SCOTLAND.

COURT OF SESSION, SECOND DIVISION.

JOHN DINGWALL - - - - - - *Appellant*;
The Reverend GEORGE GARDINER, *Respondent*.

The Scotch statute of the 1st Parl. of Charles II. sess. 3, c. 21, provides that where competent manses are not already built, the heritors, &c. shall build competent manses to their ministers, the expenses thereof not exceeding one thousand pounds (83 *l.* 6 *s.* 8 *d.* sterling), and not being beneath five hundred marks; and where competent manses are already built, ordains that the heritors shall relieve the minister of all charges for repairs, declaring that the manses, being once built and repaired, &c. by the heritors, they shall be upholden by the incumbent ministers during their possession, or by the heritors out of the stipend in time of vacancy.

Up to the year 1760 the sum allowed for building manses, upon litigation in the Courts Ecclesiastical and of Session, had not exceeded the amount specified in the statutes, except in cases where the heritors consented. But from the year 1760, it had been the practice in both courts, without the consent of the heritors, to grant much larger sums.

In 1814, the Respondent applied to the Presbytery to ordain the heritors to *build* a new manse, which was decreed accordingly, upon an estimate of the Respondent, amounting to 1,214 *l.* The question being brought before the Court of Session, 1,000 *l.* sterling was finally decreed for *building a new manse*. The question upon the construction of the act, whether expense of building was not limited to one thousand pounds Scots, had been adverted to, but not insisted upon, by the Appellant in his pleas before the Presbytery or the Lord Ordinary, but only before the Court of Session in the last stage of the proceedings. The point raised, discussed in the former stages of the cause, was, whether 1,214 *l.* or 700 *l.*, or any intermediate sum, should be allowed.

Held, that the case fell within the clause of the statute which relates to the repairing of manses, and not within

the clause as to the building of manses; and with this finding the judgment below was affirmed.

Whether a custom, beginning in 1760, can abrogate or control a Scotch Act of Parliament, *quære?*

The defender, by his pleadings in the first instance, having taken issue upon the sum necessary to build a *competent* manse, and not having then insisted upon the limitation of the statute (*semb.*) had waved the objection arising out of the statute; but having finally, in a reclaiming petition, insisted upon that objection, which the Court referred to the Lord Ordinary as a point not before argued, and the pursuer not having objected or appealed against the interlocutor, by which this reference was made, the right to insist upon the objection was restored.

BY the Scotch act of the first parliament of Car. II. 3d sess. c. 21, it is recited and provided as follows: "And because, notwithstanding of divers acts of "parliament made before, diverse ministers are not "yet sufficiently provided with manses and glebes, "and others do not get their manses free at their "entry, therefore our Sovereign Lord, with advice "foresaid, statutes and ordains, That *where compe-* "*tent manses are not already built,* the heritors of "the parish, at the sight of the bishop of the dio- "cese, 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 beneath five hun- "dred 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 repairing the *fore-* "*said* manses: Declaring hereby, that the manses

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"*being once built and repaired*, and the building "and repairing satisfied and paid by the heritors 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 readiest of the vacant sti-* "*pend.*"

In the year 1814 the Respondent, who is minister of the parish of Aberdour in Aberdeenshire, made an application to the Presbytery of Deer, within which the parish lies, setting forth that his manse was in a ruinous condition, and praying that it might be inspected, and that the heritors of the parish might be ordained to build a new one; and at the same time he produced a plan of the proposed house and offices, with an estimate of the expense, amounting to 1,200*l.*

The Appellant, who is proprietor of the greater part of the parish, objected to the plan as extravagant, stating, that *although the presbytery could not legally subject the heritors to the payment of any sum beyond what was mentioned in the act of parliament*, yet, considering how inadequate that sum was in the present times, he was willing to forego the plea, and would consent to a sum being assessed equal to what had been expended in erecting manses in some neighbouring parishes of much greater extent than Aberdour; and he produced a plan of what he considered a sufficient manse, with an estimate of the expense, amounting to between 700*l.* and 800*l.*

The Respondent rejected this proposal; and after an inspection and report by a mason and a carpenter,

to whom the matter had been referred, the Presbytery gave their decree against the heritors for 1,214*l.* 14*s.* 10*d.* sterling.

The Appellant complained of the decree to the Court of Session by bill of suspension, which was passed; and the matter came to be discussed before the Lord Pitmilly as Ordinary.

