[7th April 1834.]

ANDREW MILLER, Appellant.—*Lord Advocate* (*Jeffrey*) —*Dr. Lushington.*

No. 11.

Earl of GLASGOW and others, Heritors of the Parish of Neilston, Respondents.—*Attorney General* (*Campbell*) —*Murray.*

Church.—Where the population of a parish has greatly increased, so that there is not sufficient accommodation in the parish church for such increase, and the church is not ruinous, nor in such a state as to require rebuilding, —Held (affirming the judgment of the Court of Session), that the heritors are not bound to enlarge the old or build a new church to accommodate such increased population.

Question, Whether the assessments should be on the real or the valued rent?

2D DIVISION.

Lord Fullerton.

THE church of the parish of Neilston was built in 1762, and then contained less than 500 sittings. It was enlarged in the year 1798, and made to accommodate about 800 sitters. Between 1762 and 1828 the population of the parish had increased from about 1,300 to 6,800, and the rental from about 500*l.* to about 1,600*l.* The parish contains one or two villages, but no burgh. The increase of the population was caused chiefly by the establishment of public works. The parties in the Court below were at issue as to whether the church was

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in a good state of repair, and a great deal of detail was entered upon in relation to this matter. The case was however argued in the House of Lords on the footing that it was in a proper state of repair, but was inadequate to give accommodation to the legal proportion of the population, and therefore it is not necessary to take any notice of the statements in regard to the state of the building. The subject having been brought before the presbytery of Paisley, they came to the following resolution on the 30th of August 1827 :—" The church of Neilston " appeared to the presbytery at last sederunt as greatly " deficient in the extent of accommodation, and not in " a good state of repair either in the wood or walls. " The presbytery did and hereby do adhere to and " adopt said opinion, and do find and decern accord- " ingly : Find, that the church of Neilston is, according " to the census verified upon oath by Mr. Anderson, " totally insufficient and inadequate for the accommoda- " tion of the parishioners of Neilston capable of attend- " ing public worship: Find, that the parish of Neilston " contains at present 6,808 persons, of which number " 4,789 are above twelve years of age : Find, that two " thirds of 4,789 make 3,192 examinable persons who " have, by law and practice of the supreme Court, a " right to be accommodated with seats in the church of " Neilston : Find, that only 830 persons are at present " accommodated in said church, which, deducted from " 3,192, leaves 2,362 persons to be accommodated: " Find, that additional accommodation ought to be " provided for these 2,362, agreeable to law ; and decern " accordingly."

Estimates, with plans and specifications, were ordered to be procured, and having been given in to the pres-

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bytery, they preferred certain estimates "for enlarging "and repairing the church of Neilston, &c., amounting "to the sum of 4,313*l.* 18*s.* 4*d.* sterling; and ordained "said plans and specifications to be carried into effect "for the accommodation of the parishioners of Neilston, "so soon as the whole sums are collected from the heri- "tors for that purpose; wherefore the presbytery did and "hereby do assess the whole heritors of the parish of "Neilston in the sum of 4,556*l.* 0*s.* 4*d.* sterling, for "enlarging and repairing said church, including in the "said sum 66*l.* 18*s.* sterling for incidental expenses, "&c.; and the presbytery did and hereby do appoint "the said sums to be paid by the heritors according "to their valued rent in said parish."

The appellant, Mr. Miller, was appointed collector, and laid a state of allocation before the presbytery, who sustained the same, and decerned accordingly. He then raised letters of horning and gave charges of payment to the respondents as heritors, who presented a bill of suspension on the ground mainly that they were under no liability to enlarge the church for the accommodation of the increased population. The bill having been passed, the letters came before Lord Fullerton, Ordinary, who, on the 5th of July 1830, pronounced this interlocutor:—"The Lord Ordi- "nary having heard parties procurators, and considered "the closed record and productions, in respect that it "was not proved by the reports of the tradesmen em- "ployed, and has not been found by the presbytery of "Paisley, on considering those reports, that the church "of Neilston was in such a state of dilapidation as to "require to be rebuilt, or to be repaired to an extent "substantially equivalent to rebuilding,—finds that it

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" was incompetent for the presbytery to order an en-" largement of the said church, on account of its " inadequacy to accommodate the increased population " of the parish; and therefore suspends the letters sim-" pliciter, and decerns; finds no expenses due." His Lordship at the same time issued the subjoined note.*

Miller presented a reclaiming note on the merits, and the respondents a similar note in regard to expenses. The Court, on the 1st February 1831, refused Miller's note, but altered the interlocutor as to expenses, and found Miller liable in them, reserving to him relief against his employers and constituents.† In pronouncing this judgment, the following opinions (which were laid before the House of Lords) were delivered:—

