if made with a view to the transfer of the burden, may have the effect of bringing the matter under the Presbytery's consideration, and so save all question on the point. But I desiderate authority for holding that, if the heritors shall build a manse, of which the incumbent has taken possession, and which manse has been used and regarded for many successive years as the manse of the parish, the heritors are under a continuous obligation, which is to subsist until it shall please the Presbytery to express themselves satisfied with the extent of accommodation. In my view, if a building has been constructed as a manse, taken possession of without objection by the incumbent, to which the Presbytery do not object at the time of its occupation, or for a long course of years subsequently, the heritors will be held to have erected a suitable manse. Any other view would render the non-observance of what is not enjoined by statute, nor held as requisite by civil and recognised custom as a source of very serious and lasting obligations. It might not be a very easy finding to obtain. The Presbytery are under no obligation that I can see to grant and record any such certificate of opinion. If the expression or non-expression of their opinion were to be attended by consequences so serious, and if, by withholding what they are under no obligation to grant, they could from time to time decern for additions in conformity with the varying views of suitable clerical residences, they would secure a very large power not hitherto considered to be vested in them.

The manse was built in 1840, certainly at no great cost, but after litigation in the Court of Session, and after a report had been made by a very eminent architect of the day, Mr G. Graham. The then incumbent, who possessed up to 1857, lived in it without complaint. The present incumbent, Mr Hunter, applied to the heritors for and obtained repairs from time to time, and I do not see that additions were demanded till 1866. Viewing the manse as a building erected by the heritors, and accepted for sixteen years or so as their manse, I cannot regard the absence of any formal acceptance by the Presbytery as constituting any material distinction between this and other cases. I hold it to have been accepted as a suitable manse at the time. If so, there only remains for consideration, whether the heritors can be called upon to add to the manse in order to render it a suitable residence without the manse being in any condition of structural defect or substantial disre-

pair. I am of opinion that they cannot. They have built the manse, they are ready to repair it; the repairs required are of a trifling description, and may be completed at a small cost, and I can find no obligation on the heritors to do more. The cases on this subject are reviewed, and their import, as it appears to me, accurately given in the note appended by Lord Jerviswoode to his judgment in the case *The Heritors of Kingoldrum* v. *Haldane*, 1 Macph., p. 325. In the present case it is unnecessary, as it appears to me, to enter into any examination of them. I hold that this manse, built in 1840, and then and for many years occupied without objection as the manse, must be held to have met the requirements then thought sufficient. And, as this manse is capable, by slight repair, of being made perfectly sound and suitable, there is no claim maintainable for additions in order to make the accommodation suitable to what we may now think proper for a manse in that parish. If the manse were in such a condition of disrepair as to involve structural renovation—if there were serious defects in the building—it may be the claim might fairly come under consideration. It is not so here, and consequently the obligation, in my view, does not subsist.

As to the garden wall, I hold that, in offering to repair the walls of the proper manse garden, the heritors have made a sufficient offer in law. I was, in the course of the discussion, disposed to have held that the heritors, by getting the site of manse changed, may be held to have impliedly changed the site of the garden. But, upon consideration, I do not think that the one change implies the other. The manse garden certainly, in so far as regards vegetables and fruit, does not require to be immediately adjacent to the manse; and as to a flower garden or plots for flowers, a wall is not required or desirable.

The other Judges concurred.

Agents for the Heritors—Maconochie & Hare, W.S.

Agent for the Minister—D. J. Macbrair, S.S.C.

Saturday, July 13.

FIRST DIVISION.

DIXON AND OTHERS, APPELLANTS.

Bankruptcy—Bankruptcy Act 1856, § 35–38—*Bankruptcy Amendment Act* 1860, ℣ 5—*Deed of Arrangement—Composition.* At a meeting of creditors a resolution was carried by a majority in number and four-fifths in value "that the estate should be wound up under a deed of arrangement to realise the estate and divide it among the creditors." Held that that resolution was *ultra vires* of the meeting, which could resolve on a deed of arrangement but could not fix the nature of the deed, that power resting with four-fifths of the creditors in number and value claiming on the estate.

This was an appeal against an interlocutor of the Sheriff-Substitute of Lanarkshire in the sequestration of William Weir, Brothers, & Co., wholesale wine and spirit merchants in Glasgow. At a meeting of creditors held on 20th May it was resolved, by a majority in number and four-fifths in value of those present, (1) that the estate be wound up under a deed of arrangement to realise the estate and divide it among the creditors; and (2) that Mr Dixon be appointed by the meeting to report the foregoing proceeding and resolution to the Sheriff, and to apply for a sist of the sequestration for a period not exceeding one month. Mr Dixon accordingly presented a petition to the Sheriff, craving that the first resolution should be declared duly carried, and craving sist. To this petition it was objected on the part of certain creditors, (1) that under the powers conferred upon creditors by the 35th section of the Bankruptcy Act (1856), 19 and 20 Vict., c. 79, it was not competent for them to do more at said meeting than to resolve that the estate should be wound up by a deed of arrangement, leaving the nature and character of said deed to be subsequently determined when it came to be prepared in terms of section 38, and that the said first resolution was incompetent in respect it prematurely restricted the deed of arrangement to one under which the estate shall be realised and divided among the creditors, thereby excluding an arrangement by way of composition, or otherwise, as declared to be competent by the Bankruptcy Amendment Act (1860), 23 and 24 Vict., c. 33, ℣ 5. (2) Another objection was taken on the ground that the deed of arrangement proposed was not reasonable. The Sheriff-Substitute found that the first objection was well-founded, for the reasons stated, and because it was *ultra vires* of the creditors assembled at the preliminary meeting, provided for by ℣ 35, to resolve that the estate should be wound up by a deed of arrangement only on the condition that said deed should be of a particular character, and so prejudging what the general body of creditors have a right to fix as to the terms of the deed after a sist is obtained. He sustained the second objection also. He therefore refused the petition; found that the resolutions were not duly carried, and that the application for a sist was not reasonable; and appointed the sequestration to proceed.

Dixon presented a note of appeal.

A. Moncrieff (Scott with him) for appellant.

Dean of Faculty (Moncrieff) and J. Burnet for respondents were not called on.

The Court unanimously dismissed the appeal.

Lord President—These proceedings on the part of the creditors might have been defended as competent under the former Act, because the sort of arrangement that was contemplated by the 35th and subsequent sections of the Act 1856 was a deed of arrangement for winding up, and therefore the creditors at the meeting on 20th May 1867 might not have been going beyond their power in resolving to wind up under a deed of arrangement and divide the estate among the creditors. But the Act of 1860, which was passed after the decision of this Court in the case of *Douglas* v. *Hunter* (21 D., 1302), makes it optional to the creditors, when adopting a deed of arrangement, to make it either for winding up and dividing the estate, or a deed of arrangement by way of composition. Now the right of adjusting a deed of arrangement does not rest with the body of creditors empowered to resolve on winding up by such a deed, for it requires the concurrence of four-fifths of the whole creditors both in number and value actually claiming on the estate; and so the effect of this resolution is to tie up the creditors to make a deed of arrangement for winding up and dividing only. It seems to me that that resolution was *ultra vires* of that meeting; and therefore the whole proceeding is null, and the interlocutor of the Sheriff is right.

The other Judges concurred.

Agent for Appellants—A. K. Morison, S.S.C.

Agent for Respondent—W. Mason, S.S.C.