On the 16th of February the Lord Ordinary made avizandum to himself, &c.; and on the 24th lodged a note in process, by which he states, that "having considered the plans in process, there is no "question about repairing or adding to a manse "already built. 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 minister should be adopted, &c."

On the 1st March 1815, the Lord Ordinary pronounced this interlocutor: "Having heard parties "procurators, before answer, remits to Mr. Laing, "architect, to inspect the plans, specifications, and "estimates produced, to consider the objections to "each which have been stated in the extracted "decree of the Presbytery, and to report.

Mr. Laing accordingly made a report on the merits of the several plans, in which he stated, that the sums allowed by the Presbytery exceeded any he had ever heard of being allowed for building a manse and offices.

The Lord Ordinary made avizandum to himself with the report, and thereafter pronounced the following interlocutor:

"The Lord Ordinary having considered the report "of Mr. Laing, and heard Mr. Laing along with

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" the counsel of the parties thereon, of new remits " to Mr. Laing with instructions to adopt either of " the plans in process, or to make such alterations " as he shall think proper ; or, if preferable, to make " a new plan ; *the expense of whichever plan to be* " *adopted not to exceed* 1000 *l. sterling, exclusive of* " *the old materials.*"

Against this interlocutor the Appellant having offered a representation, it was refused by the Lord Ordinary.

In all the discussions before the presbytery and the Lord Ordinary, the question turned upon the amount of the sum to be expended in the erection of the manse, &c., the Appellant admitting that it was reasonable, and had been the practice, *with the consent* of the heritors, to exceed the sum specified in the statute as the maximum to be expended in erecting a manse, and consenting to allow 800 *l.* for the purpose ; but at the same time referring generally to the objection arising under the words of the statute.

Against the final interlocutor of the Lord Ordinary the Appellant presented his petition to the whole Court, reclaiming against the interlocutor, and praying them to suspend the letters *simpliciter*, and to find that the expense of the manse and offices, so far as leviable from the heritors, could not exceed 1,000 *l.* Scots ; or at any rate to remit to the Lord Ordinary to find, that the sum to be expended should not exceed 750 *l.*, *granted of consent* of the heritors.

On hearing this petition the Court remitted to the Lord Ordinary to hear parties thereupon, in

respect that the plea stated in the prayer thereof, that the expense of the manse and offices leviable from the heritors should not exceed 1,000 *l.* Scots, had not been discussed before the Lord Ordinary.

The Respondent having given in to the Lord Ordinary an answer, the following interlocutor was pronounced:

"The Lord Ordinary having considered this "petition, with the answers thereto, and whole pro- "cess, finds, that by the act 1663, c. 21, the "heritors of parishes are ordered to build competent "manses for their ministers, and that this express "provision 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 a view to the expense of building at the date "of the act, was fixed at 1,000*l.* Scots, as the maxi- "mum, and five hundred merks as the minimum: "Finds, that the clause in the statute which pro- "vides 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 understand- "ing of the act that the expense of repairing 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

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"construction put upon the statute by the petitioners were adopted: Finds, 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 Inverury *, after the point was litigated by one of the heritors: Refuses the desire of the petition, and adheres to the interlocutor reclaimed against."

Against this interlocutor the Appellant presented a reclaiming petition to the whole Court, which was refused. And a second petition against the former interlocutor, praying an alteration, and that the Court would suspend the letters *simpliciter*, and find that the sum mentioned in the statute could not be legally exceeded, was also refused.

For the Appellants, *Mr. C. Warren*, and *Mr. J. P. Grant.*

On the part of the Appellant, it was contended, that the act 1663 was a temporary measure; that the act was not applicable to the case of rebuilding when the manse *once* built has become ruinous, or to a second repair at the expense of the heritors

That although the institutional writers on the law of Scotland construed this statute as a subsisting and perpetual law, authorizing the presbyteries, in place of the bishop, to take cognizance of the state of manses, and to subject the heritors in the expense of repairing or rebuilding under the control of the Court of Session; yet every writer who touches on the subject is agreed that the power of the Presbytery is restrained to the sum mentioned in

* See the note at the end of the case.

the statute (1000 *l.* Scots) as the maximum for building *.

That the inadequacy of the sum which the statute allows might afford a ground for application to the legislature for enlarging it, but could afford no reason for the church courts usurping a power of assessing the subject at their discretion.

