Feb. 23. 1821. supply the defect; but, instead of supplying it, they admit the defect was incapable of being supplied. Having themselves, in the year 1720, thus admitted the fact, that the defect was incapable of being supplied, are we, at the distance of a hundred years, upon conjecture, to supply that defect? It appears to me, therefore, that the party has lost his right by his own negligence, and that originally the decree was defective in that point, and I presume it was defective,—that is, that there was originally a blank, which is now attempted to be supplied; because all that has been now offered to the Court to supply that defect was equally capable of being offered in the year 1720; and, in subsequent proceedings, the parties have admitted they could not supply the defect. Under these circumstances, I conceive that it is fit that what has been done by the Court below should be affirmed.

Appellant's Authorities.—28. Voet. 4. 2; Matheus de Prob. l. 3. c. 131; Earl of March, July 9. 1743, (15820); Nimmo, July 9. 1771, (15825); Cranstoun, Jan. 22. 1674, (15794); Cunninghame, June 1674, (15794); 4. Ersk. 2. 34; Gilbert's Law of Evid. 301.

Respondent's Authority.—Bacon's Abridg. p. 700, voce *Obligation.*

SPOTTISWOODE and ROBERTSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 6.)

No. 3.

JOHN DINGWALL, Appellant.—*Lord Advocate Maconochie—Romilly—Horner—J. A. Maconochie.*

Rev. GEORGE GARDINER, Respondent.—*Leach—Connell.*

Manse—Stat. 1663, *c.* 21.—Held, (contrary to the judgment of the Court of Session,) that where a manse has been built and has become ruinous, the first clause of the statute 1663, c. 21. relative to the building of manses, and limiting the expense to £1000 Scots, does not apply; but that the second clause as to repairs, and which is unlimited, is applicable; and therefore the judgment of the Court of Session, awarding £1000 sterling, was affirmed.

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2D DIVISION. Lord Pitmilly.

IN 1814, the Rev. George Gardiner, minister of the parish of Aberdour in the county of Aberdeen, presented a petition to the presbytery of Deer, founding on the statute 1663, c. 21. stating that his manse and offices were ruinous and untenantable, and praying for decree against the heritors to rebuild them. By this statute it is enacted, that 'Because, notwithstanding divers acts of 'Parliament made before, divers ministers are not yet sufficiently 'provided with manses and glebes, and others do not get their 'manses—therefore, &c. ordains, that where competent manses 'are not already built, the heritors of the parish, at the sight of 'the bishop of the diocese, or such ministers as he shall appoint, 'with two or three of the most knowing and discreet men of the

'parish, build competent manses to their ministers, the expenses 'thereof not exceeding one thousand pounds, and not being be- 'neath 500 merks; and where competent manses are already 'built, ordains the heritors of the parish to relieve the minister 'and his executors of all costs, charges, and expenses, for repair- 'ing the foresaid manse; declaring hereby, that the manses be- 'ing once built and repaired, and the building and repairing 'satisfied and paid in manner foresaid, the said manses shall 'thereafter be upholden by the incumbent ministers during their 'possession, and by the heritors, in time of vacancy, out of the 'vacant stipend.' After causing an inspection to be made, from which it appeared that the manse (with the exception of one wing) and the offices were in the condition alleged by Mr. Gardiner, and after receiving estimates, the presbytery ordained the heritors to rebuild them, and decerned for £1214: 14: 10 sterling. Of this decree Mr. Dingwall, the patron, and one of the principal heritors of the parish, brought a suspension, in which he mainly contended that the sum was too large. Lord Pitmilly remitted to Mr. Laing, architect, to inspect and report, after issuing a note, in which he observed, that 'there is no ques- 'tion about the repairing or adding to a manse already built; 'that it seems admitted that a new manse and offices must be 'erected; and the point to be determined is, whether the plan 'produced by the heritors, or the plan produced by the minister, 'should be adopted? or what alterations should be made in 'either, or if any new and different plan should be adopted?' On advising the report, Lord Pitmilly, on the 11th of March and 12th of May 1815, remitted to Laing to adopt either of the plans he thought fit, or a new one, but the expense of which was not to exceed £1000 sterling. Against this interlocutor Mr. Dingwall presented a petition, and contended, that in terms of the statute 1663, c. 21. the sum could not exceed £1000 Scots (£83: 6: 8 sterling.) This petition the Court remitted to the Lord Ordinary, 'in respect that the plea stated in the prayer thereof, that 'the expense of the manse and offices, so far as leviable from the 'heritors, shall not exceed £1000 Scots, has not been urged be- 'fore the Lord Ordinary.' In reference to this plea, Lord Pitmilly, on the 16th of January 1816, found, 'That by the act '1663, c. 21. the heritors of parishes are ordered to build com- 'petent manses for their ministers; and that this express provi- 'sion of the statute, under the authority of which alone new 'manses can be built, could not in the present day be complied 'with, if the expense of the building were to be limited to the 'sums of money mentioned in the act of Parliament, which, with

