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John W. Douglas.

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THE

PAROCHIAL ECCLESIASTICAL LAW OF SCOTLAND

BY

WILLIAM GEORGE BLACK

MEMBER OF THE FACULTY OF PROCURATORS, GLASGOW

CLERK TO THE HERITORS OF GOVAN

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TO

MY FATHER'S MEMORY

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PREFACE.

While the arrangement of this edition follows that of its predecessors, every chapter has been re-written and greatly enlarged, and the chapters on the Heritors' Clerk, Ornamenta, and Procedure under the Ecclesiastical Buildings and Glebes Act, 1868, are new. The provisions of the Ecclesiastical Assessments Act, 1900, are fully dealt with, and the Act is printed in the Appendix. The account of the history of Teinds in Scotland is adapted from the author's book, "What are Teinds?" It is not an exhaustive notice of the law of teinds—but such a historical account as it is hoped may be an aid to the understanding of a complicated and difficult subject. Larger use than formerly has been made of decisions in the Sheriff-Courts as, with very few exceptions, questions under the Ecclesiastical Buildings Act are decided there.

WILLIAM GEORGE BLACK.

Glasgow, *February*, 1901.

FROM THE

PREFACE TO THE FIRST EDITION.

THE purpose of this book is to state as concisely as possible the existing Ecclesiastical Law affecting Scottish parishes.

The arrangement of subjects is not one hitherto adopted, but I have had in view the special purpose of the work. It is the law of the parish in its ecclesiastical aspects, and not either general parochial law, or general ecclesiastical law, of which a summary has been attempted. The constitution of the parish is therefore followed by consideration of the responsibilities of the heritors who are the civil authorities of the ecclesiastical parish. The matters of which they have charge, or for which they have had originally to provide, such as church building and repairing, churchyards, manses, and glebes, are then treated. The strictly ecclesiastical authorities form the subject of the succeeding chapters which deal with the minister, kirk-session, and Presbyterial jurisdiction in parochial ecclesiastical affairs. The chapter on Dissenting Churches forms an apparent exception to the above plan; but the reader will find some explanation of its inclusion in the nature of the cases cited.

By the Act 1592, c. 116, the Church of Scotland was established on a Presbyterian basis, with its four constitutional courts, the Kirk-session, Presbytery, Synod, and General Assembly. The Presbyterian establishment, however, did little to alter the existing parochial ecclesiastical

law, and to this day the groundwork of parish law is the law of the Church prior to 1592. It would be an instructive and interesting task to show how essentially the main features of that law have been preserved, but in the present work I have not felt myself justified in entering upon this subject; of its importance to every one who has professionally or otherwise to inquire into modern parochial law, there can be no question.

I am indebted to my brother, Mr. J. Moreton Black, Advocate, for reading the proof-sheets, but the responsibility for errors must lie upon myself. In parochial ecclesiastical law it is easy to err, and I shall be glad to receive any corrections or suggestions for the improvement of this handbook.

WILLIAM GEORGE BLACK.

88 West Regent Street,
Glasgow, *Nov.*, 1887.

SECOND EDITION, 1891.

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ABBREVIATIONS.

Bankton.—Bankton's Institutes of the Law of Scotland.
Bligh.—Bligh's House of Lords Reports.
Br. Supp.—Brown's Supplement to Dictionary of Decisions.
C.A.—Common Agent.
Connell Par. Ap.—Connell's Treatise on Parishes, Manses, &c. Supplement.
D.—(If prefixed by numeral) Dunlop's Reports.
D. —(If not prefixed by numeral) Duncan's Parochial Ecclesiastical Law.
Dow.—Dow's House of Lords Reports.
Elchies.—Elchies' Decisions.
F.—Court of Session Reports subsequent to Rettie's Reports.
F.C.—Faculty Collection.
Hailes.—Lord Hailes' Dictionary of Decisions.
H. of L. —House of Lords.
Jamieson.—Jamieson's Scottish Dictionary.
Jur.—Scottish Jurist.
Mac.—Macpherson's Reports.
Macq.—Macqueen's House of Lords Reports.
M.—Morison's Dictionary of Decisions.
Pardovan.—Steuart of Pardovan's Collections and Observations Methodised Concerning the Worship, Discipline, and Government of the Church of Scotland.
Paton's App.—Paton's House of Lords Reports.
R.—Rettie's Reports.
Rankine.—Rankine's Law of Land Ownership in Scotland. 2nd edition.
S.—Shaw and Dunlop's Reports.
Shaw App.—Shaw's House of Lords Reports.
S.L.R.—Scottish Law Reporter.
Skeat.—Skeat's Etymological Dictionary.
Stuart.—Stuart's Reports of Decisions.
Teinds.—Shaw's Reports of Teind Cases.
W. and S.—Wilson and Shaw's House of Lords Reports.

PAROCHIAL ECCLESIASTICAL LAW OF SCOTLAND.

PART I.

CHAPTER I.

THE PARISH.

THE word *Parish* is derived through the Middle-English *parische* from the French *paroisse*, which is again derived from the Latin *parœcia*, springing from the Greek παροικία =a neighbourhood (Gk. πάροικος, neighbouring; Gk. παρ-ά, near; οἶκος, house, abode (Skeat)). It has, therefore, not necessarily any ecclesiastical meaning; it describes a district or division. From its use to indicate a district allocated to and benefiting by the services of a particular chapel or religious house, the word took its present meaning of an ecclesiastical district, the unit of ecclesiastical local government. The historical evolution of the parish in Scotland is noticed in Part V., on Teinds.

When the Reformation shook the religious system of Scotland to the heart, the State intervened to secure continuity of religious ordinances. The Act 1581, c. 100, provided that every parish church and such places within bounds "as sall be found to be a sufficient and competent Parochin theirfoir" should have their "awin pastour" with reasonable stipends, and subsequent Acts provided for parishes erected thereafter. From 1617 to 1707 alterations of parish boundaries and the formation of new parishes were effected by decrees of parliamentary com-

missioners who are now represented by the Judges of the Court of Session as Teind Commissioners. The Church as a body has never had any authority in such matters either in Roman Catholic or Protestant times. In the Auchtergiven case two parishes had been united in 1617, with one minister. The bishop afterwards, with consent of the presbytery, gave a minister to each church, dividing the stipend, but, later, again united the charges, giving Mr. Chrystison the united charge. The other clergyman, Mr. Anderson, competing with him for the stipend, the Court decided in favour of Chrystison, because a "kirk so united by Parliament could not be loosed, disunited or altered by the bishop, nor no other, but by the Parliament" (*Chrystison* v. *Anderson*, 1631, M. 7946.

In 1617 (c. 3) a commission was appointed to provide for a proper stipend for ministers in parishes where the stipend did not amount to 500 merks Scots, or five chalders of victual, besides manse and glebe. The commissioners had power "to unite sik kirks [*i.e.*, parishes] ane or moe as may conveniently be unite, where the fruits of any one alone will not suffice to entertain ane minister." By the Act 1621, c. 5, another commission was appointed with similar objects as to the plantation of kirks, and stipend, and with power "to disunite such kirkes one or moe, as were united of before, and appointed to be served by one minister," and to "appoint the same to be served by several functions and charges as distinct parochins." Subsequent commissions, or commissioners continued under Acts of the years 1627, 1633, 1641, 1644, 1647, 1649, 1661, 1663, 1672, 1685, 1686, 1690, and 1693, were empowered to deal with such subjects as the too great extent of some parishes, the union of small parishes, and the provision for new churches where necessary. An enumeration of the provisions of the various Acts is unnecessary. By Act 1707, c. 9, the Lords of Council and Session, as commissioners for planting churches and valuing teinds, took up the function of the parliamentary commissioners under previous Acts, and have since exercised the power of erecting (or creating) or uniting parishes, and of disjoining and annexing lands, but the alteration of parochial boundaries is now effected by the Court under the Act 7 & 8 Vict. c. 44. The Court may, under this Act,

with the consent of a majority in value of the heritors of the parish, erect new churches, and disjoin parishes as after mentioned.

A parish is a district included within ascertained boundaries, and allocated to a particular church, the inhabitants of which district are in theory, on the one hand, entitled to claim the spiritual superintendence of its minister, and, on the other, bound to contribute to his maintenance and that of the church and manse by their representatives the landowners of the district.

A parish may be (1) Landward=rural; (2) Burghal=within or pertaining to a burgh, and non-rural in its character; (3) Burghal-landward=containing both rural and burghal portions.

Originally those three classes of parish were all parishes *quoad sacra et omnia*, or *quoad omnia*, but with the development of the parish system in Scotland parishes have been created with all the spiritual jurisdiction but none of the secular authority of the older parishes, and are parishes *quoad sacra tantum*. They may belong to any of the above three classes.

A landward parish is a rural parish, either food producing, or adapted, either pastorally or agriculturally, to be so. If teinds are payable from a district, this is indicative that it is, or formerly was, a landward, as opposed to a burghal, parish. See *Auld* v. *Magistrates of Ayr*, July 5, 1828, 6 S. 1093. If the lands within a parish appear on the cess-book of the county in which the parish is situated, this fact indicates that the parish is landward; for had it been within a royal burgh, the lands would not be entered on the county cess-roll, but upon the stent-roll of the burgh. At the same time the test is not a final one, for the burgh might be one of barony or regality, or a police burgh, or the lands might be held in feu by a burgh-royal, though lying outside the burgh, as in the case of the parish of Ayr, which, besides the ancient burgh liberty, held, in the time of William the Lion, a tract of ground, the Borrowfield, in feu. In 1236, Alexander II. granted to the burgh of Ayr the lands of Alloway, which comprised the old landward parish of Alloway. In 1691 this anomalous state of things was got rid of by the erection of the two parishes of Ayr and Alloway into one

parish—the modern parish of Ayr: see case, *supra*. In a landward parish the minister is entitled to a manse and glebe.

A burghal parish is a parish the territory of which was the territory of a burgh, or was contained within the boundaries of a burgh. Whether the burgh is a royal burgh, or a burgh of regality or of barony, is of no consequence. It is probable, though the point has not been raised, that the formation of a police burgh, under the General Police Act of 1862, also would cause a parish to be regarded as burghal, the main use of the term now being to denote that the parish area is used exclusively or mainly as the site of dwellings, or of shops and manufactories. A "burrowstoun kirk" is the church of a burghal parish with no landward district attached to it. (See *Auld* v. *Magistrates of Ayr*, per L. J.-C. Boyle, 6 S. 1090, *supra*.) The minister of a burghal parish is not entitled to a manse.

A burghal-landward parish is a parish partly burghal, partly rural, where the former element predominates. When the rural territory is considerably the more important in extent or value, the word landward-burghal is sometimes used. In former times a burghal parish might become a burghal-landward parish, in consequence of a grant to a burgh of a rural district situated outside the burgh's liberty; in modern times a rural parish becomes burghal-landward by the growth of a town or large village, or the formation of a police burgh within it. The minister of a burghal-landward parish is entitled to a manse and glebe.

The following are the powers of the Teind Court under the Acts 1707, c. 9; 7 & 8 Vict. c. 44; and 31 Vict. c. 36, as to parochial alterations:—

(1.) To unite parishes.

(2.) Disjoin and erect.

(3.) Disjoin and annex lands to other parishes.

(4.) Disjoin and erect districts *quoad sacra*.

(5.) Erect Gaelic churches and congregations into parishes *sine territorio*.

(6.) Disjoin and erect into parishes *quoad sacra*, districts attached to additional churches under 4 Geo. IV. c. 79; 5 Geo. IV. c. 90.

(7.) Disjoin and erect into parishes *quoad omnia*, under 5 Geo. IV. c. 90.

(8.) Disjoin and erect districts *quoad sacra* out of united parishes.