When a sum was limited, beyond which the heritors could not be assessed, for building a new manse, and at the same time they were subjected to the expense of repairs without an express limitation, the reasonable interpretation of the statute is, that the cost of repairs could not go beyond the cost of building. If, immediately after the passing of the act, the Presbytery or the Bishop had decreed the heritors to pay a sum beyond the 1,000 *l.* for repairing an old manse, while necessarily confessing that they were limited to that sum for building one entirely new, it seems impossible that the courts of law could have given their sanction to such a decree; and Lord Stair accordingly considers the limitation to apply equally to repairs and building.

The Appellant is not called upon to show that the statute is consistent. He admits that there ought to be a new law on the subject, to correspond with the present state of society.

The legislature, when limiting the expense of the original building, could not mean that the expense of repairing or rebuilding should be unlimited.

The Appellant denies that any practice can justify

* See Stair's Institute, b. 2, tit. 6, sec. 19. Mackenzie, b. 1, tit. 5, sec. 12. Bankton, b. 2, tit. 8, sec. 121. Erskine, b. 2, tit. 10, sec. 55, 56.

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the disregarding a clear act of parliament in such a case as the present. If the heritors were under an obligation to provide competent or suitable manses by the common law, or independent of the act 1663, it might be argued that that act had become obsolete, or had been departed from, and that therefore the common-law obligation might be resorted to. But the common law is here out of the question, there being no such obligation but by force of the statute. If that statute is obsolete, there is no authority to assess the heritors in any sum whatever.

It is true that Presbyteries have taken upon them to exceed the sum limited by the act of parliament, and that the Court of Session has lent its sanction to their doing so, it being felt that the sum mentioned in the statute had been extremely inadequate; but those interested were considered as tacitly consenting, till very lately, that it has been done avowedly and against their will. The industry of the Respondent or his counsel has discovered one solitary case, occurring in the year 1760, which the interlocutor alludes to, where one of the heritors did plead the act of parliament unreasonably, the sum decreed for being extremely moderate; and the Court appear somehow or other to have got over the plea: but this case, so far from being considered as consistent with law, or as settling the law, has never been reported or mentioned as an authority by any writer. In the second edition of Erskine's Institutes, published *several years after this decision*, no notice is taken of it; but, on the contrary, the rule of the statute 1663 is laid down broadly, as the law by which Presbyteries are bound to proceed.

The judgment in the present case seems inconsistent in principle with that given by the Court in the case of the minister of Dunbar*. The statute on which the present question arises also enacts, that the minister besides his glebe shall have pasture land for a horse and two cows; and if there be no pasture land in the parish as distinguished from arable, there shall be paid to the minister in lieu of it the sum of 20*l.* Scots. In the parish of Dunbar there was found to be no pasture land in the sense of the statute; and the minister arguing, as in the present case, that the sum specified in the act was totally inadequate, and instancing that the Court had in practice disregarded the limitation with regard to manses, prayed that they would do the same, by awarding compensation in money in lieu of pasture, computing what would be sufficient, according to the modern rate, to maintain the cattle specified in the act: but the Court, holding themselves bound to follow the direction of the statute, declared that they had no power to go beyond its strict letter.

For the Respondents, *The Attorney General* and *Mr. H. Stephen.*

On behalf of the Respondents the argument was to the following effect:—

At the Reformation the clergy were deprived of a part only of their revenues; and, therefore, at first a certain part only of the burden of building churches was imposed upon laymen. By the act of Privy Council 1563, it was provided that *two parts* of the

* 15 May 1814.

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expense thereof be made by the parishioners, and a *third part* by the *parson*, who then was not a stipendiary minister, such as all the clergy of Scotland now are, but a parson in the proper sense of word, *viz.* a beneficiary having a right to the tithes of his parish.

With regard to manses, by an act of Parliament (1563, c. 72,) it was provided that ministers serving at kirks should have "the principal manse of the parson or vicar;" or, if the manse and glebe was set in feu or in tack, it was enacted that "*ane* "*reasonable and sufficient house be bigged to them,* "*beside the kirk.*"

After episcopacy was restored in the reign of James VI, it was thought just that the old law should be revived, throwing the burden of repairing and upholding manses upon the beneficed clergy; and accordingly the act 1612, c. 8, was passed, which speaks of "archbishops, bishops, *and others, eccle-* "*siastical persons*;" but it is plain from the purposes of the act, as well as from the period when it was framed, that beneficed persons only were meant; and hence it is denominated in the rubrick, "An "act anent repairing of *bishops* manses."