Lord Justice Clerk.—I was not one of those who were ultimately called upon to give a judgment in the case of Methven, but when that case was first before us I con-

* " *Note.*—It was determined in the case of Methven, 14th May 1828, " that heritors cannot be called upon to enlarge a parish church when in " good repair, on the ground of its inadequacy to accommodate the in-" creased population of the parish; and, according to the opinion of the " consulted Judges in that case in regard to the former practice of the " Court, even the permanency of the increased population 'does not ap-" 'pear to have been considered by the Court as warranting a demand to " 'enlarge the church, unless the church, at the time of the demand, was " 'so ruinous as either to render it necessary to rebuild it, or to give it " 'such extensive repairs, that an addition became a matter of little mo-" 'ment in adding to the expense.' Now, in the present case, the reports " of tradesmen, obtained by the presbytery, do certainly not appear to the " Lord Ordinary to support a demand for the enlargement of the church " upon that ground; and accordingly all that is found upon that point by " the presbytery, in their resolution of 30th August 1827, is, 'that the " 'church is not in a good state of repair, either in the wood or the walls,' " —a finding falling very far short indeed of what would be requisite, " according to the fair construction of the rule laid down in the case of " Methven, to subject the heritors to the obligation to enlarge it. In " short, it appears to the Lord Ordinary, on looking into the whole pro-" ceedings, that the resolution of the presbytery cannot be maintained on " the state of the church, but truly rested on the state of the population."

† 9 S. & D, 370.

curred in the propriety of sending it for the opinions of the other Division; and when those opinions came back to us, I may state, that although, from circumstances, I was not called on to vote, I concurred entirely in the principles there laid down. The first question which there occurred, and was submitted for the opinion of the consulted Judges, was "Whether heritors can be "called upon to enlarge a parish church which is in "good repair, on the ground that it is greatly inade-"quate to the accommodation of the increased popula-"tion of the parish?" To this an answer was returned:—"We are of opinion that the heritors "cannot be so called upon." A second question was no doubt put, relative to the special circumstances of the case of Methven, to which the consulted Judges answered, that there was less reason there than in the general case; but whether the ultimate judgment of the Court went upon general or on special grounds, it is quite clear that the law, as applicable to the present case, is ruled by the principles there laid down. The case, however, was decided upon the general ground, and the point had also been previously fixed by the decision of the Court in the case of Stewarton. Under these decisions, the law is now reduced to the clear principle on which the Lord Ordinary has here rested his judgment, and comes in all such cases to turn upon the question,—Whether the church is ruinous, or in such a state of disrepair as to make it a matter of little moment, in estimating the expense, whether it is to be repaired or rebuilt?—or, as the Lord Ordinary has put it—if the necessary repairs should be substantially equivalent to rebuilding? Apply this principle to the present case:—There is here no doubt whatever of the

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matter of fact as to the state of repair of the church; and I am ashamed to see such reports founded on, as those on which the decision of the reverend presbytery rests. We have the reports of two respectable tradesmen (M'Queen and Miller), who were appointed by the presbytery themselves in the first instance, and whose opinions are conclusive as to the state of the church; and the subsequent reports by inferior tradesmen, appointed ex parte, are deserving of no weight whatever.

Lord Meadowbank concurred in the view given of the general question of law. There is no doubt whatever left by the decisions of the Court upon the general principle applicable to questions of this kind, and there is as little doubt of the application of this general principle to the present case. Every body knows that Government provides funds to meet those cases where, from accidental circumstances, the means of religious instruction are denied. A remedy may also be provided by private subscription; but it would be the hardest thing in the world to lay the burden of building a new church upon heritors in such a case.

Lord Cringletie concurred in the opinions which had been delivered.

Lord Glenlee also concurred upon the general question. In addition to this, it is settled law, that in cases such as this, where the population is not properly landward, but increases in consequence of manufactures, the valued rent is not the correct rule of assessment. But here, even if the proceedings of the presbytery had been regular, the facts of the case do not justify their finding. As to the question of expenses, it is clear that the presbytery cannot be liable, and it is equally clear that

Mr. Miller, as collector, cannot be liable; but Mr. Miller must be employed by somebody or other who is to protect him against loss.

