

which the respondents submit to interdict. It is said that circulars containing similar tables had been previously issued by other makers and were public property. But the complainers did not copy from previously published tables, but in every instance prepared these tables from private sources of information, and it is open to the respondents to do the same thing if they have the skill to do so and are willing to undertake the labour. On the question of the originality of the complainers' catalogue and circulars, I think there is a fallacy in considering the case as if each circular were a work complete in itself. The circulars no doubt were issued separately, but they form part of a series, and when exception is taken to parts of this series on the ground that something of the kind had been done before, it is fair to remember that every part of the complainers' publication is honest work, the result of independent study, and that the work as a whole is original in the sense of being the first complete publication of a set of tables of the required description. For these reasons I am of opinion that we should adhere to the Lord Ordinary's interlocutor.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Complainers—Sol.-Gen. Asher, Q.C.—Shaw. Agent—Philip, Laing, & Company, S.S.C.

Counsel for the Respondents and Reclaimers—Graham Murray, Q.C.—Ure. Agents—T. J. Gordon & Falconer, W.S.

Tuesday, November 29.

SECOND DIVISION.

MACDOUGALL v. THE DUKE OF PORTLAND.

Church—Parliamentary Church under Act 5 Geo. IV. c. 90—Repair of Wall Surrounding Church.

Where no pew rents were available for the repairs of a Parliamentary church erected under the provisions of the Act 5 Geo. IV. c. 90, held that it was not necessary for the heritor liable for the repair of the church in terms of the statute to get the consent of the minister before proceeding with repairs on the wall surrounding the church.

The Act 5 Geo. IV. c. 90, was passed for the purpose of providing for the erection of additional places of worship in the Highlands and Islands of Scotland. The churches erected under its provisions are commonly called Parliamentary churches.

By section 16 of the Act it is enacted—“That it shall and may be lawful for the minister and kirk-session of the parish or parishes to which the district attached to any such place of worship belongs, to make such provision for the attendance of mem-

bers of the said kirk-session or kirk-sessions (being inhabitants of the district attached to the additional place of worship) to officiate as elders at the said place of worship as to them shall seem necessary and expedient, and as is customary by the practice and forms of the Church of Scotland for the attendance of elders at parish churches, and that the minister of the district, together with these elders, shall give direction in all things relative to the additional church of the district.”

By section 18 it is provided that “Whereas it is necessary that effectual provision should be made for the repair of the said additional place of worship . . . after they shall have been built or provided, be it further enacted, that with respect to every such additional place of worship, the heritor or any two of the heritors applying for the same, his or their heirs and successors in the lands situated within the district for which such additional place of worship shall be set apart to be specified and described for that purpose, shall by such application be and become bound to keep and maintain such additional place of worship in good and sufficient repair to the extent hereinafter enacted, that is to say—Provided always, that the pew rents of such additional place of worship shall be applied towards the repair of such additional place of worship, . . . in the first instance under the direction of the surveyor appointed by the commissioners, and in default of his giving such directions during one whole year, then under the directions of the heritor or heritors undertaking for the repair of such additional place of worship, of the minister and of the officiating elders, who are also hereby empowered to give direction for small repairs at any time when requisite; and provided further, that after the application of the pew rents, the expense to be defrayed by the said heritor or heritor so applying, his or their heirs or successors as aforesaid, shall not in any one year exceed the sum of one per centum upon the amount of the money originally expended in building or purchasing and completing such additional place of worship (or in case of gift of any building for that purpose, in like manner not exceeding one per centum upon the original value of the same as estimated by the surveyor of the commissioners), to which extent, and no further, the said heritor or heritors shall be compellable to repair the same in such manner as heritors are compellable by law to repair parish churches in Scotland.”

In 1827 the church of Berriedale, Caithness-shire, was erected as a Parliamentary church under the Act 5 Geo. IV. c. 90, on a piece of ground conveyed to the Commissioners under the Act by James Horne of Langwell. The church was surrounded by a stone wall. As early as 1833 interments had been made in the ground enclosed by the wall, and immediately surrounding the church, and since then a few other interments had been made in that ground.

In 1846 the Parliamentary church and district were erected into the *quoad sacra* parish of Berriedale.