On this footing the law stood till the abolition of episcopacy in the reign of Charles I. By the act 1641, c. 30, (afterwards rescinded,) it was provided that the stipends of ministers should be modified out of bishops tithes, as well as out of other tithes. By another act passed about the same period, patronage was abolished; and, in lieu of this right taken from patrons, all the unappropriated tithes were bestowed upon them. In this way the whole clergy of

Scotland became stipendiaries; and having become stipendiaries, it was thought just that the burden of building and repairing manses should be thrown entirely upon heritors. This was specially provided by the rescinded acts 1644, c. 31, and 1649, c. 45; and the enactment in the latter statute was, after the Restoration, revived almost verbatim by the act 1663, c. 21.

The Appellant has argued that the question at issue is not whether the burden of manses should be again transferred to the clergy, but to what extent it shall be imposed upon a particular class of the laity; and has maintained that it was by the titulars or lords of erection, and not by the heritors at large, that the spoils of the church were acquired. That the heritors at large did not obtain the whole spoils of the church is very true; but in acquiring the privilege of valuing and purchasing their teinds, heritors certainly shared in a very important part of those spoils. But the point at issue must be regulated by the statutes, according to the interpretation which has been put upon them by long usage, and by express decisions.

The limitation of the statute 1663 was only meant to apply to those parishes which had no manses built at the date of the statute, and which were to be immediately built. The sum was fixed upon as the maximum in those cases, because at that period a good manse might then have built for the sum of 1,000*l.* Scots.

In that part of the enactment which devolves upon heritors the burden of repairing manses there is no limitation of any sum. Heritors are required to

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relieve ministers "*of all cost, charges and expenses* "*for repairing of the foresaids manses:*" Under the authority of this part of the statute, the courts in Scotland have a power of ordering a manse to be repaired to an indefinite extent; and can it be supposed that the legislature could mean that more than 1,000 *l.* Scots might be given for repairing a manse, and yet that no more than this sum should be allowed where it was necessary wholly to rebuild it? Even speaking of manses which were to be rebuilt, the legislature says that they shall be "*competent* manses," that is, they should be *suitable* to the respective benefices; whereby it virtually enacted that the sum to be allowed must vary with the expense of the building; and it follows that as soon as the supposed sum became inadequate, from a rise in the materials for building, or a fall in the value of money, the courts who had jurisdiction in this matter were entitled to increase the estimated value according to such a change of circumstances.

In interpreting acts of Parliament, all writers on the law of Scotland agree that a certain latitude is given to judges*.

This being a remedial statute must receive a liberal interpretation. The words founded upon by the Appellant are evidently contrary to the spirit of the enactment, and even to the words used in the very same statute, which immediately precede those which have been quoted. Supposing the words used conveyed a doubtful meaning, that construction must

* Ersk. Inst. b. 1, tit. 1, s. 52, 53. Inst. l. 17, 18. 24. 28, *de Legibus.*

be adopted which accords best with the real object of the legislature.

But this strict construction of the act is contrary to the practice both of the church judicatories and of the courts of law, and the express judgments of the Court of Session.

So long as a *competent* manse could be built for 1,000*l.* Scots, this sum was not exceeded. For nearly a century after the date of the act 1663, there was little diminution in the value of money, or rise in the price of materials employed in building manses. This appears from the price of grain remaining stationary till about the middle of the last century, 100*l.* Scots the chalder being the conversion price of grain at the date of the act 1663; and this was not merely the Court conversion, but seems to have been much about the real price during the first half of last century.

From the date of the act 1663, downward, to about 1750, it appears that 1,000*l.* Scots continued to be the sum usually allowed by the Court for building a manse; and, until that period, competent manses could generally be built for that sum, partly in comsequence of the low price of labour and materials, and partly from the very humble buildings which were then allowed to the clergy; for not only were these very small, both in the number and in the dimensions of the rooms, but the walls were frequently built with clay instead of lime. About the year 1750, the expense of building appears to have risen; and as other ranks of people began to live in better houses, it was natural that the clergy

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should look also for some melioration in their habitations. At first, however, it appears the Court did not venture to exceed the 1,000*l.* Scots, unless there was a consent of the heritors; but in the year 1760, the power of the Court to exceed that sum was fully discussed, and terminated in a judgment in favour of the minister.

The question occurred in the case of the minister of Inverury*. This decision was probably the origin of the practice which has prevailed so long both in the ecclesiastical judicatories, and in the Court of Session in Scotland, of awarding to clergymen such sum as would give them competent manses, without regard to the pecuniary *maximum* mentioned in the act 1663.