Lord Justice Clerk.—In regard to the question of expenses I have no doubt whatever of the competency of finding expenses, and it is no defence to state that the collector is a public officer, as it is quite clear that there must be somebody or other behind him to cover his retreat. It is of no consequence whether this real party be a body of subscribers, or even the reverend presbytery themselves. If a case for expenses is made out, I have no doubt whatever of the competency of awarding them; but perhaps, upon the whole, it may be sufficient to mark our opinion of this case, to give expenses only since the date of the Lord Ordinary's interlocutor. The principles of law being then clearly laid down by his Lordship, it is impossible for the parties to pretend ignorance, and they should have acquiesced in his judgment.

Lord Meadowbank.—I concur entirely with your Lordship as to the competency of awarding expenses; but I do not think it would be doing justice to the heritors to award them partially. Your Lordships will observe, that the proceedings have been very expensive; and, considering the whole circumstances, and the nature of the reports and proceedings before the presbytery, I cannot view the conduct of the parties who have pressed forward this matter, otherwise than as being most unnecessary, indecorous, and oppressive.

Lords Cringletie and *Glenlee* concurred in the opinion of Lord Meadowbank.

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Miller appealed.*

Appellant.—The general principle in regard to the building of a parish church is, that it ought to be of dimensions sufficient to give accommodation to the parishioners capable of attending divine service. It is on this principle that all parish churches are built; and as it is the essential characteristic of an established church, that there is a provision made by law for the supply of religious instruction to the whole community, it is necessary, as the population of the country increases, that there should be a corresponding increase in the means of this supply. It therefore follows that where a permanent increase of population takes place in a parish, a corresponding enlargement must be made of the church. Unless this be enforced, a large proportion of the population may, in consequence of the mere

* On the above decision being pronounced a petition was presented by Miller and other inhabitants of the parish of Neilston to the General Assembly, praying for aid with a view to appeal to the House of Lords. The petition was remitted to the procurator for the church, who made a report, in which he stated, " I certainly do not think that the present is " the best case in which such a question could be tried; but there is a " danger of no other occurring within a reasonable time; and every year " that the decision in that of Methven is allowed to stand unchallenged, " the difficulty of obtaining an alteration in the Court of the last resort " will be increased; and therefore, on condition that the petitioners will " shape their appeal so as to lead to the decision of the abstract question, " without regard to the specialties which they have hitherto founded on " as being involved in their particular case (but which I do not think " would, in any circumstances, have been entitled to much weight), I " would humbly recommend that the assembly should give its sanction " to their proposal of carrying the case by appeal to the House of Lords." It was also mentioned in the appeal case, that " it may not be altogether " irregular to inform your Lordships that the present appeal is, in fact, " brought under the express sanction of the venerable General Assembly, " with the special view of trying, at your Lordships bar, the validity of " the judgment in the case of Methven."

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architectural state of the fabric of the parish church, be left destitute of religious instruction, which is at variance with the idea of an established church. It is a mistake to suppose that this right, and the obligation on the part of those who are bound to furnish church accommodation, depend on a special statute. Both the right and the obligation are founded on the common law, and the statute was merely declaratory and corroborative of the previous law. Before the Reformation the canon law regulated all ecclesiastical matters. Its authority in doctrine was overthrown by the Reformation; but in so far as related to the civil rights and obligations connected with the fabric of the church it is still an existing authority. Through the whole of that law there runs one general principle, which is the essential principle of a church establishment; viz., that the whole community must be provided with accommodation for attending religious ordinances within the walls of the church. In accordance with this principle it was settled that an increase of population necessarily inferred an extension of accommodation. On the same principle it was established, that where the people of a district became too numerous for the care of the pastor, additional instructors were to be appointed; and that where the increase of numbers was scattered over an extensive country, so as to make it impossible or inconvenient for them to come to the original place of worship, new parishes were to be constituted, and new churches erected. So, on the same principle, not only was the parish church to be upheld in a constant state of repair, and to be rebuilt when ruinous, but to have an addition or enlargement made to its fabric

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whenever a permanent increase of the number of the parishioners rendered it expedient.*

The burden of accomplishing these objects, and more particularly of repairing and enlarging the church, was, by custom, divided in certain proportions between the clergy and the parishioners or the possessors of land within the parish; the practice being to lay the burden of the chancel upon the clergy, and of the nave or body of the church on the parishioners.† Numerous authorities recognize the canon law as of authority in these respects in Scotland.‡

The statutory enactments are not only not at variance, but are confirmatory of these principles and rules. They were intended to enforce the law already in operation, and to fix more accurately the allocation of the burden than otherwise in many cases could be done.|| Their object plainly was, not to introduce for the first time a legal provision on the subject of church accommodation, or to abolish the previous existing law, but to put "ordour thereto," and contemplated the enforce-

* Decretum Gratiani, P. 2. xvi. 1, 53; Decrees of Council of Trent, sess. 21; cap. 4; Decret. Greg. lib. 3. p. 48. de Ecclesiis Edificandis. Paulus Lancelottus, Institutiones Juris Canonici, lib. 2. t. 18; Corvinus, Jus Canonicum, lib. 2. t. 20; Decretum, P. 2. x. 1. 10; Peckius de Ecclesiis Reparandis, cap. 3; Carpzovius, Definitiones Ecclesiasticæ, lib. 2. t. 2. Def. 3. 50.