When two parishes are *united* by decree of the Teind Court, their separate existence ends. The minister of the parish is not minister of two united parishes, but of one parish. There can as a rule be but one church and one manse. If both cures are full at the time of the union, it may be provided in the decree, either—(*a*) that the decree is not to be operative until one of the cures becomes vacant; or (*b*) that both ministers are to draw their accustomed stipend until one of the cures becomes vacant. The more suitable of the existing churches and manses is generally selected, and designated as the church and manse of the united parish, but an entirely new church and a new manse and glebe may be rendered necessary by circumstances. The disuse of existing graveyards is not countenanced. As a rule the heritors of a united parish are benefited by the union, as there is only one church and one manse to maintain; the minister receives the united stipend.

Where a decree of the Court of Teinds, in 1670, united two kirks under the minister of one of them, who was to serve the cure at both kirks Sunday about, but declared the parishioners of each parish free of the support of the church in the other parish, it was held, in 1880, that the heritors in one of the original parishes were not liable for the repair of the church of the other parish, though they were liable for that of the manse and other buildings (*Magistrates of Fortrose, &c.*, v. *Maclennan* (Collector of Rosemarkie), Nov. 26, 1880, 8 R. 124).

A union of two or more parishes leaves the civil status of the parishioners as it was previous to the union.

A new parish may be formed out of an existing parish, if the mother parish be too large or too populous, by *parochial disjunction and erection* (1707, c. 9; 7 & 8 Vict. c. 44). The new cure may be independent of the mother parish either in part or wholly. In the former case the decree of the Court of Teinds will bear that the stipend of the old parish is in part to be paid out of the teinds of the disjoined lands, and the incumbent of the new parish will derive stipend from the teinds of the new parish only so far as the decree of modifica-

tion in favour of the minister of the old parish permits (*C. A. in Locality of Abbotshall* v. *Martin*, Nov. 22, 1815, F.C.). In the latter case (the more usual) the parochial burdens imposed on parishioners or heritors will be transferred. The minimum consent to such disjunction and erection is that of the majority of the heritors, according to valuation. This consent may be dispensed with, if already there be in the lands about to be disjoined and erected, a church or place of worship suitable for the church of the new parish, and capable of being lawfully appropriated to that purpose, thus saving the heritors the expense of erecting a new church; and if the titulars or others having right to the teinds out of which is to be paid not less than three-fourths of the additional stipend or stipends to be modified in consequence of the disjunction, have consented to it, or have offered no objection, after due intimation by direction of the Court made to them, then the Court may allow the process to proceed, and give decree (7 & 8 Vict. c. 44, § 4). As matter of practice, the consent of the titulars does not seem essential. See *Campbell* v. *Officers of State*, Dec. 21, 1864, 3 Mac. 295. On the other hand, although all the heritors may consent to and desire a disjunction and the erection of a new parish, the Court may give effect to the objections of titulars.—Case of *Calder*, 1743; Connell, on Parishes, 78.

Objections to such an erection may be—

(1.) That the new district is too thickly populated for one additional church.

(2.) That the free teind of the district is not sufficient to maintain suitably the minister of the new church.

(3.) That the site of the church is inconvenient, or that the church is insufficient in size.

The Court may declare the new parish to remain part of the old parish, so far as regards the poor. Otherwise the new parish, ecclesiastically and civilly, stands by itself. In the *Maryhill* case the heritors were held to be bound to keep the church in repair, and to be entitled to an allocation of seats (see *Reid* v. *Commissioners of Woods*, July 10, 1850, 12 D. 1215).

A new parish may be erected out of two or more parishes in the same way, and under the same conditions as to liability to

or freedom from old parochial burdens, as in the case of its being carved out of one parish.

The procedure and conditions as to the *division* of a united parish, under the United Parishes Act, 1868, are referred to *infra*, p. 13.

Again, a parochial change may be effected by the *disjunction* of lands belonging to one parish, and their *annexation* to another. The transference of those lands from one ecclesiastical area to another operates not only ecclesiastically but civilly. The parishioners and heritors who were liable to the burdens of A parish become liable to the burdens of B parish to which they are annexed. A disjunction and annexation is presumed to be *quoad omnia* unless the words *quoad sacra* are actually inserted in the decree—(Lord President Inglis and Lord Kinloch in *Pennel* v. *Malcolm*, June 11, 1869, 6 S.L.R. 560)—even though the decree bear that the interest of the minister of A parish for his stipend from the lands annexed to B parish is reserved. After satisfaction of his stipend as so provided, the teinds may be localled on for the stipend of the minister of B. As to the incidence of stipend where lands have been disjoined from one parish, and annexed *quoad omnia* to another, see *Simpson* v. *Ewing* (Bonhill), December 8, 1882, 10 R. 313.

When lands are disjoined and annexed *quoad sacra tantum*, under the Act 1707, this infers an extension of the pastoral area of B parish giving the former parishioners of the portion of A parish which is annexed, a right to sittings in the B parish church, and freeing them from liability to church assessments for A parish, but not involving any change civilly in their relations to A parish. Thus, while for ecclesiastical purposes they are parishioners of B parish, for civil purposes they continue parishioners of A parish. They are entitled to seats in the parish church of B, and to all the rights of parishioners, and have been held bound to share the burden of maintaining the *church* of B (contrary to Erskine's dictum, ii. 10, sec. 64), not that of A (*Drummond* v. *Heritors of Monzie* 1773, M. 7921). But this decision is very doubtful law. See *Scottish N. E. Railway Company* v. *Gardiner* (Coupar-Angus), Jan. 29, 1864, 2 Mac. 540, and *Duke of Roxburgh* (Jedburgh), 3 R. 728. In the last named case the question of the liability of the heritors of disjoined lands, for building, maintaining, and repairing the church of the

original parish was reserved, but opinions in favour of the continuing liability of the heritors were indicated by several judges, and expressed decidedly by Lord Deas. See also the judgment in *Magistrates of Fortrose, &c.*, v. *Maclennan* (Rosemarkie), Nov. 26, 1880, 8 R. 124, which is distinctly opposed to the spirit of the decision in Drummond's case.[1] The heritors of the disjoined lands are not liable for assessments for maintaining the *manse*, of B (*Park* v. *Maxwell* (Carmunnock), 1748, M. 8503), and if so, unless they are liable for the manse of A, they would apparently escape any ecclesiastical burdens (*Magistrates of Fortrose, supra*). The minister of A continues to draw his stipend from the annexed lands (*M'Donald* v. *Campbell* (Fortingall), March, 1836, 9 Jur. 8); and in the very few parishes where heritors continue to provide for the poor, the liability of the heritors of A parish is unaltered.

The Act of 1844 (7 & 8 Vict. §§ 8, 11) provides, with reference to the disjunction and erection of *districts quoad sacra*, that where a church, and endowment therefor, is provided by any person or persons, the Court may, on his, or her, or their application, where the number of such persons does not exceed five, or of two-thirds, or any ten of such persons where they exceed five in number, and without any concurrence of heritors, inquire into the circumstances, and erect such church into a parish church, and designate a district to be attached thereto *quoad sacra*, and disjoin such district *quoad sacra* from any parish or parishes to which it may have belonged, and erect it into a parish *quoad sacra*, the minister and elders having the status of a parish minister and elders. The provisions as to minister's stipend, manse, &c., are referred to *infra*. The titles of such a church are to be taken and conceived so as that it shall be inalienably secured as the church of the new parish in connection with the Church of Scotland. It was held in the Dalreoch case that a 999 years' lease of a church site did not satisfy this condition (*Donaldson, &c.*, March 3, 1873, 11 Mac. 489). Lord Jerviswoode observed: "My view is that a lease, however long, cannot be looked on here as a sufficient title." (The Lord Justice-Clerk and Lord Ardmillan dissented.) Due

[1] Two judgments in the Sheriff-Courts appear to indicate a growing opinion that the case of Drummond was a special one, and was not meant to supersede the general law laid down by Erskine. See *Aitken* v. *Waddell*, 1889, 5 Sh. C. Reports 262, and *Aitken* v. *Thomson*, *ibid.*, p. 300.

provision must be made for the future maintenance of the fabric of the church.[1]

The Court of Teinds will not sanction the erection of a *quoad sacra* parish merely because a manse and stipend have been provided for the minister, but will only do so when it is necessary for the spiritual interests of the district, on account of the distance of the parish church, or the growth of population, or some such circumstance. In *Irvine* v. *Maxwell* (Dornock, &c.), Feb. 17, 1873, 11 Mac. 409—Lord President Inglis observed: "It is too much taken for granted that if the parties have provided a church, and have made arrangements for the payment of the minister, it follows as a matter of course that the Court will assign a district. If any such idea does prevail, the sooner it is put an end to the better, for that is not the object of the Act of Parliament."

It has been decided that the Annuity Tax Abolition Acts, 1860 and 1870, did not in any way affect the jurisdiction of the Teind Court under the Act 7 & 8 Vict. c. 44, § 8, and that an application for the erection of a parish *quoad sacra* must be judged of on the same principles as any other similar application under that section, and—in the under-cited case—that the Lord Provost, Magistrates, and Town Council of Edinburgh were proper objectors in such an application, and that the competency of the application and the expediency of granting it being both doubtful, the application should be refused (*Murray, &c.*, v. *Magistrates of Edinburgh*, Feb. 9, 1874, 1 R. 482).

The expression "the ministers of the Established Churches in Kilmarnock" has been held to mean "not only the ministers of the Laigh Kirk, but also the ministers of the *quoad sacra* churches which have been created from time to time" (*Buchanan's Trustees* v. *Buchanan Bequest Trustees*, Dec. 18, 1886, 14 R. 284), thus recognising the truly parochial position of *quoad sacra* parishes. Six months later it was held that the minister of a chapel of ease that had been built by private subscription, on his being "inducted" to the same church after its erection into a *quoad sacra* church, was entitled and bound to become a contributor to the Ministers' Widows' Fund (*Maclagan* v. *Brown*, July 20, 1887, 14 R. 1083; for

[1] "The Erection of Parishes Quoad Sacra, &c.," by Nenion Elliot, S.S.C., 1879, gives an account of the procedure of the Court of Teinds under the Act 7 & 8 Vict. c. 44.

observations on this case per Lord President Inglis, see *Hastie* v. *M'Murtrie*, June 4, 1889, 16 R. 731).

The heritors of a *quoad sacra* parish continue liable for the maintenance of the church of the old parish (L. J.-C. Hope in *Reid* v. *Commissioners of Woods* (Maryhill), 12 D. 1215).

For the *maintenance* of the church of the newly erected *quoad sacra* parish, and other expenses, it is provided (7 & 8 Vict. c. 44, § 9), that, after providing free seats, not exceeding one-tenth of the whole sittings, a minister's pew, and a pew for officiating elders, a portion of the sittings in the church, not exceeding one-fifth of the whole sittings, shall be let at rents not exceeding a rate to be fixed by the Presbytery of the bounds, and the remaining portion of the sittings may be let in such manner as is agreed upon by the minister for the time being, and the person or persons liable for the repair of the church and for the stipend of the minister, and in the event of their not agreeing, the Sheriff of the county determines the matter. As to the application of the pew rents the Act provides:—

"The pew or *seat rents* of any such church as aforesaid may be expended and applied for the purpose of defraying the necessary expenses of a precentor, a beadle or kirk-officer, and other expenses necessarily incurred in dispensing the ordinances of religion therein, and not otherwise provided for, and for the purpose of upholding in due repair and improving the fabric of such church, or of the dwelling-house and offices of the minister, or for the relief of any person or persons who may have undertaken or become liable to uphold the same, or who may be liable for the endowment or stipend provided and secured for the minister of such church; and it shall be lawful to make collections at the door of any such church for any of the purposes aforesaid: Provided also, that the sum received by any person liable to uphold the church or dwelling-house, or liable for the endowment or stipend as aforesaid, shall not in any year exceed the sum paid or expended by such person in the same year by reason of such liability" (§ 9).

It is thought that where precentors have ceased to be appointed, owing to the introduction of organs, the salary of the organist or leader of psalmody (or both) may be payable from the fund provided by seat-rents.