It is a maxim of law universally acknowledged, that "as one statute may be explained by another, "it may also be explained by the uniform practice "of the community, for which reason custom is said "*to be the surest interpreter of law* †."

It is an express rule of Scotch law, that a statute may be entirely deviated from and lose its power by custom. This is laid down by Lord Stair‡. "In "the next place our statutes, or our acts of Parlia-"ment, which in this are inferior to our ancient "law, that *they are liable to disuetude* which "never encroaches on the other. *In this we differ* "*from the English, whose statutes of Parliament,*

* Not reported. See the note at the end of the case.

† Ersk. b. 1, tit. 1, s. 45.

‡ B. 1, tit. 1, s. 16. Inst. L. 37. de Legib.

"*of whatever antiquity, remain ever in force till "they be repealed, which occasions to them many "sad debates (public and private) upon old "forgotten statutes.*"

The same doctrine is laid down by Lord Bankton*. He says, our municipal law "further consists of our "statutes or acts of Parliament; to those, no doubt, "former laws or ancient customs must yield, but "with this limitation, that laws here, before the "Uuion, relating to private rights, are not to be "altered by the British Parliament, but for the "evident utility of the subjects within Scotland. "*Many of our old statutes have run in disuetude, "a contrary usage for a long course of time "acquiesced to by the law-givers, being a tacit "abrogation of them; and this is expressly declared "to be the law with us by our old statute.*"

In like manner Erskine † states, that "as a pos-"terior statute may repeal or derogate from a prior; "*so a posterior custom may repeal or derogate "from a prior statute,* even though that prior "statute should contain a clause forbidding all "usages that might tend to weaken it, for the con-"trary immemorial custom sufficiently presumes the "will of the community to alter the law in all its "clauses, and particularly in that which was in-"tended to secure it against alteration; and this "presumed will of the people operates as strongly "as their express declaration."

Although, therefore, the Appellant could make

* B. 1, tit. 1, s. 60. † B. 1, tit. 1, s. 45.

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out that the act of Parliament was once imperative with respect to the sum to be allowed for building manses, yet the Respondent, in virtue of these authorities, would be entitled to argue that this part of the act has lost its force by contrary usage.

Supposing the words of the statute to be doubtful, they have received an interpretation by express decisions and long-continued practice. *The Duke of Hamilton* v. *Scott* *.

As to the acts respecting bail in criminal matters, to which the act in question has been assimilated,

* The question there was, whether a minister, whose manse had been once repaired, was entitled to demand farther repairs from the heritors? The heritors founded upon a clause in the same act of Parliament, 1663, c. 21, in support of their argument, that after a manse had been once repaired, the burden of upholding it should fall upon the incumbent. The minister (Mr. Scott) pleaded, that although this argument received some countenance from the words of the act of Parliament, yet it was quite contrary to the spirit of the enactment, and that a different construction had been put upon the statute for a long period. It was said by the Lord Chancellor, in moving the judgment, that he "agreed that the legislature meant, by the "act of 1663, that when the manses should have been once "built or repaired, the burden of upholding them should rest "on the ministers. But it had not been so construed; and "when a different construction had been for so long a time "put upon it, and acted upon, especially considering the effect "of desuetude, as connected with the Scotch acts, they were "not now to go back nearly two centuries to give it a new "construction. *The statute, as it had been construed, was now "to be taken as the law.*" Accordingly the judgment of the Court of Session finding Mr. Scott entitled to a certain sum, for additional repairs to his manse and offices, was affirmed D. P. July 13, 1813.

there is a wide difference between the cases. The act of 1701 gave no power to magistrates to exact "competent" bail; but *fixes precise sums*, which no authority short of that of the legislature could exceed. Criminal statutes must in all cases be strictly interpreted. The act 1701, with respect to bail, has not been deviated from in relation to the sum specified, either by the decisions of the Court or by a contrary practice.

In the cases before the House of Lords, respecting second augmentations of ministers stipends, the argument of the heritors was founded upon the special words of the decreets arbitral of Charles I, and of the relative acts of Parliament; and the answer made on the part of the clergy was, that supposing the argument to be well-founded, it was overturned by the invariable practice of the Court in granting first augmentations after the Union; and that if the Court had power to augment a stipend once which had been modified during the time of Charles I, it had power to augment more than once. It was upon this ground principally that the judgments by the House of Lords were founded*. The rule of the Court of Session in refusing to grant second augmentations was objected to as a recent practice, which could not be put in competition with the prior inveterate usage. The issue of these cases, therefore, so far from being favourable to the argument of the Appellant, is directly the reverse; for the judgments were founded entirely upon the force of usage to explain express laws of a doubtful nature, or

* See the cases of Kirkden, Tingwall, and Prestonkirk, D. P.