† Decret. P. 2. xii. 2, 28, 30; Van Espen, Jus Ecclesiasticum, P. 2. sec. 2. t. 1. cap. 6; Peckius de Ecclesiis Reparandis, cap. 14. 20. 22; Van Espen, vol. i. p. 637; Boehmer, Jus Ecclesiasticum, lib. iii. 48. 71; Gibson, Codex Juris Ecclesiastici Anglicani, vol. i. p. 223.

‡ Statutes 1493, cap. 51; 1540, cap. 80; 1551, cap. 22; 1 Bankton, 42; 1 Stair, 1. 14; Canons of Perth, tom. i. p. 607, 618; Hailes' Annals, vol. iii. p. 163; Chambers' Caledonia, vol. i. p. 685; Chart of Aberdeen, folio, 66; M'Farlane, M.S. in Advoc. Bib. vol. i. p. 33, 304, vol. ii. p. 199, 556, 558, 932; Connell's Sup. App., No. 2.; Balfour, p. 35.

|| Statute 1563, cap. 76; Act of Privy Council, 13th Sept. 1563; Statute 1572, cap. 74.

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ment of an existing obligation. This is confirmed by the decisions pronounced on the interpretation of, and carrying into effect, these statutes.* In the progress of the Reformation, and on the establishment of the presbyterian form of church government, the jurisdiction in regard to these matters was transferred from the bishop to the presbytery; and as the clergy became stipendiaries the whole burden of upholding and enlarging the church was laid on the parishioners, which was interpreted to mean the heritors of the parish. This was also a necessary result of the appropriation of the tithes to laymen, and of the power conferred on heritors of acquiring right to their tithes.† The practice of the country, as well as the decisions of the Supreme Court, until the case of Methven, also support the position maintained by the appellant.‡ It is true that in the case of Methven the Judges arrived at an opposite conclusion; but that decision was pronounced almost simultaneously with the present one, and cannot therefore be quoted as a precedent so as to prevent this House from giving judgment according to the established law.

It only remains to observe that if any objection be

* Shaw v. Countess of Wigton, 25th June 1623, Mor. 7913; Kirk of Selkirk v. Stewart, 30th Nov. 1628, Mor. 7913; Williamson v. Parishioners of Kirkaldy, 25th March 1685, Mor. 7914.

† Connell's Sup., p. 12; Forbes on Tithes, p. 209.

‡ Connell on Parishes, p. 8; Session Papers in the case of the Minister of Dunning v. the Heritors, 10th June 1807, Mor. No. 4., App. Kirk; Acts of Assembly, 1638, 1647, 1700, 1706; Stewart of Pardovan's Collection, b. 1. 18. 10; Feuars of Crieff v. Heritors, 20th Nov. 1781, Mor. 7924; Minister of Tingwell v. the Heritors, 22d June 1787, Mor. 7928; Connell's Sup., p. 30; Harlaw v. Heritors of Peterhead, 19th Jan. 1802, Connell's Sup., p. 24; Cunninghame v. Deans, 12th Dec. 1811; Maxwell v. Gordon, 19th June 1816, 4 Dow, 279; Menzies v. Heritors of Lerwick, 17th Jan. 1820; Connell's Sup., p. 44, 53, 125.

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taken to the assessment being laid on according to the valued rent, the appellant is willing that the assessment should be made according to the real rent.

Respondents.—The act of the Privy Council 1563, ratified by act of parliament 1572, c. 54, as modified and explained by usage, affords the only rule to determine the liability of heritors for the expense of building or repairing churches. And although presbyteries exercise a jurisdiction in enforcing the provisions of that act so modified, it is limited to those cases to which the act clearly applies. They have therefore no authority to tax heritors for the expense of providing additional church accommodation for the increased population of a parish in which there is already a sufficient church. Had there been any pretence for the plea maintained by the appellants, that presbyteries have a power to impose a tax for providing sufficient church accommodation in parishes where there is a good church, but where the population has increased, there must have occurred so many cases of this description as to warrant an argument that presbyteries had acquired by usage a more extensive jurisdiction than what originally belonged to them. But there is no instance of any such practice; and in the only two cases in which presbyteries are known to have assumed such a power, their judgments were reversed by the Court of Session.* In the case of Methven, a large majority of the heritors concurred in the view taken by the presbytery, that the

* Cuningham v. Deans, 12th Dec. 1811; Smythe of Methven v. Lord Lynedoch and others, 14th May 1828, 6 S. & D., 791.