The importance of the provision as to the payment of seat-rents should not be overlooked by those desiring the erection of a parish *quoad sacra*, as was remarked by the Lord President Inglis in refusing such an application: "If the erection is to be effectual, the people in the district will have to resort to the church. People are entitled to go into their parish church without any payment, whereas if they go to the new church they will have to pay seat-rents" (*Irvine* v. *Maxwell* (Dornock, &c.), Feb. 17, 1873, 11 Mac. 409). A minister is not entitled to dispense at his own discretion with seat-rents; they are virtually part of the endowment.

Intimation of an application for the disjunction and erection *quoad sacra* of a church and district situated wholly within a *quoad sacra* parish, should be made both in the original and the *quoad sacra* parish churches (*Whitelaw, &c.* (Airdrie), Nov. 8, 1875, 3 R. 88). The proclamation of *banns* is one of the functions and duties of the office of minister of a church erected into a parish church under the Act of 1844, for the district attached thereto as a parish *quoad sacra* (*Hutton, &c.*, v. *Harper, &c.* (Wishaw), March 9, 1876, 3 R. (H. of L.) 9).

Provision is made under 7 & 8 Vict. c. 44, for erecting *Gaelic Churches* and congregations into parishes with or *without* territory (§§ 12 and 13). The constitution is somewhat of an anomaly, as otherwise territory is regarded as essential to the idea of a parish but is not opposed to the canon law.[1] The ministers and elders of such a parish enjoy all the powers, rights, and privileges of ministers and elders of the Church of Scotland. "Provided always, that nothing herein contained shall be construed as giving to the minister or ministers and elders of any such Gaelic congregation right to exercise pastoral superintendence and discipline over persons who are not either

[1] "Parishes, as a rule, are distinguished from each other, and the number of people belonging to each parish is usually determined by *territorial* circumspection or boundaries. We say *as a rule;* for it is not repugnant to canon law that a parish, in the canonical sense of the word, should consist of certain families, even though living in the districts of other parishes. In the United States German [Roman Catholic] congregations are usually established in this manner—that is, they are made up of the German Catholics of a place, no matter whether they live in the confines of English-speaking congregations" (Smith's "Elements of Ecclesiastical Law, adapted especially to the Discipline of the (R.C.) Church in the United States," 1887, vol. i., p. 405).

members of such Gaelic congregation, or of the families of such members, or resident within the territorial district, if any, which may be assigned to such parish exclusively" (§ 13). It is not necessary that both services on Sunday should be in Gaelic (*Christian Knowledge Society* v. *Magistrates of Edinburgh*, July 10, 1850, 12 D. 1216). It is needless to say that the heritors of such a district and the congregation remain in all civil respects parishioners of the mother parish.[1]

By 4 Geo. IV. c. 79, the Commissioners appointed by that Act were authorised to erect or purchase places of public worship in the *Highlands and Islands* of Scotland. The cost of such buildings and the stipend of the minister, who had the status of assistant minister of the parish within which the new place of worship was provided, were to be paid from the public funds provided by the Act. Provision for a certain district being defined and set apart for such an assistant minister was made by 5 Geo. IV. c. 90. The Act 7 & 8 Vict. c. 44, § 14, provided that, upon application by the Presbytery within which any such place of worship is situated, or by one or more heritors holding together one-fourth part of the valuation of the district, or by the Lord Advocate, the Court might disjoin the district from the parish or parishes to which it, or any part of it, belonged, and erect the district into a parish *quoad sacra*, and the minister and elders of such a parish were declared to have the status of a parish minister and elders of the Church of Scotland.

By § 15 it was provided, further, that if application were made to erect such a district alone, or with additions thereto, into a parish *quoad omnia* with the requisite consent of heritors, the Court might give effect to such application; the Commissioners, under 4 Geo. IV. and 5 Geo. IV., thereupon cease to hold the place of worship and the minister's dwelling-house (now become respectively the parish church and manse of the new parish), and the burden of upholding those falls on the heritors of the parish. The minister of a parliamentary church under 5 Geo. IV. c. 90 has no control over repairs on the church

[1] The Act of Assembly of 23rd May, 1843, declared previous Acts of Assembly relative to ministers of Chapels of Ease, &c., to be rescinded. Without a proper constitution, a church erected under such rescinded Acts is not even a chapel of ease; it is a meeting-house wholly under the ecclesiastical authority of the Presbytery of the bounds.

buildings carried out by the heritors at their own expense. He has right to apply the pew rents to keeping the buildings in repair, but none whatever to interfere with repairs undertaken by the heritors. Where a minister sought interdict against such repairs being executed the Court refused it. Lord Young observed, "This seems to me a most nimious application" (*Macdougall* v. *Duke of Portland* (Berriedale), Nov. 29, 1892, 20 R. 105).

In 1866 an Act was passed to provide for the case of *united parishes* in which two or more parish churches already existed, and where, from increase of population or other change of circumstance, it might be expedient to apply, under the provisions of the 1844 Act, for the erection of a parish *quoad sacra*, and to give the heritors of the united parishes power to convey one of the parish churches to the party or parties endowing the parish *quoad sacra* (29 & 30 Vict. c. 77). This Act, as not sufficiently accomplishing the objects for which it was designed, was repealed by the Act 31 Vict. c. 30, the United Parishes (Scotland) Act, 1868. This Act provides that, whenever, in the case of a united parish containing two or more parish churches, any persons have undertaken to endow one of the churches along with a district, being part of such united parish to be attached thereto, it is competent for them to apply for the *disjunction* of such district, and for the erection of it into a parish *quoad sacra*, in terms of the 8th section of the 1844 Act, and for the Court to entertain and dispose of the application in the same manner and to the same effect as if the persons applying for such disjunction and erection had at his, her, or their expense, built or acquired, or undertaken to build or acquire, a church, in order to its being erected into a parish church in connection with the Church of Scotland. It is provided that it is not necessary for the persons applying for such disjunction and erection to make any provision for the maintenance of the fabric of the church which they have undertaken to endow (§ 2). It is competent for the Court, in pronouncing decree of disjunction and erection in an application presented under the above section, to declare that the church undertaken to be endowed shall, from and after the date of the decree, be the parish church of the newly-erected parish, and this declaration invests the minister and kirk-session

of the newly-erected parish *quoad sacra* with all those rights in relation to the church of the newly-erected parish which were formerly vested in the minister and kirk of the united parish (§ 3). The church declared to be the church of the new parish *quoad sacra* is not subject to the provisions of any trust constituted in terms of the 1844 Act, nor to any trust applicable to a church erected by voluntary contributions, as the church of a parish *quoad sacra* (§ 4). Nothing in the Act is to increase or affect the existing liabilities of the heritors in any parish, and the Act is to be deemed to be incorporated in the 1844 Act (§§ 5 and 6).

The trustees, kirk-session, and managers of a *quoad sacra* parish presented a petition for the annexation *quoad sacra* to it of a district forming part of the Barony parish, Glasgow; the Court held that the consent of the heritors of the Barony parish was not necessary as it did not affect their interests and in the circumstances of the case granted the petition (*Baird* (Kelvinhaugh), July 14, 1893, 20 R. 973).

The constitution of *quoad sacra* churches has passed through many forms and cannot be said to be entirely satisfactory, if the intention of the framers has been to reproduce as nearly as possible the organisation of old parishes. The church property is held by trustees, partly *ex officio* and partly elected; the managers are the responsible body, generally, in the church affairs, and the Kirk-Session is apt to become a secondary authority. Questions from time to time arise between those bodies as to their rights. In the case of the *Committee of Management of Forth Church* v. *Darling*, Nov. 26, 1898, 1 F. 177, a feu-duty was held by the trustees for, *inter alia*, payment of the expense of maintaining the fabric of the church and manse, and payment of the surplus, if any, towards defraying costs of management, supplementing the minister's stipend, or otherwise in improving the condition of the church and parish as the trustees should determine. It was held that, although the committee of management of the church had the duty of entering into contracts for necessary church repairs, and to payments from the trustees under certain circumstances for such purposes, they were not entitled to require the trustees to hand over the funds to them, as it was the duty of the trustees to administer the fund in their hands.

In an earlier stage of the same case one of the committee of management pleaded that the action was not duly authorised as he had not been present at the meeting or been called to it when the action was authorised. He did not say he was ignorant that such a meeting had been called, and the Court held that with his knowledge it was his duty to attend and the intimation must be held to have been sufficient (*Darling* v. *Darling*, Mar. 10, 1898, 25 R. 747). Notice had been given from the pulpit. The constitution contained no provision as to how meetings should be called. The opinion was indicated that if the managers had had reason to believe that the objecting manager did not know of the meeting they would have acted wisely in adjourning the meeting, seeing the purpose of the meeting was to authorise an action to be raised against him. It may be permitted to observe that there is sometimes slackness in church affairs both in giving notices of meeting and in recording proper minutes, and it is satisfactory when notices are duly posted to each manager giving him notice of each meeting, with a brief indication of the business to be dealt with. In *Reid* v. *Maxwell*, Feb. 6, 1852, 14 D. 449, it was observed that in the administration of a trust it was "essential that the utmost fairness and openness should be observed by trustees towards each other, that ample time and opportunity for deliberation should be afforded, and that if any concealment or underhand dealing, or any misleading or deception in order to carry a measure by surprise should appear, the Court, as a Court of equity, would be entitled and bound to control and restrain trustees in such abuse of their powers." This case was approved in *Wyse* v. *Abbott*, July 19, 1881, 8 R. 983, and again in *Darling's* case *supra*. Church managers should be no less careful than other trustees.

In the case of *Cambuslang West Church Committee* v. *Bryce*, Dec. 15, 1897, 25 R. 323, where an action had been raised by a committee of management of a chapel of ease, three of the number lodged a minute disclaiming the action, and the Court, holding that they had never given their authority to it, found them entitled to have their names deleted from the record, and gave decree for expenses against the remaining pursuers. Here again it appears no notice of meeting had been given save from the pulpit. Lord Trayner observed: "There may be cases where

certain persons may be required to lend their names in an action which they would not themselves be prepared to institute, provided they are secured against all personal liability on account of such proceedings. But I do not know of any case where legal proceedings can be taken by one person in the name of another, who has never been consulted on the subject, or informed that his name was to be used" (p. 329).[1]

The proper evidence of the *boundaries* of a parish is the statute, order in council, or decree of parliamentary commissioners or (subsequent to 1707) of the Teind Court. Owing to the destruction in 1700 of the records of the Teind Court, it is not always possible to produce such evidence. Among adminicles of evidence that will be received by the Court are statements, admissions, or decrees—in actions for augmentation of stipend, modification, and locality; for valuation of teinds, for the designation of manses, glebes, or churchyards; for building or repairing churches and schools—tending to imply that the district in question was united, erected or annexed, or to rebut that inference. The description of the lands parochially in the cess-books of the county; in old charters or Acts of Parliament (*C. A. in Loc. of Kirknewton* v. *Liston*, June 8, 1831, S. Teinds, 271); the entry of them in connection with the name of their owners in the Register of Births, Marriages, and Deaths for a particular parish (*Todd* v. *Sandison* (Eyemouth), May 15, 1868, 5 S.L.R. 496; *Minister of Rescobie* v. *Carnegie*, Feb. 5, 1869, 7 Mac. 514); the "circumstance as to whether there is, or has been, more than one incumbent (see Act 1581, c. 100, against pluralities of benefices) or schoolmaster in the district; more than one manse, glebe, church, or churchyard, or school; more than one patron ex-

[1] The same case decided another point of importance. An effort having been made to raise funds to provide for the erection and endowment of a chapel of ease as a parish *quoad sacra*, the minister's father-in-law, in the course of a private letter which began "My dear John," wrote to the minister, "I will give you £100 towards endowment should your subscriptions fall short, so that this renders further discussion of the £100 in question unnecessary." An action by the managers to enforce payment was raised: the Court assoilzied the defender, the majority of the judges holding the pursuers had no title to sue, as the promise, if obligatory, was one given to the minister not to the managers. Lord Young's opinion was based on the different ground that there was no document of debt on which to sue.

ercising the rights of presentation—are all matters of suggestive import" (D. 71, 72). To these may probably be added the Ordinance Survey, and the Lands Valuation Roll, also Reports of Commissions on Parliamentary Boundaries, and reported cases of the Court of Teinds. Verbal testimony is not irrelevant, but the value to be put on it is always uncertain; plans, rentals, tacks, &c., are admissible. (See L. P. Boyle, *College of Glasgow* v. *Earl of Eglinton's Trustees*, July 2, 1845, 7 D. 970.) Evidence of the configuration of the ground as suggesting one or two parishes has been admitted as of importance (*Campbell* v. *Campbell*, Nov. 13, 1852, 15 D. 10). In the Rescobie case, 1869, lands which had, since 1704, been described in the titles as in one parish, and had for many years paid stipend to that minister, were found to lie truly in the adjoining parish, and were liable in teind in it. As to the nature of the proof, see *Minister of Rescobie* v. *Carnegie*, Feb. 5, 1869, 7 Mac. 514.