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rather to explain laws which were generally thought to be unfavourable *in the very words.*

In the case of Dunbar the question was, whether a minister was entitled to ask more than 20*l.* Scots, (the sum fixed by the act 1663,) in lieu of a grass-glebe where land could not be given. The claim of the minister rested upon very different grounds from those on which the present claim stands: 1st, The act of Parliament does not provide, as it does with respect to manses, that ministers shall in all cases have "competent" grass glebes; 2d. The practice of the Court with respect to grass-glebes was precisely the opposite way from what it had been in relation to manses, for from the date in 1663 down to 1814, the date of the Dunbar case, the Court had not in any one case given more than 20*l.* Scots in lieu of a grass-glebe.

The objection now pleaded by the Appellant was discussed in the House of Lords, and repelled in a case decided in the year 1786*.

* This was a case respecting the manse of the parish of Lethindy. The old manse had been ruinous, and a new one became necessary. The Presbytery pronounced a judgment, whereby they decreed that the heritors should build a new manse, and approved of a plan and an estimate of the expense, amounting to 210*l.* sterling. One of the heritors, Mr. Mercer, of Lethindy, who was proprietor of nearly three fourths of the lands in the parish, carried the cause to the Court of Session, and pleaded that a manse might be built sufficient for the parish for a smaller sum; but did not maintain the argument, that no more than 1,000*l.* Scots could be allowed. The Lord Ordinary approved of the plan which had been adopted by the Presbytery; but after some proceedings both before the Lord Ordinary and the Court, an inquiry was ordered to be made as to whether this plan could not be executed for a smaller sum. Thereafter he

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The Lord Chancellor:—This is a question of great importance to the heritors and clergy of Scotland, and I found that it might be executed for 195*l.* 10*s.* sterling, which was about 15*l.* less than the sum allowed by the Presbytery.

Mr. Mercer then carried the cause by appeal to the House of Lords, and he maintained four "reasons" of appeal, the first of which is stated thus in his appeal case: "Because by "the act of Parliament above recited, passed in 1663, it is "enacted, that the heritors shall provide and build manses for "the ministers, and that the expense thereof shall not exceed "1,000*l.* Scots, and not beneath 500 marks; and that this is "a positive statute which must be binding in all cases, and "over which the Court of Session neither have nor ought to "have any discretionary power whatsoever, either to exceed "the *maximum*, or to go below the *minimum*; but in the pre-"sent case, the Court of Session have decreed a sum for re-"building this manse, greatly more than double the *maximum* "allowed by law, three fourths of which falls upon the Appel-"lant in respect of his property within the parish; and there-"fore he has a right to object, and does contend, *that the sum "to be allowed for the purpose ought not to exceed one thou-"sand pounds Scots, the* maximum *allowed by the statute above "mentioned.*"

To this reason of appeal the following answer is made in the appeal case for the minister:—"This plea made its appearance "for the first time in the appeal; it was not stated in the "Presbytery, or in the Court of Session, and consequently "is inadmissible here. It will not be believed that such a "bar to the proceedings would have been omitted, had not "the Appellant and his counsel been satisfied of its being "groundless. It is well and long established, that the act "1663, in circumscribing the expense to 83*l.* 6*s.* 8*d.* sterling, "*respected only manses then immediately to be built in parishes "where there had been none before:* so it says. The sum "mentioned must have been reckoned sufficient in those days; "*but the legislature could not be so absurd as to suppose that it "would be sufficient in all future times.* And accordingly, in "the next clause in the statute respecting reparation of manses

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land; and it will be unfortunate if the main question in the cause cannot be decided upon this appeal.

The principle upon which the act of parliament is to be construed is the first question of difficulty. Looking at the admissions in the bill of suspension, it might have been difficult to contend that this point made upon the construction of the act had not been waived. But the Respondent seems to have restored the right to make that defence, by not objecting to the interlocutor of the Court of the 12th June 1815, which remitted the cause to the Lord Ordinary on that point. So it seems that question is still open. Whether all the findings of the Lord Ordinary can be adopted in case of affirmance, it is difficult to say. It will be necessary to look with care at the statute, to determine what ought to be the construction as applied to circumstances.