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permanent increased population of the parish afforded a legal ground for ordaining an addition to be built to the parish church. But the Court, although the point was not entirely new, (as it had formerly been decided, in the case of Stewarton,) considered it proper to take the opinion of the whole Court; and the Judges unanimously affirmed the judgment of the Lord Ordinary, —"that the increased population of a parish is not a "legal ground for subjecting heritors in the expense "of adding to a church that is substantially in good "repair." The respondents are therefore entitled to rely on these decisions, to the effect, at all events, of showing that there is no usage on which they can be made liable for the expense of building a new church in respect of an increase in the population.

But if there be no such usage, the appellant is bound to show that the claim is founded either upon statute, or legal principle. The Act of the Privy Council 1563 is quite inapplicable. It provides, "that "all parish kirks within the realm, which are de-"cayed and fallen down, be upbiggen; and where "they are ruinous and faulty, may be sufficiently "mended in windows, thack, and other necessaries, to "be maintained and upholden upon the expenses of the "parishioners and parson in manner following; that is "to say, the two part thereof to be made by the "parishioners, and the third part by the parson." It is on the provisions of this act, as explained and modified by usage, that the obligation of proprietors of lands in country parishes to provide church accommodation is founded; but there is no pretext for maintaining that they can be extended, so as to impose upon heritors

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the obligation to enlarge the church or build a new one where there is an increase of the population, notwithstanding there is a good and sufficient church. The effect of holding that a new church must be built would necessarily lead to the result, that in all parishes where the population is increasing the heritors must either at first build a church much larger than is actually required for present use, or make new additions to meet every fresh influx of population. Thus, for instance, had a new church been built in the parish of Neilston in 1801, when the population was only 3,796, the heritors, according to the appellant's plea, must have erected an addition to or a new enlarged church in the year 1821, when the population was 6,549. But this enlarged church would not have accommodated the population in the year 1828, for it then amounted to 6,808, and still less would it have been sufficient in 1831, when it had increased to 8,046. If the mere fact of the increase of population impose upon the heritors a legal obligation to provide church accommodation, without reference to the state of the church, it is obvious that the obligation would be unceasing, because the erection of a single public work might make an addition of 700 or 800 people, for whom, if the argument is well founded, church accommodation must be immediately provided by the heritors.

But even if the presbytery were entitled to impose such an assessment, their proceedings were irregular, in so far as they ordered the assessment to be levied not in respect of the real but of the valued rent; and the proper parties were not called for their interest.

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Lord Chancellor.—My Lords, this case has been argued with consummate ability, and in a manner extremely convenient for the ultimate decision of it. I think it cannot be doubted that this was a case extremely fit to be brought here for ultimate decision; that it is for the interests of the church, and for the interests of the law itself, that a decision should now finally be pronounced upon what appears to have been of late years a matter of some controversy among those whose interests this question particularly affects,—the one party in their secular, and the other in their spiritual concerns. My Lords, this impression which I have respecting the propriety of this case coming here, would only go to the question of costs; for it remains to be seen whether that question of costs will arise; because a much greater and more important question is, whether or not your Lordships should concur in the opinion of the Court below. Now, whatever the impression of my mind might be upon the merits, I must, in consideration of the importance of the subject, and from the wish to examine more minutely the authorities, pray your Lordships that this case may stand over. Previously to entering into this examination, I may observe, that the way in which I am disposed to view this question is this: Here is a right claimed on behalf of the King's subjects using the Established Church, and belonging to the Established Church—a right claimed also on behalf of the Established Church itself—to throw this burden, exclusively of all others, upon the heritors—the burden, not merely of repairing the church when it is in a state of dilapidation—not merely of rebuilding the church when it has come down, or when the disrepair is so large as to make the rebuilding as little costly as repair-