In 1892 the position of matters was as follows—The minister of the parish was the Rev. Daniel Macdougall. There being no resident elders in the parish, the kirk-session consisted of the minister and two assessors from the Presbytery of Caithness. There were no pew rents derived from the seats in the church. The Duke of Portland was the heritor liable for the repair of the church.

In March 1892 the Duke's factor advertised for tenders for proposed repairs "on the enclosure round Berriedale churchyard." Thereafter the repairs were proceeded with, consisting of taking down and rebuilding portions of the wall, and alterations in the form of the gateways.

The minister objected to the proceedings, and on the factor declining to stop the operations, the minister raised an action in the Sheriff Court at Wick against the Duke and his factor, in which he prayed the Court "to interdict, prohibit, and discharge the said defenders, their servants, and all others acting under their instructions or employed by or deriving authority from the defenders or either of them, or for whom the defenders or either of them are responsible, from interfering in any manner of way with the church of Berriedale, or with the ground surrounding the same enclosed within the enclosure walls thereof, also from interfering with the said enclosure walls, and from removing the coping from the said enclosure walls or any part thereof, from taking down the existing gate-pillars or any part thereof, and from altering the existing gateway and entrance from the public road into the said ground surrounding the said church, or from substituting new gateways or entrances, one or more, for the said existing gateway or entrance; and further to ordain the defenders forthwith to restore the said enclosure walls, gate-pillars, and gateway or entrance to the same condition in which they respectively were prior to the operations of the defenders thereupon."

The pursuer averred that in altering the gateway the object of the defenders was to oust the pursuer from the control and management of the church ground, and to deprive him of the exclusive possession of the keys.

The defenders, on the other hand, maintained that the object of the repairs was to remedy the neglected conditions of the ground, and keep rabbits and vermin from infesting the enclosure.

On 8th August 1892 the Sheriff-Substitute (MACKENZIE) pronounced the following interlocutor:—"Finds the pursuer, as minister of the *quoad sacra* church and parish of Berriedale, entitled to interdict against the defenders from interfering without the pursuer's consent with the enclosure walls of the ground surrounding the church of Berriedale, and from removing the coping from the said enclosure walls or any part thereof, from taking down the existing gate-pillars or any part thereof, and from altering the existing gateway and entrance from the public road into the said ground surrounding the said

church, or from substituting new gateways or entrances, one or more, for the said existing gateway or entrance as craved: Makes perpetual the interim interdict already granted: *Quoad ultra* dismisses said petition."

On 13th October 1892 the Sheriff (THOMS) sustained the appeal, recalled all the interlocutors in the case, and refused the prayer of the petition with expenses.

The pursuer appealed, and argued—Under section 16 of the statute the minister and elders had the sole right to carry out the repairs in connection with the church. If the matter was regulated by section 18 of the statute, the defenders had no right to proceed with the repairs until they had obtained the sanction of the pursuer to the work.

Argued for the defenders and respondents—Section 16 of the statute did not apply; it only re-delegated to the minister and elders the right to give direction so far as spiritual matters were concerned. Under section 18 the minister and elders were in certain circumstances to give directions with regard to the application of the pew rents, but here there were no pew rents. The defenders were acting reasonably in repairing the wall, and the expense of the repair had to be borne by them. No interdict should therefore be granted against their proceedings.

At advising—

LORD YOUNG—This is a peculiar case, and struck me from the first as being one of the most nimious applications for interdict which I have seen. The facts are these—This church of Berriedale, of which the complainant is the minister, was erected in 1827 under the provisions of the Act 5 Geo. IV. cap. 90, on a piece of ground conveyed by James Horne of Langwell to the Commissioners acting in execution of the Act. The church was built, and the ground conveyed was surrounded with a stone wall. The church has since been erected into a *quoad sacra* charge. It is admitted by both parties that the Duke of Portland is the heritor now responsible, within certain limits laid down by statute, for the church, including the walls surrounding it, being kept in proper repair. Under the 18th section of the Act the pew rents are liable primarily for the repair of the church, but in this case there are no pew rents. Indeed, in these latter days this church would seem to have become a superfluity; there are no elders, and it is said there is no congregation. But the Duke of Portland still remains liable to keep the church in repair within the limits laid down in the Act.