28 February 1821.

The Lord Chancellor:—As we find it to be necessary to alter some of the declarations of the interlocutor of the Court of Session, the proposal of the minutes of judgment in this case must be postponed. The interlocutor states several propositions of law not necessary to be decided in this

" then already built, when they should come to need repair, " no restraint or limitation is imposed."

The case having been heard in the House of Lords, a judgment was pronounced, ordering and adjudging, " that the ap- " peal be dismissed, and the interlocutor complained of affirmed " with 100 *l.* costs. D. P. 1786.

Quære whether this judgment did not proceed on the ground that the Appellant, by his mode of pleading in the court below, had waived the objection arising out of the words of the statute. But see the case of Inverury *post*, the note at the end of the case.

case. Experience confirms the truth of that which is apparent in theory, that it is inconvenient and dangerous to incorporate in judgment doctrines of law which are not called for by the circumstances of the case. It will be proposed, on moving the judgment, to narrow the finding of the interlocutor; but to sustain the judgment in effect, with some observations on the question of costs *.

March 2, 1821.

The Lords, &c. find, That this case ought to be considered as falling within the meaning of that clause in the statute 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 interlocutors of the 11th March 1815, and the 11th May 1815, and so much of the interlocutor of the 10th 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*l.* costs.

* On the subject of the effect of desuetude and practice, as applied to acts of parliament in Scotland, see the observations of Eldon, Ch., in the *D. of Hamilton* v. *Scott*, 13 July 1813, MSS. and 1 Dow, 403.

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Case of Inverury.

The following account of the case of Inverury, mentioned in the text, p. 86, is taken from the records of the Kirk session of that parish, where the proceedings are preserved:—

The Presbytery of the bounds having given a decree to the minister for a new manse in the usual form, letters of horning were raised upon this decree, and a charge was given to the heritors. Of this charge, one of the heritors, Mr. Leith, of Black-hall, presented a bill of suspension. His reasons of suspension were, 1st, That the manse was oppointed to be built upon some grounds belonging to the Earl of Kintore, which was possessed under a strict entail: 2d, That the manse, according to the plan approved of by the Presbytery, was too large in point of dimensions, and would exceed the sum of 1,000 *l.* Scots, which was the *maximum* allowed by the act 1663. The reasons for suspension came to be discussed before Lord Coalston, Ordinary, and the heritor then "judicially offered at the bar to pay his proportion of 1,000 *l.* Scots, *which is the maximum* " *directed by the law for building a manse*; and agreed that " the chargers might dispose of that in such a manner as " they thought proper, and this besides the materials of " the old manse; *but further he apprehended, under the* " *circumstances in which the case stood, he could not in equity,* " *nor in law, be desired to go.*"

This offer, judicially made, "was refused by Mr. Simp- " son (the minister) and the Presbytery, who contended, " *that the rule laid down in the act of parliament was not* " *a reasonable one*; that the expense of building *had much* " *increased since that time*; that the minister was entitled " to *have a sufficient manse built to him* without any regard " to the statute; and that the plan approved of by the " Presbytery was a reasonable plan."

Lord Coalston pronounced an interlocutor, turning the decree of the Presbytery into a libel, and "granting " probation to both parties for ascertaiuing whether the " repairing the old manse would be done at a lesser ex- " pense than building a new one, and for proving that Lord " Kintore's estate was under a strict entail." Thereafter the minister produced "an estimate of the expense which,

" he said, was necessary for building the new manse, which " had been approved of by the Presbytery, *amounting to* " 123*l.* 6*s.* 2*d. sterling*, *besides the materials of the old* " *manse*, and the benefit of all carriages from the parish, " except the drawing of stones." The cause was then taken to report by Lord Coalston; and the appointment to report was renewed at a subsequent calling, in consequence of a *viva voce* debate of the minutes.

On the part of the minister it was stated, that one of the points of debate was, " whether or not a manse should be " built according to one or other of the plans produced, " *whether the expense exceed* 1,000*l. Scots or not.*" In answer to a proposal on the part of Mr. Leith, that a consent should be obtained from the whole heritors to exceed the sum mentioned in the statute, it was stated on the part of the minister, that " the charger *does not think that* " (viz. the heritor's consent) absolutely necessary, and must " rest it upon what is already in process." " Montgomery " (for the heritor) answered, that he always was, and still " is, willing to pay his proportion *of* 1,000*l. Scots*; but he " contends, *that, at no rate, can he be subjected to any more.*" The cause having been reported, the following interlocutor was pronounced: " The Lord Ordinary having considered " the memorials for the parties, and plans, and other writs " produced, and *having advised with the Lords thereanent*, " finds that the suspender, and the other heritors of the " parish of Inverury, are *obliged to build a competent manse*; " and in respect the suspender objects to the plan of the " manse approved of by the Presbytery as improper, ordains him betwixt and the 11th instant, to give in another plan of a manse, such as he judges proper *and com-* " *petent* for the minister of this parish."