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ing—not of enlarging the church, should it be in circumstances to make such rebuilding necessary;—but, the church being in a state of repair, and sufficient to admit those whom it was sufficient to accommodate when first built, the burden of adding to the church, in respect to the increased demand for room for the increased population of the parish. That is what the Court of Session, differing from the presbytery, have refused to burden the heritors with; and this statement is of itself sufficient to show that the proof is upon those who would cast that burden on the heritors in the same way, as if a question were to arise respecting any other load which one class of the community were seeking to shift from themselves upon another class. If it is the law that the heritors shall be burdened with that load, to the relief of their fellow-subjects,—as they are unquestionably burdened at present, to the relief of their fellow-subjects, with the building of the church when it is in dilapidation, and the enlargement of the church, to meet the increasing demands of the population for church room, when they are called upon to rebuild it;—if the same load is to be cast upon them exclusively, when there is no such disrepair, but only an inadequacy of accommodation, and if in this case, as in the former, the law relieves the other part of the community,—then, no doubt, the heritors will have no right to complain. All I mean to lay down as my clear and unhesitating opinion is, that the proof of that is upon the appellant seeking to impose that burden on the heritors. He has attempted to show the existence of this burden in various ways:—by reference to principle—by reference, more or less distinctly, to the authority of the canon law—and by reference to one authority, (which, by going a great deal

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too far, and by asserting a state of right and a state of law which it is not pretended exists in any way at the present day, either in Scotland or in England, seems to me to be an authority to which little or no weight can be ascribed in the present controversy)—and by reference to the authority of adjudged cases. Of these, we have two, which go with me for little; because it appears, that, in the one, there was an acquiescence on the part of the heritors, one of them being expressly stated to be an application by the heritors themselves to the presbytery; and the other (the case of Hornsey), which was an application for a faculty, without which the church could not be built, and that faculty was granted; but there are dicta in that case which go a great deal beyond it, which I do not very well see the foundation of, and which I cannot reconcile with what at present is clearly understood to be the law of this country. That law is not that churches shall be built in the way that has been contended at the bar, and for which there is no authority even in the Hornsey case; but, as in the case of Hornsey, the majority of the parishioners applied to the Court, and obtained a faculty: so, in the Scotch case, some of the heritors seem to have applied to the presbytery, and obtained their intervention, for the purpose of making it a formal and regular proceeding, binding upon the whole. Those two cases, therefore, appear to me to go very little way towards obtaining the materials of an accurate decision upon this question. But then we come to the other cases, that of Lerwick and of Dunning. The Dunning case seems to me to come much nearer the present than any other that has been cited, or that I have found in the text-books. It is a decision of the

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Lord Ordinary, Bannatyne, and not of the Court; though the decision of the Court, so far as it goes, is not in contradiction to Lord Bannatyne's decision, but rather in support of it. Lord Bannatyne's judgment appears to me difficult, if not impossible, to be reconciled with the Methven case. That latter case appears to have been very well considered, and we have to regret that we have not the reasons of the consulted Judges, and are but scantily furnished with the reasons of the other Judges upon which their opinions were grounded. The Dunning case is stated in the report as having been argued upon at the bar, but no mention is made of it by any of the learned Judges; and this is the more to be regretted, because one would wish to see how far they had attended to it in forming their opinion upon the case then before them. With respect to the authorities upon the other side, it is by no means correct to say that they rest upon the Methven decision alone. The Stewarton case seems to be a case, I will not say deciding directly this very point, but dealing with it in its decision. We have, in that case, the dicta of judges of high authority, and especially one of them, who was distinguished both as a great lawyer in general matters of municipal jurisprudence, and more especially a lawyer of the very highest authority, both personal, official, and professional, upon questions of this description—I mean Lord Robertson. I beg to be understood as most entirely subscribing my assent in favour of the weight to be given to that authority, not only from his connexion with the great leading men of the church, and his constant habits of intercourse with them, and of conference with them upon all such questions, for a great many years, but from his long course of experi-

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ence in those matters, and from having filled the office of Procurator of the Church of Scotland twenty or thirty years, till he was elevated to the bench. His authority is as high as that of any Judge can be upon such questions. Now, it is quite clear that he held it to be a mere novelty to set up any such claim; and he illustrates the opinion he had formed unfavourable to the proposition, independently of the novelty of, it (though the novelty is decisive, because you cannot invent a new burden, and throw it upon one class of the community, without authority), by entering into reasons. It is true that he was there dealing with a proposition somewhat more startling than the one which is now contended for, namely, that when a parish increases in number, the old church, though in sufficient repair, must be taken down and a new one built. The present proposition is not so startling. The Dunning case appears also to have been of a less startling description, namely, that either a new church must be built sufficient to accommodate the increased population, or that an addition must be made to the old church. Nevertheless, Lord Robertson's opinion goes strongly against the doctrine now contended for on the part of the appellant. There is also the authority of Sir John Connell, though not given very expressly in terms, yet, on looking over the whole of the passages, we may collect from them an opinion distinctly coincident with the opinion of Lord Robertson, and we see that he ascribes but very little weight to the Dunning case, regarding it throughout as one in which the opinion of the Court was only given upon that point to which its attention was directed—the question of jurisdiction. What I have now stated I have purposely thrown out in order