In a case decided in the following year, a stream which formed the boundary between the parishes of Buittle and Kelton, both in Kirkcudbright, was shown to have had its course diverted in 1800. Several years later the piece of ground situated between the old and new channel came to be regarded as forming part of the parish to which it did not originally belong, and to be assessed for poor-rates and other taxes accordingly. It was held, in a question of settlement between the parishes, that the piece of ground still belonged to the original parish (*Knox* v. *Hewat*, Jan. 12, 1870, 8 Mac. 397). The regard paid by the Court to evidence as to the recognised boundary of a parish in times long past shows the importance in any question of this kind of careful study on the part of all concerned in the inquiry, not only of easily accessible books and papers, but of whatever records, historical and topographical, as are extant of the district in which the parish is situated.

CHAPTER II.

HERITORS.

In the case of *The Kirk of Selkirk* v. *Stuart* (1628), M. 7913, the assessment for the repair of the kirk is said to have been "set down by the parochine." Two years later, in the *Lauder* case, it appears that the Presbytery of Ettilston ordained "the parishioners" to convene themselves to see what was necessary to be done to the church (*Kirk-Session of Lauder* v. *The Goodman of Gollowshiels*, 1630, M. 7913). The word "heritor" appears in use in 1642 and thereafter.

In its ordinary meaning "heritor" means an owner of land (*Glasgow Corporation* v. *M'Ewan* (Strathblane), H. of L., Nov. 23, 1899, A.C. 91, affirming judgment of Court of Session, in whose reports the case appears as *Heritors of Strathblane* v. *Glasgow Corporation*, Feb. 3, 1899, 1 F. 523), but this may justifiably be expanded to mean an owner whose lands are entered on the cess-roll of the county in the case of assessments on the valued rent, or whose name and property appear on the valuation roll for the year, in the case of assessments on the real rent.

The following are special definitions of the word heritor under various statutes:—

Under the Act 1663, c. 16, relative to vagrant poor, which provides that one-half of the assessment for the maintenance of the poor be paid by the heritors, and the other half by tenants and possessors, wadsetters and liferenters are declared to be liable "during their rights as heritors."

By the Act 1696, c. 26, for settling schools, a "heritor" is to have relief for one-half stent as against his tenants, and liferenters are to pay the proportion imposed on the lands they liferent, "and the heritors shall be always free of the same during the liferenter's lifetime." A liferenter is therefore not a heritor under this Act.

By the Act 1707, c. 9, "heritor" is evidently limited to proprietors whose lands are separately valued on "the valuation of the Paroch."

By the Act 43, Geo. III. c. 54, 1802–3, relative to parochial schools, a "heritor" who votes at meetings under the Act is to be the proprietor of lands to the extent of at least £100 of valued rent as appearing in the cess-books of the county.

The Act 7 & 8 Vict. c. 44 (1844), requires to the disjunction of parishes the consent of the "heritors" of a major part of the value of any parish, and the meaning of "valuation" seems to be the same as in the Act of 1707, so that the cess-roll is the test.

The Valuation Act, 17 & 18 Vict. c. 91, supplied a general valuation of rent with the effect of extending the term "heritor" so as to embrace the owners of all heritable subjects within the parish indiscriminately, a valuation being now attached to all, and this roll is the basis of assessment in all parishes, except where the valued rent is the criterion of liability. "From the time when the Valuation Act came into force," said Lord M'Laren in the *Strathblane* case, *supra*, "I think that all interests in land separately entered on that roll are *prima facie* assessable for ecclesiastical rates, the case of leaseholds being an exception established by decision" (1 F. at p. 533).

By 29 & 30 Vict. c. 71 (Glebe Lands (Scotland) Act, 1866), the word heritor is declared to mean "the proprietor of any lands within such parish to the extent of at least £100 of real rent from land yearly appearing in the valuation roll of the county within which such parish is situated" (§ 2).

In practice a new division of heritors for purposes of assessment into what are called—(1) valued rent heritors; and (2) real rent heritors, has arisen since the passing of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868. In the interpretation clause, "heritor" is declared to mean "any proprietor of lands and heritages at present liable in the assessments which may be imposed according to the real or valued rents thereof, as the case may be, for the purposes set forth in the third section hereof." The third section deals with the procedure relative to "the building, rebuilding, repairing, adding to or other alteration of churches or manses, or the designing or excambing of sites therefor, or the designing or excambing of glebes or

additions to glebes, or the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof, including the building or rebuilding of churchyard walls." Section 23 provides that all assessments for such purposes shall be imposed upon lands and heritages in the parish, according to the yearly value appearing on the Valuation Roll at the time the assessments are made, or according to the valued rent of such lands and heritages, as the case may be. Then follows this clause : "Provided always, that when the area of any parish church heretofore erected has been allocated among the heritors, according to their respective valued rents, all assessments for the repair thereof shall be imposed on such heritors according to such valued rent." Or, in other words, that where a church has been built before 31st July, 1868, and the area allocated among the heritors according to their valued rents, the repair of that church will, in future, be at the charge of the valued rent heritors alone.[1] By far the greater number of churches in Scotland were built before the passing of the Act and were allocated among the valued rent heritors. In some parishes the heritors have construed the above clause to mean that although the repairs of the church are payable by the valued rent heritors among whom the church sittings have been allocated, the liability for the repair of the manse has been shifted to the shoulders of the real rent heritors, —that is of owners of property in the parish according to the valuation roll. It is therefore not unusual for a meeting of heritors according to the valued rent to be held in a landward parish to consider the repairs to the Church, and a separate meeting of heritors according to the real rent to be held to consider repairs upon the manse. The question as to whether this mode of dividing the liability is well founded has not been directly before the Court, but a great deal of difficulty has been caused in parishes owing to the sharp line of distinction which has been drawn between what is conceived to be two entirely different bodies of heritors. The writer cannot but express his opinion that the liability for repair of the manse must follow that for the church, and therefore that where the area of a parish church built prior to 1868 has been allocated among

[1] The provision of the Ecclesiastical Buildings Act is evidently taken from § 33 of the Valuation of Lands Act, 1854.

the heritors according to the real rent, there is only one body of heritors in that parish, and the same persons who are responsible for repairs upon the church are responsible for the maintenance of the manse and for the care of the graveyard. Where heritors according to the real rent are called upon to pay for the repair of the manse of a church whose area has been allocated among heritors according to the valued rent, they are put in the anomalous position of having to defray the expense of repairing the residence of the minister of a church in which they have no allocated seat. This seems unjust. Questions have arisen as to whether it is the real rent heritors, or the valued rent heritors, who are entitled to transfer the parish churchyard to the parish council under the Local Government (Scotland) Act, 1894, § 30(6), and even as to which body of heritors is entitled to appoint the beadle or the gravedigger. No such questions can arise if it is borne in mind that, although there may be a church without a manse, there can be no manse without a church—*i.e.*, the manse is merely an adjunct of the church. If there are two separate bodies of heritors in a parish, there is nothing to prevent each body appointing its own clerk. Under the Glebe Feuing Act the consent of the heritors to the feuing has to be attested by the signature of the clerk to the heritors. Which clerk? It may be said that the devolution of liability for the repairing of the manse upon the real rent heritors is the logical outcome of the Peterhead case. But this is not so. The principle of the Peterhead case is rather that, where, as in the case of the erection of a new church for the parish, the whole community are benefitted, the liability should fall upon all the owners of property in the parish. Where a new parish church is built to replace one which was in existence prior to the passing of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (with its area allocated among the valued rent heritors), the new church and the manse, whether old or new, will be maintained by the real rent heritors, but until such a church is built, it humbly appears to the writer that to impose assessments upon the owners of property according to the valuation roll for the repair of the manse of a church in which the great majority of such owners have only a remote interest, in respect that they have no allocated seat, is entirely at variance with the principle of the leading cases, and with

clause 24 of the Act itself, which provides that "nothing herein contained shall have the effect of extending or increasing the burdens which now by law rest upon the minister or heritors of any parish in respect to any of the matters" set forth in the Act. "Nothing contained in this Act shall exempt from or render liable to assessment any person or property no previously exempt from or liable to assessment." To throw upon the real rent heritors the burden of the cost of repairs upon the manse of the church whose area is allocated among the valued rent heritors, appears undoubtedly to render liable to assessment persons and property not previously (that is, not prior to 1868) liable to assessment.[1]

Superiors are not heritors (*Dundas* v. *Nicolson and Hunter*, July 2, 1778, Hailes' Decisions, p. 802). Of this case Lord President Robertson observed (1 F. 531) it is "not only a sound but an instructive case;" "a superior, although an owner of heritage, is not the owner of land in the physical and corporeal sense of that term." It is a question whether, if in feuing their lands they retain the minerals, superiors do not remain liable for parochial assessments; the point has not been decided, but see *Trades House of Glasgow* v. *Heritors of Govan Parish*, 14 R. 910.

Liferenters are not heritors (*Anstruther* v. *Anstruther*, May 14, 1823, 2 S. 306). "The case of a liferenter is related in principle to that of the superior—both are cases of different persons having different interests in the same land, the assumption being that the land must pay, and the question being through whom? Plainly, both persons could not be liable—the question is, which? The Court held that of the two the fiar and not the liferenter ought to bear a burden laid on for a purpose which had more of the element of permanent benefit than characterises the concerns of a liferenter. This seems very reasonable" (Lord President Robertson, *Heritors of Strathblane* v. *Glasgow Corporation*, Feb. 3, 1899, 1 F. 531).

[1] In the case of *Govan* (*Trades House of Glasgow* v. *Govan Heritors*, July 8, 1887, 14 R. 910), the point was specially raised. The heritors had been in the habit of assessing for the repair of church and manse on the same roll—*i.e.*, that of valued rent. The Trades House contended that, so far at least as manse repairs were concerned, the assessment should be on the real rent. Neither Lord M'Laren, Lord Ordinary, nor the First Division, gave any attention to this argument in their opinions.

Titulars are not heritors (*Relict of Minister of Ednam* v. *Laird of Wedderburn*, 1663, M. 8499; *Reid* v. *Commissioners of Woods* (Maryhill), July 10, 1850, 12 D. 1215).

Tenants are not heritors, even though they have leases of more than twenty-one years (*Miller* v. *Craig* (Neilston), 1769, 1 Hailes, 329), and appear on the valuation roll as proprietors; see *M'Laren* v. *Clyde Trustees* (Renfrew), May 28, 1868 (H. of L.), 6 Mac. 81, 40 J. 484. As to the liability of proprietors of lands let under building leases of ninety-nine years, see *Traquair's Trustees* v. *Heritors of Innerleithen*, Dec. 9, 1870, 9 Mac. 234, 43 J. 121. "It is difficult to call a leaseholder for ninety-nine years a heritor, if a leaseholder for nineteen years is not, and it would be impossible to hold a nineteen years' lease to make a man owner of the land let to him" (Lord President Robertson in *Strathblane* case, *supra*, at p. 531).