In consequence of this interlocutor, the heritor procured a new plan and estimate of a manse, according to which the building would only cost 898*l.* 14*s.* Scots. According to this plan the front of this house was only to be fourteen feet; the side walls to be only sixteen feet high, and two feet four inches thick in the first story, and two feet in the second story; the chimney-heads to be carried three feet above the roof; the walls were to be built with clay instead of lime, and the floor of the dining-room was to be of earth instead of wood. To this plan the minister gave in objections, complaining of the small dimensions of the house; of the outer walls not being to be built with lime; of the want of a wooden floor for the dining-room, &c.

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Thereafter the court pronounced this interlocutor: "On "report of Lord Coalston, the Lords find, that the heritors "of Inverury must build a manse and offices for the charger, "according to the plan given in for the suspender, with "the following variations and additions: 1mo, That the "manse is to be thirty-six feet long, and eighteen feet "wide within the walls: 2do, That the side-walls are to be "twenty feet high above ground, and the gavels of a pro-"portional height: 3tio, That the walls of the first story "above the ground are to be two feet seven inches thick, "and the walls of the second story two feet four inches "thick: 4to, That the chimney-heads are to be four feet "above the roof: 5to, That the floor of the dining-room "is to be laid with deals. 6to, That the partitions are to "be made with brick, and standards, &c. of wood, all "proper distances; and that the whole of the walls are to "be built with stone and lime; and the walls on the inside "as well as the partitions and roofs of the first and second "stories, are to be sufficiently plastered: 7mo, That the "barn, stable and byre are to be eleven feet wide within "walls, and the walls to be eight feet high, and wholly "built with stone and lime. And in respect of the offer "made by the charger of transporting the stones of the "old manse at his own expense, find, that the manse and "office-houses are to be built upon that part of the glebe "which is described in the charger's memorial; allow and "authorize the charger to call a meeting of the heritors "and magistrates of Inverury, to meet at the church of "Inverury upon the first Tuesday in September next, and "ordain the magistrates and heritors then and there to "stent themselves and the burgh of Inverury *with such* "*sum of money as may be necessary for executing the plan* "*as above mentioned*; and find expenses due to the "charger, which they modify to 4 *l.* sterling, and decern "therefore, and for the expense of the decree to follow "thereon, as the same shall be ascertained at extracting."

The heritor immediately gave in a reclaiming petition, in which he stated, in explicit terms, that "the alterations "made upon the plan by the interlocutor will make the "expense (if the work is to be sufficiently done) *amount* "*to more than double the sum in the act of parliament.*" In this petition the cause was again argued by the heritor, on the general ground that the court had no power to exceed the sum of 1,000l. Scots, allowed by the act of parment. In one part of the petition the clause in the act of

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parliament is quoted; and it is stated that the "words are "so express that they leave no room for comment; and, "under the authority of them, the petitioner maintains "that he, as an heritor of this parish of Inverury, cannot "be decerned to build a manse at a greater expense." In former cases, it is stated, where a large sum was allowed, "a consent of the *majority* of the heritors" was always obtained; and that in the present case there was not only no evidence that such consent was obtained, "but it "evidently appears *that such consent has been refused.*"

Besides this general argument, which is enlarged upon in other parts of the petition, it was stated that, according to the plan, as approved of by the Court, the manse would be made better than any of the other manses in the neighbourhood; and the heritor particularly objected to building the offices with stone and lime. The petition concludes with a prayer, applicable to the various pleas maintained in the petition; and, so far as respected the general point, the heritor craved that it should be found, "that the petitioner, as a heritor of the parish, cannot be "decerned to build a manse *at an expense above* 1,000 *l.* "*Scots*, being the maximum *allowed* in the statute 1663."

Upon advising the petition, the Court pronounced the following interlocutor: "The Lords having heard this pe-"tition, and parties procurators thereon, they find the "offices are to be built with stone and clay, and harled "(plastered) with lime; and, *with that variation, adhere* "*to their former interlocutor as to the other points*, and re-"fuse the desire of the petition."

The effect of this judgment was, to allow a sum of about 2,000 *l.* *Scots* for building the manse, &c.