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to dispense with the necessity of detaining your Lordships at any considerable length, when I shall come afterwards to propose to make a final decision of the case. If I shall remain of the opinion that I now entertain, and should see nothing in those two cases to impeach the general argument which is derived from the authorities of the Stewarton and Methven cases, and also, if I should see nothing to prove that the appellant has satisfied the exigency under which I hold him to be, of showing affirmatively his right to throw the burden upon the heritors,—then, by having made these observations now, I shall have saved your Lordships the trouble of entering at any great length into a statement of the case.

LORD DENMAN. — My Lords, I have communicated with my noble and learned friend throughout the argument upon this important case, and I agree generally with every word that he has uttered; but I take the liberty to observe, that even supposing the Dunning and Lerwick cases should be found to lay down a law directly opposite to that laid down in the Stewarton and Methven cases, still it appears to me that those cases (unless they should be supported by other authorities) would not justify this House in getting rid of the existing state of things. It appears to be quite clear, that even supposing such a law to be found to be distinctly recognised and laid down in those two cases, yet that law has never been laid down before. There is a perfect absence of all authority upon that subject; and that law could only be inferred from the general obligation to provide accommodation for the increasing population. And when, on the other hand, it is considered how extremely difficult it must be to determine the precise period, and lay down the exact line at which it

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would become proper to call into exercise any discretion, for the purpose of imposing the heavy burden which an enlargement of the church would impose, it appears to me, that that consideration would probably be found to furnish a very sufficient reason why the law should have stopped short with imposing the obligation to a renewal of the former church, and not carrying the duty of further enlarging, except in the case where the church shall have become utterly ruinous, so as to require complete rebuilding. I have thought it right to throw out these few observations, because it appears to me, that even in the case supposed by my noble and learned friend, it would be hardly possible to question the decision that has been come to by the Court below.

LORD CHANCELLOR.—My Lords, I quite agree in what my noble and learned friend has just stated, that it would by no means be decisive, if I found the Dunning case and the Lerwick case as I have stated. The question would still be open upon the authorities. Adjourned.

LORD CHANCELLOR.—My Lords, it is very seldom that a case of greater importance ever comes before your Lordships; and if it would be at all times a question of great moment, it is peculiarly interesting at the present moment, when, from accidental circumstances, every question relating to the rights of the church, and of the heritors, and of the congregations in Scotland, appears to excite a more than ordinary share of attention. My Lords, I formerly stated the view I held of this case, and which was in entire accordance with the unanimous judgment of the Lords of the Court of Session, both in the Methven case and this case itself. The Methven case, however, was not of such old occurrence, and had

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not been for so long a period acquiesced in, as to claim the rank of an authority in the law, binding upon the Court below, and upon your Lordships; and we may take it as if the present case brought the Methven case as well as itself here for final decision. It is thus highly expedient that a final and deliberate attention should be bestowed upon this point of the Scotch Ecclesiastical Law;—and that attention, I flatter myself, has now been given to it. On a former occasion, I stated so fully the grounds upon which I agreed with their Lordships in the Court below, and the general principles which influenced my opinion, that I think it is unnecessary that I should do more now than advert to the matter upon which alone I desired time for further consideration: that was the two cases of Dunning and Lerwick, which had been pressed upon our consideration, and appeared, at first sight, not to be in strict accordance with the Methven case and the present case. The interlocutor of the Lord Ordinary in the case of Dunning I could not certainly reconcile with the principle of the Methven case, and the decision now under review; but, in that case, the Court appears to have argued chiefly, and decided entirely, the question of jurisdiction. Nevertheless, some things appear to have been assumed by their Lordships, which I did feel a difficulty in reconciling with the Methven case and the present case; and the same observation is applicable to the Lerwick case. We are therefore to consider that we have at the utmost only obiter dicta. We have no train of recognition of the principles to which those obiter dicta refer, by way of decision, nor even have we any train of obiter dicta; and what is more important, we have in the case of Stewarton, (which appears to have undergone a much