Proprietors of udal lands are heritors (*Dundas* v. *Nicholson*, 1778, M. 8511); and so are feuars (*Boswell* v. *Hamilton* (Mauchline), June 15, 1837, 15 S. 1148).

The term heritor is not necessarily confined to individuals. It is used with equal correctness to describe an incorporation or a union of persons, such as a railway company (*Anderson* v. *Union Canal Company*, March 7, 1839, 1 D. 648; *Macfarlane* v. *Monkland Railway Company* (Slamannan), January 29, 1864, 2 Mac. 519; *Scottish N.-E. Railway Company* v. *Gardiner* (Coupar-Angus), January 29, 1864, 2 Mac. 537), for business or other purposes, so long as they are owners of ground in a parish. This point frequently arises in the case of burghal-landward parishes. In the Stranraer case of 1836, the Lord Ordinary (Moncreiff) said: "There is no doubt that the incorporation of the burgh in this case constitute the heritors" (*M'Neel* v. *Robertson*, May 27, 1836, 14 S. 849; see also *Magistrates of Elgin* v. *Gatherer*, November 17, 1841, relative to magistrates of a royal burgh; *Lockhart* v. *Lockhart* (Lanark), January 24, 1832, 10 S. 243).

An owner of coal-mines is not liable *qua* proprietor thereof for assessments for church purposes (*Bell* v. *Wemyss*, 1805, Inveresk, M., Kirk, Appendix 3), it being said that the profit derived by him by these mines is of the nature of casual profit as opposed to permanent rent.[1] In the case of *Glasgow Cor-*

[1] But if his mines are worked from the surface within the parish, is he not a heritor, and are not the works, &c., assessable as valued in the valuation roll?

poration v. *M'Ewan* (Strathblane), Nov. 23, 1899, A.C. [1900], 91, the House of Lords held, affirming the decision of the First Division of the Court of Session, that, in a parish where a conduit was carried underground in virtue of grants of way-leave in perpetuity obtained from the proprietors of the land, the Waterworks Commissioners, who had obtained those grants, and who had laid the conduit, were liable to assessment as heritors of the parish. The opinions of the judges of the First Division (whose decision was affirmed) deal exhaustively with the definitions given to the word "heritor." Regarding *Bell* v. *Wemyss, supra*, Lord President Robertson said: "Lord Wemyss certainly was the owner in fee of the *dominium utile* of land, unless coal is not land. But then the ratio of the decision was that the profit was casual and exhaustible, and that it was therefore wrong that coal should bear permanent burdens, although right that it should bear annual burdens. Whether this be a sound principle of exemption or not, it is enough for the present purpose that the ratio does not apply to the lands of the water company, for the ground of judgment is not that the lands were subterraneous, but that the profits were casual, which is not the case of water-works" (Feb. 3, 1899, 1 F. at pp. 531-33). A heritor's liability is irrespective of his occupancy of a seat in the parish church. The Act of Privy Council and Statute 1572, c. 54, imposes the stent on the "parochiners" (here meaning the "heritors"), and this has been held to be irrespective of their occupancy of the church (*Farie* v. *Leitch*, Feb. 2, 1813, 17 F.C. 152). The doctrine has been questioned in the case of a burghal-landward parish (*Williamson* v. *Parishioners of Kirkcaldy*, 1685, M. 7914), from the Court finding that the heritors were liable for repair of the church, "unless they would quit their seats." It seems unlikely that the Court intended that by ceasing to use the parish church heritors would obtain freedom from ecclesiastical assessments. The language is more that of a threat of deprivation of spiritual benefits, for at that time there was no choice of churches in a parish. At present in several burghal-landward parishes, from the multiplication of churches of various denominations, not a single heritor occupies his allocated seat in the parish kirk. Heritors whose lands are situated in a parish erected *quoad sacra*, and to which these lands have been dis-

joined, were formerly said to be liable for the maintenance of the church in the parish *quoad sacra*, not in the old parish; see, however, *supra*, p. 7. Heritors of *quoad sacra* parishes erected under 7 & 8 Vict. c. 44, § 8, and probably heritors in all disjoined parishes, are, it is now decided, not freed from liability for the parochial burdens to which they were previously liable (*Magistrates of Fortrose* v. *Maclennan*, Nov. 26, 1880, 8 R. 124). In this case, in giving judgment Lord Curriehill said: "It is quite clear that the burden of maintaining the manse, &c., is not *inter sacra* but *inter civilia*, quite as much so as the payment of stipend, which in all such cases continues to be paid by the heritors of the lands disjoined to the minister of the parish from which they have been so disjoined."

Where lands are not disjoined, persons whose lands are in the parish *quoad sacra* remain heritors of, and are liable for, the assessments in the old parish.

In some cases the manse of a united parish may be maintainable by the heritors of two parishes united therein who are yet separately liable for the kirk of each parish. Thus, in 1455, Chanonry was created into a burgh and united with the burgh of Rosemarkie, the two being called in combination the burgh of Fortrose. There was a church in each, the cathedral church of the diocese being in Chanonry and the parish church in Rosemarkie. In a proceeding by "the Bishop of Ross *v.* the Parishioners of Rosemarkie," the Commissioners of Teinds, after opposition, pronounced the following decree, dated February 2, 1670: "The Lords unites the kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday day about. The Lords, of consent of the Bishop of Rosse, declares the parishonairs of Rosemarkie frie of the support of the kirk of Chanonrie *et e contra*." In an action seeking to enforce liability upon the heritors of Chanonry for repairs of the church, manse, and other ecclesiastical buildings of Rosemarkie, it was held that the meaning of the decree was that, while uniting the two kirks, the heritors of the two districts were to be separately liable each for the support of their own church, viz., the heritors of Chanonry for support of the cathedral church, and the heritors within Rosemarkie district for support of the parish church, and that, looking to the decree and what followed upon it, the heritors of Chanonry

were exempt from assessment for the repairs to the church of Rosemarkie, although liable in so far as regarded the manse and other buildings (*Magistrates of Fortrose, &c.*, v. *Maclennan* (Collector of Rosemarkie), *supra*).

Heritors act as a quasi-corporation in the management and disposal of parochial matters as to which they are entitled, at their own hand, to take action (*Boswell* v. *Duke of Portland* (Mauchline), Dec. 9, 1834, 13 S. 148).

Meetings.

Meetings of heritors may be called—

(1.) By requisition of one or more heritors possessed of the necessary qualifications;
(2.) Or of the clerk to the heritors;
(3.) Or by the minister voluntarily;
(4.) By requisition of the Presbytery; or,
(5.) By order of the Court.

Meetings may be called in three ways. The old procedure (still competent) was—

(1.) To call the meeting by written notices from the heritors' clerk to each heritor, transmitted through the post-office or left at the heritor's residence; or,

(2.) By "edict"—*i.e.*, intimation given from the pulpit of the parish church, or by the precentor, immediately before the dismissal of the congregation, written notices being also transmitted to the non-resident heritors (*Campbell* v. *Stirling* (Cadder), Mar. 4, 1813, F.C., aff. 6 Paton, 238). If it is the minister who desires the meeting to be called, the second course is generally followed, and so also if the Presbytery directs the meeting to be called, unless some special procedure is directed.

(3.) The procedure sanctioned by the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, § 22, will, however, be generally adopted by heritors. It provides that, notwithstanding any law, statute, or usage to the contrary, meetings of heritors for any purpose whatsoever may be called in the following manner:—The minister, on the requisition of (*a*) the clerk of the heritors; or (*b*) of any heritor or heritors possessed (1) of lands yielding one-fourth part of the total real rental of the parish, as appearing on the valuation roll in force at the time,

or (2) valued at one-fourth part of the total valued rent of the parish; or (*c*) when he himself thinks such meeting expedient or necessary, shall cause an intimation of the meeting to be given immediately after Divine service in the forenoon, and circular letters containing a similar intimation to be sent to all heritors of the parish, at least twenty-one free days before such meeting takes place. If the number of heritors exceeds forty, it is not necessary to send circular letters, but in lieu thereof the minister gives intimation of the meeting by advertisement in a newspaper circulating in the county, once during each of two successive weeks, between the intimation from the pulpit and the day for which the meeting is called. It does not appear that a more frequent repetition of the advertisement would be warranted, and an item for the expenses of this might be objected to in an audit of the clerk's account —however desirable it occasionally may be, especially in landward-burghal parishes, to have more public and frequent advertisement of an important meeting. A meeting summoned for the purpose set forth in § 1 of the Ecclesiastical Assessments (Scotland) Act, 1900, is to be convened in the manner prescribed in the Ecclesiastical Buildings Act, § 22.

Notices addressed to public companies or corporations should be addressed to the secretary or clerk or other officer at the principal office, or the office specified in the Articles of Association, Act of Parliament, or charter, as that whereto notices may be legally sent.

Notices intended for insane or pupil heritors should be sent to their guardians; but to prevent any possible question, notices may prudently also be sent to the parties themselves. Although such heritors cannot act by reason of incapacity, their lands are still liable to assessment, and the fullest opportunity should be afforded their guardians of acquainting themselves with the position of matters in the parish.

Questions have arisen as to the fact of notices being duly issued, and the clerk is advised either to send all notices in registered envelopes, or to prepare a special list of heritors and their addresses, and have a certificate of postage endorsed on it, and signed either by himself or by two clerks present at the actual posting. The *inducice* of citation of heritors' meetings under the Ecclesiastical Buildings Act is twenty-one free days

(§ 22). While it may be that a shorter citation is competent for meetings not called under the provisions of that Act, the clerk should err on the safe side, and, except in some case of special urgency, give twenty-one days' clear notice.

In the case of *adjourned* meetings the opinion has been expressed that the safe course to follow is to treat an adjourned meeting as substantially similar to an original one, and to give the same notice. It is true that if the provision as to twenty-one days' notice applies to adjourned meetings, it may have the effect of inconveniently retarding the despatch of business at heritors' meetings. This has been felt in practice. There is no statutory provision as to adjourned meetings, and there seems no reason for importing so stringent a rule as applies to original meetings—provided always that full notice of the adjournment, of the new place of meeting, date, and continuation of subject be given in the same way by notice from the pulpit, and circular; or, where applicable, by advertisement. In the Mauchline case a meeting of heritors was adjourned from 17th August to 14th September, and on 14th September to 28th September (*Boswell* v. *The Duke of Portland*, Dec. 9, 1834, 13 S. 148).

Care should be observed that no matter is imported into an adjourned meeting of which notice was not given in the notice of the original meeting.

The following is a suggested form of advertisement or notice of meetings:—

PARISH OF *A*.

I hereby call a meeting of the *Landward* Heritors of the Parish of *A*, to be held within *the Parish Church*, on at o'clock, for the following purposes:—

First.—

Second.—To receive and consider Report by the Clerk to the Heritors relative to *the assessments for parish purposes*, and, if so resolved, *to impose an assessment.*

Third.—To transact any other business competent to be considered by the meeting.

C D, *Minister of A Parish.*

The minister's certificate is as follows:—

I certify that I duly read the above citation immediately after divine service in the forenoon of Sunday, *6th January*, 1901.

C D, *Minister of A Parish.*

If the citation is read by anyone but the parish minister, the certificate will run thus :—

I certify that the above citation was read immediately after divine morning service, &c. C D, *Minister of A Parish.*

The place of meeting is usually the parish church. There is, however, no special reason why it should be. Any public hall, or other convenient place, in the parish is as suitable, or more so.

There is no statutory quorum, and if the heritors have been legally convened a meeting is constituted by the arrival of a single heritor. In the case of *Mauchline* one heritor alone attended an adjourned meeting of heritors when the repairs of the church was determined upon. Three other heritors ultimately signed their names as concurring (*Boswell* v. *The Duke of Portland*, Dec. 9, 1834, 13 S. at p. 149), but although such concurrence is very properly taken, it is not essential. Regard, however, must be had to the qualifications of the heritor or heritors constituting a meeting when an assessment is imposed on the valued rent, in view of the provisions of the Ecclesiastical Assessments Act, 1900, § 1.