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'a view to the expense of building at the date of the act, was 'fixed at £1000 Scots as the maximum, and 500 merks as the 'minimum. That the clause in the statute, which provides that 'where manses are already built, the heritors shall relieve the 'minister of the expense of repairing them, does not limit the 'amount; and that these repairs therefore must frequently, in 'the present day, exceed the expense of building a new manse, 'as fixed in the act, although it must evidently have been the 'intention and understanding of the act that the expense of re-'pairing an old manse should be much less than the expense of 'building a new one, and that it should be for the interest of the 'heritors to repair rather than to build, while the reverse would 'be the case if the construction put upon the statute by the peti-'tioners were adopted. That the usage to this effect is not only 'uniform and long established, but was sanctioned by the Court 'in the case, referred to by the respondent, of the minister of In-'verury, after the point was litigated by one of the heritors.' His Lordship therefore refused the petition, and adhered to the interlocutor remitting to Mr. Laing. To this judgment the Court adhered on the 9th of July and 27th of November 1816.*

Mr. Dingwall then appealed to the House of Lords, on the ground, 1. That the statute 1663, c. 21. contained no authority for rebuilding manses, but only for building them where originally there had been no manses, and for repairing them where one had been built; and, 2. That, at all events, the sum to be expended could not exceed £1000 Scots; and that, although this sum was inadequate, yet the Court could not lawfully exceed the sum prescribed in the statute. To this it was answered, 1. That the statute ordained competent manses to be built and upheld; and therefore, when they became ruinous, the heritors were bound to rebuild them. 2. That the sums mentioned in the statute had reference to the period of its enactment; and as it ordained competent manses to be built, the Legislature could not have intended to limit the sum, so as to prevent this being accomplished; and therefore the Court were entitled to give effect to it, not according to its strict words, but to its true spirit; and, 3. That, at all events, the part of the statute as to the extent of the sum had fallen into desuetude, and in various cases decrees had been pronounced, and carried into effect, for sums of a much larger

* See Fac. Coll. Vol. 1815-1819, No. 74. It is there said, that 'at moving a peti-'tion by the heritors, none of the Court had the least doubt upon the point, but, at the 'request of the minister, allowed answers to be given in; upon advising which, they 'were unanimously of opinion, that the point was fixed by long and invariable practice.'

amount. The House of Lords found, 'That this case ought to be 'considered as falling within the meaning of that clause in the 'statute of 1663, c. 21. which relates to the repairing of manses, 'and not within the clause which relates to the building of manses, 'where manses had not been then already built: And it is 'ordered and adjudged, that with this finding, the said interlo- 'cutors of the 11th of March 1815, and the 12th of May 1815, 'and so much of the said interlocutor of the 16th of January '1816 as refuses the desire of the petition of the appellant, and 'adheres to the interlocutor reclaimed against, be affirmed: And 'it is further ordered and adjudged, that the said several other 'interlocutors be affirmed, with £100 costs.'

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Appellant's Authorities.—(2.)—2. St. 6. 19; 1. Mack. 5. 12; 2. Bankt. 8. 121; 2. Ersk. 10. 55. 56; Carfrae, May 13. 1814, (F. C.)

Respondent's Authorities.—(2.)—1. Ersk. 1. 53. — (3.) — Min. of Inverury, Aug. 9. 1760, (not rep.); Mercer, March 17. 1786, (not rep.); 1. Ersk. 1. 45; 1. St. 1. 16; 1. Bankt. 1. 60; Duke of Hamilton, July 13. 1813, (Ho. of Lo.)

J. CHALMERS,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 7.)

ROBERT ANGUS and Others, Appellants.—*Romilly—Moncreiff.* No. 4.
DUNCAN MONTGOMERIE, D. WISHART, Captain JOHN MONTGOMERIE, and J. GULLAND, Respondents.—*Warren—Grant.*

Burgh Royal—Stat. 16. *Geo. II. c.* 11.—It having been held in the Court of Session, that where councillors of a burgh were elected for life, and had been long on the roll, and no new election was usual, and where no objection had been made to their continuing on the roll, the House of Lords, in the circumstances of the case, affirmed the judgment as to the respondents before the House.

ROBERT ANGUS and others, councillors of the burgh of Inverkeithing, presented a petition and complaint, under the 16th Geo. II. c. 11. against Montgomerie and others, stating that by the set of the burgh it was declared that 'the council 'consists of fifteen persons at least, viz. the Provost, two Bai- 'lies, Dean of Guild, and Treasurer, and ten or more inha- 'bitant Burgesses:' That the mode of election was ordered to be thus: 'Upon the 29th of September yearly, the Magistrates 'and old council meet in the forenoon within their tolbooth; and 'when those of the old council, who are desirous of an ease, have

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