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more deliberate degree of discussion,) a doctrine laid down by many of the learned judges, entirely in accordance with that of the Methven and the present case. Upon these grounds, I entirely come to the conclusion which was expressed by the learned Chief Justice, that even although, upon further consideration, it should be found less easy than it might have been expected, to reconcile the dicta in those two cases with the dicta on the opposite hand, that circumstance would be no ground to justify your Lordships in laying down the law for which the appellant has contended. I therefore, upon the whole, remain of the opinion which I originally expressed, that their Lordships have come to a sound and accurate conclusion upon this matter, and that the law cannot be said to be, that however great the increase of the population in a parish may be, provided the existing church is in sufficient repair; — nay, if it is not in such disrepair that it would be easier and better, or as easy and as well, to rebuild it,— in no case, except that, is it a matter of right on the part of the church or of the parish that there shall be an enlargement of the church, at the expense of the heritors, by either building a new church, or making a new addition to the old structure. I am perfectly aware of the objection, in point of principle, to which this position is subject. It was said (and I agree that it is difficult to evade such an observation,) that this is resting the important right of the people of Scotland to sufficient accommodation for religious worship in their churches, not upon the demand for that accommodation, — not upon the insufficiency of the accommodation now existing, — not upon the importance of that right to them, and their great anxiety to enjoy that right; — but resting it upon

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something of an accidental nature, which has no intimate, or substantial, or essential connexion with the matter itself,— which does not affect the demand for the accommodation, — which does not touch the supply of accommodation,— which does not touch the importance of the accommodation,—but which merely goes upon the accident of what state of repair the church may happen to be in at any given time, insomuch, that although the parish may have outgrown the church in population beyond all comparison, so that a church capable of holding, as in this case, eight hundred persons, may now be called upon to accommodate three thousand, nay, I might say, ten thousand; yet you never shall have for that population sufficient room allotted in church, where they may have the benefit of divine service, till it happens that the old church is either tumbling down or has actually come down. I feel the force of the statement, and I admit that this principle of the law of Scotland is liable to strong remark. At the same time, the opposite doctrine is liable to remarks of a nature as strong; because, where are you to draw the line? The population is constantly increasing. It does not even increase regularly. There may be a sudden and rapid increase by great commercial speculation in one seaport, — by opening a new channel for trade in a manufacturing town, — by a sudden cessation of hostilities, and the restoration of peace, — nay, even by the calamity of war, which may be accidentally useful to many. Instances are to be found in the neighbourhood of some of our great commercial and manufacturing towns in England, where the population has more than doubled in the course of eight or ten years, and there are instances of villages which have become large manu-

facturing towns; and then the church, which is in perfectly good repair, and was quite sufficient to accommodate the people formerly, becomes wholly inadequate to meet that demand. Are you then (according to the doctrine maintained by the appellant) to be allowed to resort to the presbytery, not to pull down an old church, and build a new one in its place, (for that is not contended for,) but to add a new church to the old? — and which, be it observed, implies a partial pulling down of the old, for of course it is not meant that the new church is to be without-side the old; consequently it implies the taking down the wall of the outside, which may be an operation of some risk, and may be attended with so much risk, that it would almost always raise the question, whether, if the church must be extended to double its size, it would not be better to take down the old church and build a new one. Then, as the population may have extended during ten or twelve years of peace, so during ten or twelve years of war it may shrink back to its former state, and the new building, which has been erected upon the spur of the occasion, remains comparatively useless. Again, even when the increase and demand for seat-room is more gradual than in the case I have figured, if it goes on regularly, as it has gone on recently, not doubling once in three or four hundred years as it used to do, but doubling once in twenty, or thirty, or forty years, then there must be an addition to the church, or a new church built, at intervals, almost every ten, twelve, or fifteen years. That I can see no warrant for whatever. It appears to be an arbitrary doctrine, assumed for the occasion, and to suit the purposes of the argument, and in which no reasonable qualification can be introduced (which goes very

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much against its existence as a doctrine of the law) to reconcile it with good sense, and with general convenience. Upon the whole, therefore, I am of opinion that the pressure of the difficulty is not all on one side, and does not lean and bear only against the doctrine upon which the learned Judges in the Court below have proceeded in this, and in the Methven case. The other side is liable to objections of at least as great, and I should say, of greater weight; and what is the result of the whole comparison of these two opposite lines of objection? From that comparison there results the remark, that the proper quarter to which to apply is the Legislature, which, if the law is defective on either hand, can well deal with the defect, for the purpose of supplying it, and which is not tied down to adopt the one principle or the other principle, — but which may, (though courts of law cannot,) without being put to any such election, adopt so much of the one as shall be consistent with general expediency, and so much of the other as shall make the rule taken not liable to those great objections. In the meantime your Lordships have only, in your judicial capacity, to administer the law as it is, and which, as it is, appears to me has been well decided upon by their Lordships in the Court below.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, Solicitors.