The first business of the meeting is to appoint a preses. There is no person entitled to claim to preside. If the election is not, as is usually the case, unanimous, the election must be decided by a vote, and in deciding this matter each heritor has one vote and no more, whether, it is thought, he represents absent heritors or not.

The clerk to the meeting is then appointed. There is usually a regularly appointed heritors' clerk, who will act as clerk to the meeting (see Chapter III., *infra*, "The Heritors' Clerk"). He need not be either a heritor or a parishioner. He is sometimes also clerk to the kirk-session, but the offices are entirely distinct. As heritors cannot be too careful in procedure, it is desirable that, wherever it is possible, a solicitor should be appointed clerk. If there is no regular clerk to the heritors the election of a clerk to the meeting is conducted in the same way as that of the preses.

The clerk reads the advertisement calling the meeting and the certificate by the minister of citation from the church pulpit, and lays on the table copies of the newspapers containing the advertisement. In the case of a meeting called by circular,

the circular will be read, and a certificate of postage to each heritor should, it is advised, be laid on the table.

The clerk takes note of the names of all present. Absent heritors may be represented by proxies (*Robertson* v. *Murdoch* (Barony), Feb. 23, 1830, 8 S. 587), which should be valid mandates, and be stamped with a penny stamp (27 Vict. c. 18, Schedule C.). Women may attend and vote, or may grant proxies. At a meeting of heritors called for the purposes of the Glebe Lands Act, an absent heritor may vote by a letter under his hand (see *infra*, p. 161). Husbands have been accustomed to attend on behalf of their wives without proxies. The propriety of this general custom as the law affecting married women now is, appears very doubtful. It seems more than probable that a minor "on the verge of majority," but having curators, can attend and vote. A minor with curators cannot vote (or grant a mandate) without their concurrence. Curators alone cannot grant a mandate (*Campbell* v. *Stirling* (Cadder), *supra*).[1]

Persons acting as commissioners or factors of estates being the property of minors are by custom allowed to vote. The commission or factory should be produced, particularly if the meeting be called for the purpose of imposing an assessment.

The minister is not a heritor. He is not entitled to be present except by invitation; it is not unusual for him to attend, but of course he cannot preside, he cannot vote, and he is not entitled to speak unless invited to do so by the meeting. The minister is often well qualified from his knowledge of parochial affairs to advise with the heritors, but he will best consult the dignity of his office by not tendering counsel unless he is requested to do so.[2]

The clerk reads the minutes of the previous meeting of

[1] This is given on Mr. Duncan's authority, but the report of the case *Fac. Coll*, Mar. 4, 1813, contains no mention of curators.

[2] In the *Moreham* case (*Ainslies* v. *Tainsh*, Jan. 17, 1872, 20 Mac. 336) the provisions of the Act 1696, c. 26, were considered with reference to the direction "that there be a school settled and established and a schoolmaster appointed in every parish not already provided, by advice *of the heritors and minister of the parish*, and for that effect, that the heritors in every parish meet and provide a commodious house for a school." It was held (Lord Deas dissenting) that this did not entitle the minister to vote at a meeting of heritors for the purpose of considering the condition of the existing schoolroom, or any question as to repairing or renewing it.

heritors, and of any meetings of committee of heritors. These minutes, if approved, and if not already signed by the chairman of the meetings, should be signed in presence of the meeting at which they are read. If the chairman of the meeting of which minutes are read is not present, the chairman of the occasion should, after their approval, initial them as approved. They can then be subsequently signed by the preses whose signature is required.

The preses explains the business of the meeting, preserves order, determines the relevancy of motions or amendments, and takes the sense of the meeting by vote. Voting-papers are not necessary. If voting-papers are used they must be stamped (27 Vict. c. 18). The recognised manner of voting, however, is by open vote. It has been decided (*Campbell* v. *Stirling* (Cadder), *supra*), that a preses has a deliberative but not a casting-vote. The case is an old one, and the manifest inconvenience of such a rule in the case of an equality of votes, points to the desirability of the preses having also a casting-vote. The point has been raised, but not decided, whether a meeting can voluntarily, as a condition of the preses' appointment, give him a casting-vote. As the heritors present are, or are presumed to be, the whole parties interested, it may be thought that they can confer such a power.

Absent heritors are bound by the actings of those present, if all is done in strict conformity with the law (*Goodman of Gollowshiels*, 1630, M. 7913; *Boswell* v. *Duke of Portland* (Mauchline), Dec. 9, 1834, 13 S. 148). For circumstances in which it was held (aff. judgment of Court of Session) that a heritor whose land had been compulsorily taken as an addition to the churchyard was not entitled to have the proceedings set aside on the ground of want of notice, see *Walker* v. *Presbytery of Arbroath*, Nov. 24, 1876 (Barry), H. of L., 4 R. 1 (Court of Session, 3 R. 498). When an assessment is proposed to be imposed, it is the duty of both the preses and clerk to be well advised both as to the competency of assessing for the purpose, and as to the mode or rate of assessment.

The business competent to a meeting of heritors is of a varied kind. Any questions as to the church, churchyard, or manse, can there be properly raised and discussed, and assessments for their repair or protection imposed; the collector is

usually the heritors' clerk, but any other person may be appointed. If any heritor is aggrieved by any resolution, his remedy is by action in the Court of Session. As the heritors meet as a civil body, there can be no doubt that recourse to the Presbytery, which is an ecclesiastical court, is incompetent.

Can a body of heritors rescind a resolution come to at a previous meeting? If nothing of a practical nature has followed the first resolution, and things are, in fact, in the same position as they were formerly, the heritors are probably entitled to rescind their resolution. Where, however, anything has followed upon a resolution, such as the incurring of any expense connected with carrying out such a resolution, or a contract entered upon, the second resolution appears voidable if parties interested insist on implement of the first resolution, or is only competent where the parties instrumental in carrying the second resolution become liable for the loss incurred through the heritors' change of mind.

The circumstances under which authority was given to heritors to sell lands declared to be held inalienably for behoof of the parish of Springburn, Glasgow, were unusual, and, as the case is not reported, may be noted at length. In 1835 the "Society for Erecting Additional Churches in the City and Suburbs of Glasgow," was instrumental in procuring the delimitation of a portion of the Barony parish of Glasgow which, under the name of Springburn parish, was ultimately erected and disjoined by decree of erection and disjunction of 14th June, 1854. The Society had acquired a piece of ground to provide for the erection of the parish church, and certain trustees for the Society were duly vested by disposition, recorded on 21st November, 1842. It was, *inter alia*, declared that it should be in the power of the Society to convey the subjects to trustees for the church to be erected thereon, but at such time, in such mode, and under such rules, and conditions, and restrictions, as the Society might deem best calculated to establish on a secure, permanent, and beneficial basis the interest of the new church, in connection in all time thereafter with the Church of Scotland. A church to accommodate 750 persons was built upon part of the site at the expense of the Society. In May, 1854, a disposition of the subjects, with

the buildings thereon, was executed by the trustees vested in them, with consent of a quorum of the directors and office-bearers of the Society. The grant under the disposition was made "to and in favour of the Rev. A B, moderator of the Presbytery of Glasgow, and the Rev. C D, clerk of the said Presbytery, and to their successors in office, the moderator and clerk of the said Presbytery for the time being, as representing the said Presbytery, and under their control in all time coming as trustees, and in trust for the purposes aftermentioned, and to the assignees of the said trustees heritably and irredeemably." The conveyance was also declared to be made under the declarations, burdens, conditions, &c., set forth in the instrument of sasine vesting the trustees for the Society, and the purposes of the conveyance were stated to be as follows:—"Which subjects are conveyed in trust and to the end and intent that the said trustees may hold and manage the same for behoof of the said parish of Springburn as the church and property of said parish, and with and under the following express provisions and restrictions—viz., That it shall not be in the power of the said trustees or their foresaids to sell, alienate, or dispone the said steading or plot of ground and others and buildings thereon, or any part thereof, or to burden or affect the same with any securities, mortgages, or other incumbrances for debt, or to hold or use, or allow the same to be used otherwise than as a parish church, and in connection with the Church of Scotland."

The subjects conveyed were affected by a ground-annual of £5, 9s. 1d., which was purchased by the Society, in order that the subjects might be used for parish purposes free of incumbrance. The ground-annual was made over "to and in favour of the Reverend A B, moderator of the Presbytery of Glasgow, and the Rev. C D, Doctor in Divinity, clerk of the said Presbytery; and to their successors in office, the moderator and clerk of the said Presbytery for the time being, as representing the said Presbytery, and under their control in all time coming as trustees, and in trust for the purposes aftermentioned, and to the assignees of the said trustees heritably and irredeemably." The conveyance of the ground-annual was made by disposition and assignation, dated 18th and 22nd May, 1854, and the deed contained clauses of restriction similar

to those contained in the disposition of the subjects. Both the deeds in favour of the moderator and clerk of Presbytery, and their successors in office, were forwarded to the Teind Office, but no infeftment was taken. In the course of the process of disjunction and erection, a judicial undertaking was given by the moderator and clerk of the Presbytery of Glasgow that they would execute, whenever required after decree should be pronounced, any deed which might be considered necessary to vest the subjects, the church thereon, and the ground-annual, in the heritors of the parish of Springburn. By the terms of the decree "the said Lords further appointed the pursuers to obtain, and lodge in process forthwith, a disposition by the moderator and clerk of the Presbytery of Glasgow, conveying the said church of Springburn to the heritors of the said parish, to be held by them as the parish church in all time coming." In accordance with that undertaking and decree, a disposition of the subjects was duly executed, dated 27th June, 1854, by the then moderator and clerk of the Presbytery of Glasgow, "to and in favour of the heritors of the said parish of Springburn, and to their successors, heritors of the said parish in all time coming, and to their assignees heritably and irredeemably, . . . which subjects are conveyed in trust, and to the end and intent that the heritors, our said disponees, may hold and manage the same in all time coming, for behoof of the said parish of Springburn, and of the parish church of the same." The deed contained the further obligation—viz., "We oblige ourselves, as if we were already infeft in the said subjects, to infeft the said heritors and their foresaids." This disposition was also forwarded to the Teind Office, but no infeftment followed.

For some time prior to 1897, owing to the increase of the population in the neighbourhood of the church, the demand for sittings was much greater than the church could meet, and accordingly the kirk-session were forced to face the question of enlarging the building. A suitable hall to be used for congregational purposes was also urgently required, and plans in connection with both improvements were obtained and considered. The plan for the enlargement of the church showed additional accommodation for 500 worshippers; and it was proposed to build the congregational hall upon ground immediately to the north of the church. Further to the north than the

proposed site for the latter, an area of 1640⅔ yards of ground available for building purposes extended. It was of no use as church building ground in connection with Springburn parish, although it was part of the ground conveyed for behoof of the parish church. The kirk-session accordingly, acting under the best advice at their command, came to be of opinion that the measure of highest expediency, with a view to the spiritual needs of the parish, would be the sale, or feuing, of the superfluous land, and the devotion of the price, or feu-duty, to the building scheme.

Upon the 19th February, 1897, a meeting of heritors was convened in the parish church, when the proposals of the kirk-session were submitted. The heritors unanimously gave their approval thereto, and appointed a committee of their number, with a general authority, to act in the heritors' interests. Thereafter a petition having been presented to the Presbytery of Glasgow as conservators of the benefice, the Presbytery also approved of the proposals as being in the best interests of the parish.