The walls surrounding the ground fell into a state of disrepair. A public meeting was held to consider the matter, the interest of the public being that some burials have taken place in this piece of ground from time to time since 1833, and I suppose the relatives and friends of those buried there thought it wrong that the walls should admit rabbits and other vermin into the ground where

those interments had taken place. In pursuance of the request of the meeting, the Duke, or rather his factor, advertised for tenders to put the walls into repair, and work was begun. Thereupon this controversy arose, the minister asserting that he alone had any right within the said ground, and that he was entitled to have it locked and have exclusive charge of the key. The repairs, however, were proceeded with, and the wall was put up and finished all but the coping, when the present petition for interdict was presented by the minister, on the ground that according to the statute the heritor had only an obligation imposed on him to pay for repairs, that he had no right to carry out the repairs, that repairs executed by him at his own hand without the authority of the minister were illegal and an invasion of the rights of the latter, and that therefore the wall should be restored to its former state, and interdict granted against further interference.

Now, I think this is a nimious proceeding. There is no suggestion that the defender proposes to interfere with the ground inside the wall. I am not in a condition to express any opinion as to the rights of the public in the ground. I should suppose the proper parties who may have a right to the ground are the proprietor, the Commissioners to whom it was conveyed, and perhaps the local authority. But these parties are not here, and their rights are not before us. All that we have to consider is, whether by statute law, and particularly under sections 16 and 18 of 5 Geo. IV., there is given to the minister any right or control in the matter of repairs. I am of opinion there is none. A right is given to the minister and elders to apply the pew rents towards keeping the church, including this wall, in repair, but outwith the pew rents I am of opinion that beyond the possibility of question the minister has no right whatever to interfere with the repair of the walls on any ground stated in this petition for interdict. I therefore think that this application is altogether unfounded, and that it should be refused with expenses.

LORD RUTHERFURD CLARK—I agree.

LORD TRAYNER—The pursuer in this case has failed, in my opinion, to show sufficient cause for the interference of the Court by way of interdict with the proceedings of the defender complained of.

The Sheriff-Substitute in granting a limited interdict—limited, that is, in comparison with the interdict prayed for—has proceeded upon the ground—and as far as I can see upon the sole ground—that repairs of a church like the one in question are to be executed on the orders or under the direction of the heritors, the minister, and the officiating elders. This is the Sheriff-Substitute's view of the 18th section of the Act 5 Geo. IV. c. 90, but I think it is not a sound view. What that section principally entrusts to the heritors, minister, and elders is, not the ordering of repairs, but the application of a part of the pew rents towards paying or providing for

the expense of repairs, and that only where this has been neglected to be done by the statutory commissioners or their surveyor. No doubt the same clause contains the provision that the heritors, minister, and elders "are also empowered hereby to give direction for small repairs at any time when requisite." But that provision does not certainly amount to a direction that no repairs are to be executed by the heritor or heritors bound for repairs, and liable in the expense thereof, without the concurrence of the minister or elders. In the case of a parish church, it has been decided that the heritors are entitled to proceed to repair the church without the intervention of the presbytery—*Boswell*, 13 Sh. 148—and I should suppose that the rule might fairly be extended to the case of a heritor bound for the repairs of a church like the one in question. It is his interest to see to such repairs, and his chiefly, for neglect in timeous repairing might lead to a great additional burden falling upon him.

It was suggested, if not maintained, by the pursuer that the concluding words of the 16th section of the Act above cited gave the pursuer and elders the right to regulate the matter of repairs. I think that is not so. That section seems to me to deal only with the rights or duties of the minister and officiating elders in reference to the services of the church or matters incident to such services.

Perhaps it would be enough for the decision of this case to say, that the pursuer has not averred any real interest which he has for restraining the defender from making the repairs complained of. His statement that the defender's motive is "to oust the pursuer from the control and management of the church ground, and to deprive him of the exclusive possession of the keys," is barely relevant, even if well founded. If the defender attempts to interfere with any control or management of the church ground, with which the pursuer is vested by law as minister of the church in question, he will have his remedy—a remedy not interfered with in the least by the dismissal of the present petition.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff appealed against, and the interlocutors of the Sheriff-Substitute of 2nd July and 8th August 1892: Dismiss the action, and decern: Find the pursuer liable in expenses to the defenders in the Inferior Courts and in this Court."

Counsel for the Pursuer and Appellant—Cheyne—Maclennan. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Defenders and Respondents—Rankine—C. K. Mackenzie. Agents—Melville & Lindesay, W.S.