In order to have the title of the heritors completed to the subjects, a disposition was executed in favour of certain heritors as trustees for the heritors of Springburn, by the then moderator and clerk of the Presbytery of Glasgow, who had obtained from the Sheriff of Chancery a decree of service as heirs of provision in general in trust to the Rev. A B and the Rev. C D, moderator and clerk in 1854, under the disposition of 1854, and they had expede a notarial instrument on that disposition and their extract-decree and service, and recorded it; they had similarly completed a title to the ground-annual. The disposition contained the clause following, viz.:—"Which subjects are conveyed in trust and to the end and intent that our said disponees as trustees foresaid"—that is to say, for behoof of themselves and the other heritors of the said parish of Springburn—"and their foresaids, may inalienably hold and manage the same in all time coming for behoof of the said parish of Springburn and of the parish church of the same."

In these circumstances a petition was presented by the committee of heritors under the Trusts (Scotland) Act, 1867 (and particularly § 3), for power to feu the piece of ground, and to dispose thereafter of the feu-duty, or alternatively for power to sell said ground.

The Court ordered intimation to the moderator and clerk respectively of the Presbytery of Glasgow, and also to the minister of the parish of Springburn, as such and as moderator of the kirk-session of the parish, and to the session-clerk, and thereafter Lord Low (Lord Ordinary), on 17th July, 1897, remitted to a Writer to the Signet and to a Land Valuator to inquire into the circumstances and report,—the special purpose of the remit to the latter being to report as to the amount of feu-duty which should be fixed. The legal reporter advised the Court that as the result of his inquiries, he was of opinion "that the heritors in the present case occupy the position of trustees as defined by the Trusts Acts and that this position is likewise held by those of their number in whom for conveyancing reasons the title is now vested. The position therefore appears to your reporter to be competently presented. The circumstances are, however, most peculiar, and so far as he can ascertain without exact precedent. The question of competency is therefore respectfully submitted for your Lordship's consideration. Should your Lordship be satisfied on that head, your reporter is respectfully of opinion that the realisation of ground proposed is expedient, and also of the reported decisions and especially the case of *Downie*, June 10, 1879, 6 R. 1013, that it would not be inconsistent with the 'intention,' that is (as construed by the Court), the main purpose for which the land is held." The Court granted authority as craved to feu 1640$\frac{2}{3}$ square yards at a minimum feu-duty of £41 per imperial acre, and thereafter to sell the feu-duty, or alternatively to sell the piece of ground, and to expend the proceeds of the sale of the feu-duty or ground as the case might be upon the alterations, additions and buildings proposed in connection with the Springburn Parish Church and Congregational Hall mentioned in the petition (*Petition, Reid and others*, November 9, 1897).

Ecclesiastical Assessments.[1]

In a landward or rural parish the assessment is usually imposed on the valued rent, and under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (31 & 32 Vict.

[1] The common law of England on the same subject was thus explained by Lord Chief-Justice Tindal in *Veley and Another* v. *Burder*, February 8, 1841, and his words are quite applicable to the obligations on heritors in Scotland: "The

c. 96), an assessment for the *repair* of a church built prior to 31st July, 1868, the area of which has been allocated among the heritors according to their respective valued rents, must be imposed on such heritors according to the valued rent. Allocation may be inferred in the absence of a decree or agreement (*Duke of Abercorn, &c.*, v. *Presbytery of Edinburgh* (Duddingston), March 17, 1870, 8 D. 745). The writer's opinion has been already expressed that the manse and churchyard walls are pertinents of a church having an allocated area. There are parishes without such allocation of seats, which by long custom impose assessments for church repairs on the valued rent. The Ecclesiastical Buildings Act, 1868, did not make such assessments illegal, and the Ecclesiastical Assessments (Scotland) Act (63 & 64 Vict. c. 20), leaves it to the decision of the heritors of a parish where recourse to the real rent would be competent, although their "previous use and wont" has been to use the valued rent as the basis of assessment, whether they shall continue to impose assessments on the valued rent or not. If a majority of not less than two-thirds in value of valued-rent heritors, voting personally or by proxy, resolve that the assessment shall be imposed according to the valued rent, then such assessment shall be imposed according to the valued rent, any law to the contrary notwithstanding. It is not thought that this Act will enable a parish, the heritors of which have imposed assessments on the real rent, to revert to the valued rent, but the Court may possibly be asked to decide what "previous use and wont" means before practice becomes uniform.

In a burghal parish the church is built and maintained by assessment (where assessment is necessary) on the real

repair of the fabric of the church is a duty which the parishioners are compellable to perform, not a mere voluntary act which they may perform or decline at their own discretion; the law is imperative upon them that they do repair the church, not binding on them in a qualified limited manner only, that they may repair or not, as they think fit; and where it so happens that the fabric of the church stands in need of repair, the only questions upon which the parishioners, when convened together to make a rate, can by law deliberate and determine, is not whether they will repair the church or not (for upon that point they are concluded by the law), but how, and in what manner, the common law obligation so binding them may be best and most effectually, and at the same time most conveniently, performed and carried into effect."

rent. In a burghal-landward parish the cost of building a church is defrayed by assessment on the real rent since the case of *Peterhead* (a burghal-landward parish), where the Court of Session found that a new *church* should be built, and that the expense of building as much of the church as was necessary for accommodating the landward part of the parish should be defrayed by the heritors according to their respective valued rents, and the expense of the remaining part should be defrayed by the feuars and proprietors of houses in the town of Peterhead according to their real rents. On appeal, the House of Lords "ordered and adjudged, there being no custom to regulate the proportion in which the heritors are to contribute to the rebuilding the church, the interlocutors complained of be reversed, in so far as they assess the rate at which the parishioners are to be charged to the rebuilding the church. And it is hereby declared that such charge is a parochial duty, and that it ought to be defrayed by all the owners of lands and houses in proportion to their real rents" (*Harlaw, &c.*, v. *Governors of the Merchant Maiden Hospital, &c.*, June 24, 1802, 4 Paton's Ap. 356). Lord Chancellor Eldon observed: "In landward parishes there is no reference to population, but to the valuation of the estates. The question then comes to be, whether, when a parish comes to be divided by a new-raised town, a different principle is to be applied, and the population resorted to as the rule for allotting between feuar and heritors. The rule of law is, that all the heritors should contribute according to the value of their land. It may appear strong to say that heritors are to find a church roomy enough for the population of a town; but, if it once become a parochial burden, it must fall on the value of the land, in whatever shape it may be occupied or divided. If a different rule were adopted, great inconveniences would follow. A manufacturer may bring into the parish what people he chooses; and it is the duty of the heritors to provide a church fit to accommodate all the parishioners. The land upon which houses are built in a town like this has great value in reference to its extent. It therefore does appear to me that the true rule is, not that the Court should take one proportion of the expense for one species of heritor, and another for another species, but that it is proper to lay the burden on the whole heritors, in-

cluding the feuars of the town, according to their real rents." Lord Thurlow said: "I believe it ought to be noticed in the judgment that it is not meant to affect those cases which have been regulated by custom time out of mind."

In the case of *Mauchline* the heritors of the parish were assessed in proportion to their valuation for rebuilding a parish *church*, and no portion of the assessment was laid upon the feuars of the village or town of Mauchline; it was not a burgh. One of the heritors refused payment, and the case came before the Court of Session. The heritor pleaded that the case of *Peterhead* settled a general principle, applicable to all cases where a parish, though partly landward or agricultural, contained a town or village population. The collector answered that Peterhead was a considerable town and Mauchline a minor village; further, the custom of assessing by valuation alone was that of the parish. The Court held that feuars were heritors, and that the principle of the case of *Peterhead* applied here. Lord Corehouse referred to Lord Eldon's judgment as contrary to the general custom of Scotland; Lord Eldon "did not direct that that proportion of the valuation of the county, which effeired to the ground of the town, should be taken as a cumulo valuation for assessing the proprietors of that ground, by subdividing it rateably among them in proportion to their real rents; but he took the real rents of all heritors, great and small alike, in town and county, and directed the assessment to be proportioned to that real rent. I think great inconvenience will result from adopting this rule of assessment as a general rule; but I do not see any ground on which the Court can refrain from adopting it here" (*Boswell* v. *Hamilton* (Mauchline), June 15, 1837, 15 S. 1148).[1]

The Valuation of Lands (Scotland) Act, 1859 (17 & 18 Vict. c. 91), § 33, provided, "where, in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax under any Act of Parliament, is author-

[1] See also the observations of the judges in *Hay* v. *Edinburgh Water Company*, July 13, 1850, 12 D. 1240; 1 Macq. H. of L. 682: "It is true that it is a decision on the construction of a different statute," said Lord Kinnear in the *Strathblane* case, 1899, 1 F. at 533-4, "but still the question was in reality the same we are now considering—viz., What is the true meaning of the words 'owners of lands and heritages'?" His lordship held that *Hay's* case decided that the principle to be observed was the equal rating of all persons who have a beneficial interest in works carried out under statute.

ised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands or heritages, as appearing from the valuation roll in force for the time under this Act, in such county, burgh, or town, shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding; provided always, that when the area of any parish church heretofore erected has been allocated among the heritors, according to their respective valued rents, as appearing upon the present valuation roll, all assessments for the repair thereof shall be imposed according to such valued rents."

In the case of *Duddingston* in its first stage the Presbytery of Edinburgh decerned for the expense of the repairs of the parish *church* of Duddingston against the four valued-rent heritors of the parish, which contained a very large number of feuars. Two of the valued-rent heritors suspended a charge given them upon this decree, on the ground that, as the area of the church had never been allocated according to the valued rent, the assessment should have been imposed on all the heritors of the parish according to the real rent. The collector, besides defending the assessment on the ground that the assessment fell to be imposed according to the valued rent, pleaded that the valued-rent heritors, having from time immemorial borne the burden of repairing the church, were bound to convene the feuars as the parties mainly interested in the question. The Court repelled this plea, and sisted process for a time in order that the collector might institute such proceedings as he might be advised to institute with the view of bringing into Court any parties interested or considered to be interested in the litigation (*Duke of Abercorn, &c.*, v. *Presbytery of Edinburgh* (Duddingston), June 11, 1869, 7 Mac. 875). The collector having declined to avail himself of the opportunity, the case was reheard (*Duke of Abercorn, &c.*, v. *Presbytery of Edinburgh* (Duddingston), Mar. 17, 1870, 8 Mac. 733). The Court refused a suspension of the decree, reserving to the suspenders any right of relief competent to them against

the feuars. There were only four heritors in the parish, and they had been accustomed to let the seats in the area of the church and apply the proceeds in repairing the church and manse, making up any deficiency by a voluntary assessment among themselves in proportion to the respective amounts of their valued rent. The parish contains the burgh of Portobello, and the *quoad sacra* parish of that name. The suspenders argued that the Lands Valuation Act, § 33, required all parochial assessments to be levied according to real rent, except where there had been an allocation of the area of the church according to valued rent, and there had been no allocation here. The Presbytery replied that there had been a virtual allocation, and that had it been otherwise the Valuation Act was not conclusive; it was not a taxing Act, citing *M'Laren* v. *Clyde Navigation Trustees*, Nov. 17, 1865, 4 Mac. 58. Lord Cowan observed that the importance to be given to the Valuation Act by both sides was overstated, as that enactment was carefully limited to assessments, whether municipal or parochial, authorised by any Act of Parliament "to be imposed or laid upon or according to the real rent of lands and heritages;" and its declared object was solely to fix that the real rent, when it was prescribed as the rule, should in every case be taken from the real rent inserted in the valuation roll. On the other hand, unless allocation can be proved, the proviso of the statute has no application. Had the Presbytery resolved on a new church being erected, however, the rule of the cases of Peterhead and Mauchline, this being a parish within the same class, would have applied, and the expense must have been levied on the real rent. The question was specially raised, Did a different principle apply to assessments not for rebuilding a church, but for repairing an existing structure? no precedent was found for the real rent being adopted as the basis in the latter event, and a distinction was drawn between the two cases. In the first the parties assessed have an equivalent in the allocation of the extended area of the new church; in the second there is no extension of the area, and the parties assessed would have no equivalent, but would be assessed for the benefit of the valued-rent heritors to their own exclusion. "Be it that a new church was erected in this parish, the assessment would be on real rent. The case is entirely different when it is the question of repairs that requires to be

provided for; and those who have hitherto had, and will in time coming continue to have, the management of the church, and the possession and enjoyment of the area, by themselves or others under them, must bear the burden" (Lord Cowan, p. 742). The Lord Justice-Clerk (Moncreiff) said: "Whether the case of *Peterhead* applies to a case of repairs I do not say" (p. 739). Lord Neaves, while also disclaiming to give an opinion, said the effect of *quoad sacra* disjunction and erection might come in "in a very singular way." "When you come to build a new church, the question being whether the inhabitants of the *quoad sacra* are to share in the expense of building the church, that will involve this other question, is the new church to be built of such magnitude as to provide for the examinable persons in the *quoad sacra* parish? If it is to do that they will bear a share. But it would be a very odd thing to have people provided with two places of worship. On the other hand, if the new church, when it comes to be built, is to exclude the *quoad sacra* parish, and only to be built of a magnitude such as will comprehend the examinable persons within the original parish as diminished by the *quoad sacra* parish, then, of course, the burden will be confined to those heritors, because those who participate in the burden will be entitled to divide the area, and the possession and division of the area are naturally commensurate with the incidence of that burden."

The circumstances in the case of *Kinghorn* (*Heritors of Kinghorn* v. *Provost of Kinghorn*, Mar. 12, 1897, 24 R. 704) were peculiar. The parish *church* is very old. In 1761 the Court of Session held that repairs of the church and manse were customarily paid half by the burgh and half by the landward heritors, and that therefore the burgh "are lyable in the half of all the repairs on said kirk, manse and office-houses in all time coming." The church is still standing, and the Court in 1897 held that the same rule of assessment as in 1761 must still subsist—viz., that one-half of the cost of recent extensive repairs and alterations should be paid by the burgh and one-half by the valued-rent heritors. Lord Adams and Lord Kinnear expressed the opinion that had the question been open the rule of the *Kinclaven* case would have applied as to assessment on the real rent. "So long as this church lasts," said Lord President Robertson, "this and none other is the law of

the matter. The decree necessarily applies solely to that fabric which was the subject of the action, and the area of which was divided. It has, and could have, no application to a new church, which might be built of a totally different size, and might be divided in entirely different proportions."

In the case of *Annan*, 1883, a parish partly landward and partly consisting of a royal burgh, an assessment for the repair of the *manse*, was imposed on the real rent. In an action by the collector it was stated that the assessment was in accordance with the custom, practice, and usage of the parish. Defenders argued the valued rent was the proper basis—if the real rent were taken there would be the practical injustice that a person might be assessed for the repair of a manse who had no seat in the church. It was held that the assessment for the repairs of the manse had been rightly imposed on the individual owners of lands and heritages in the parish (*i.e.*, not on magistrates for burghal portion), without distinction, according to their real rents as shown in the valuation roll (*Downie* v. *M'Lean* (Annan), October 26, 1883, 11 R. 47). The special points of the defenders do not appear to have been dealt with, the Court's decision being sufficiently clear otherwise—the real rent being the basis of the parish assessment. Had the valued rent here been taken as the basis, the Glasgow and South-Western Railway and the Solway Junction Railway would have escaped assessment. This alone, on the principle of the *Kinclaven* case, said the Lord Ordinary (Lord Kinnear), would be a sufficient justification of the course taken by the heritors in imposing the assessment on the real rent. The *Kinclaven* case, however, though it also related to a manse, arose out of the circumstances of a purely landward parish in Perthshire. It had no village and no feuars. The line of the Highland Railway passed through it, but there was no station. The Second Division held that an assessment for the repair of the manse should be on the real rent. On the valued rent the railway company would only have been liable for a trifling sum. Lord Cowan, who gave the leading opinion, said, "Whenever there is a body of heritors, or even one heritor, possessed of subjects assessable, but capable of being reached only by taking real rent as the basis of taxation, I apprehend the principle of the decided cases must be adopted as alone applicable to the circum-

stances of the parish" (*Highland Railway Company* v. *Heritors of Kinclaven*, June 15, 1870, 8 Mac. 858). In the case of *Nesting*, another purely landward parish, in Shetland, with no railway passing through it, it was held (Lord Justice-Clerk Moncreiff dissenting) that in such a parish the assessment for alterations and repairs on a manse fell to be assessed upon the heritors according to the number of merks land (valued rent) held by them respectively, that having been the rule of assessment from time immemorial, and there being no special circumstances in the case to render that rule inequitable or the real rent desirable (*Bruce* v. *Bruce and Another* (Nesting), June 24, 1873, 11 Mac. 755). Under the Act of 1900 a parish like Kinclaven may resolve to continue to impose assessments on the valued rent, notwithstanding such alteration upon the rural character of the parish as is caused by large feuing operations or the erection of extensive works.

The Ecclesiastical Assessments (Scotland) Act, 1900 (63 & 64 Vict. c. 20), came into force on 1st January, 1901. It uses for the first time the expressions "valued-rent heritor" and "real-rent heritor," and defines the former to mean "a heritor liable to contribute to ecclesiastical assessments where the same are imposed according to the valued rent," and the latter to mean "a heritor liable to contribute to ecclesiastical assessments where the same are imposed according to the real rent." It provides that where according to use and wont an ecclesiastical assessment would fall to be imposed according to the valued rent, but might be imposed according to the real rent, any valued-rent heritor may request the clerk to the heritors to summon a meeting of valued-rent heritors, and if at such meeting it is resolved by a majority of not less than two-thirds in value of such heritors, voting personally or by proxy, to impose the assessment according to the valued rent "then such assessment shall be imposed according to the valued rent, any law to the contrary notwithstanding." It may first be observed that a parish containing a church built prior to 1868 the area of which has been allocated among the valued-rent heritors, is not affected by the Act of 1900;[1]—nor (in the writer's opinion) are the

[1] A church built in substitution of such a church is, it may be assumed, in the same position as the church it replaces, if built without an assessment. Thus Lord Lothian provided a new church for Jedburgh, and the area of it was

manses of such churches. In the second place, the section assumes the existence of a roll of parochial valued rent, by means of which the exact two-thirds in value of valued-rent heritors is to be ascertained. The word "heritor" in relation to valued rent means, as we have seen, a landowner whose lands are entered on the cess-roll of the county, though there is no connection between the Cess or Land Tax and Ecclesiastical Assessments. By valued rent is meant a series of rentals made up by Commissioners appointed in the years 1643, and other years. The Act of the Convention of Estates of 23rd January, 1667, gave a Supply which was to be raised on land according to the roll of 1660, and subsequent supplies were given on the same roll of valued rent. The Land Tax was at one time collected by the Commissioners of Supply, but by 6 & 7 William IV. c. 65, the collection of the tax was transferred from the Commissioners to the Crown. Lord President M'Neill observed, in the *Lord Advocate* v. *Commissioners of Supply for the County of Edinburgh*, 23 D. 933, "the valued rent was ascertained at a distant period, and no power exists now of revising or correcting or altering that valuation. So that the tax is imposed according to a rental and a state of possession unsuitable to the present condition of matters. It was imposed according to the value of the subjects at the time, and with reference to the possession by the parties at the time. The value is changed, the parties are changed, and the division of property is altered. It is not easy to ascertain all the parties who are now the proprietors of the several subjects as they then existed. The subjects remain, though differently arranged or distributed, and they have proprietors, though the proprietors are changed; but the relative values as at the time of the original valuation of the several lots as they are now distributed cannot be ascertained with certainty; that is impossible. But steps have been taken from time to time to have the properties of parties rated according to the old valuation. That was not a difficult matter for a

llocated as was the area of the old church (*Duke of Roxburgh and others* v. *Miller*, June 29, 1877, 4 R. (H. of L.) 76. In like manner the present church of Govan was built without assessment, and was accepted by the heritors as identical with the old church, and the area was allocated by the Sheriff of Lanarkshire among the valued-rent heritors according to the allocation of the old church.

certain time after the valuation, because evidence could then be obtained of what was their relative value at the time of the valuation: but in the course of some years that evidence was no longer attainable, and other modes were resorted to, which were held to give the nearest approximation possible to their original respective values. These modes were various. We used to see a good deal of them before the Act of 1832, which altered the representation of the people. There was a good deal of judicial discussion in regard to these matters in former times, when the valued rent was the criterion of qualification for electors. And we know that when it was desired to divide between two or more proprietors of lands that had been valued *in cumulo*, the relative proportions of the old valuation, there were means of doing so. There was an application presented to the Commissioners of Supply, and upon the statement of one or more of the parties, those having interest—at least those whom the law regarded as having interest—were convened, and evidence was taken; and it was held as a general rule, the best perhaps that could be found, that the relative value at the date of the application was a fair criterion of the relative value at the date of the valuation. And so the Commissioners divided the valued rent. That was one mode. The proceeding was entered in the books and so appeared, and became matter of judicial record and procedure before the Commissioners. There was another mode, which was this: Where parties had arranged among themselves, at the transference of portions of lands, that the respective proportions of the valued rent were so and so; and if upon that arrangement the parties had paid the land tax and cess in that proportion, it was held that a certain length of time of such payment was to be taken as presumptive evidence either of the value at the time of the original valuation, or as a presumption that at some period a division had taken place, though no record of it remained. That was held to be another mode of ascertaining the proportions of valued rent. I do not know the precise time that was required to give that sanction to a use of payment, if indeed it was a fixed time. I think it varied, but it was such length of time as satisfied the Court that there was ground to conclude either that there had been a valuation, or that it was a fair criterion. There were other modes also as to arrangements between the parties. For instance, sometimes

it appeared on the face of titles that the values of the properties at the time of the transference were equal, or that the division of the lands was equal, and that was sometimes taken as sufficient without going into proof as to the actual values at the date of the application. Such modes were resorted to. But all of these, when they came to be dealt with in any way, became matter of judicial procedure and record before the Commissioners of Supply, and were so entered in their books; and thence the parties to whom these parcels of land belonged, and the respective values of the lands belonging to them, might to that extent be ascertained. But where there had been no such procedure before the Commissioners of Supply, I do not know of any authority or power that the Commissioners of Supply had to obtain for themselves that kind of information, to set about an ascertainment of the present relative values of properties, or to compel parties to disclose the payments they had made, or to compel them to disclose the transactions which had taken place between them, or to show their titles. I am not aware of any authority for that. The earlier statutes certainly entitled them to ascertain the value; but that was at the time of making the valuation, and to enable them to value, and to correct irregularities, but it was not a permanent power. It was a power which only lasted for a short time; and thereafter all that the Commissioners of Supply could do was to divide *cumulo* valuations between parties on the application of the parties, or to do what they were moved to do judicially by the parties. The insufficiency of the power of the Commissioners of Supply to ascertain at their own hand the actual and relative values of properties, is, I think, very clearly shown by the statute that was passed in 1854, for ascertaining the real values of the respective properties of parties throughout the country, and the new powers that were, for that purpose, then conferred on the Commissioners of Supply, and the new aid that was necessary to be given to them in order to enable them to accomplish that object." After the passing of the Act 6 & 7 William IV. c. 65, although the collection of the tax was transferred to a Crown officer, the Commissioners continued to keep the roll carefully, partly because "Rogue Money" was levied in the counties according to the old valuation until the passing of the Act, 2 & 3 Vict. c. 42 and 65 (by which Rogue Money came to be levied according to the real

rent) and partly from custom. In the important case from which the above quotation is made, it was decided that Commissioners of Supply were not bound to furnish annually to the collector of the land tax an assessment roll for that tax. It is to be feared that since that date the roll of valued rent has had a somewhat uncertain value. It is no one's duty to keep it. The Commissioners of Supply continued to divide the valued rent when required by land owners until by the Local Government (Scotland) Act, 1889 (§ 102), the authority to do so was transferred to the Sheriff, but they had no other duty. The land tax is still collected from subjects situated in counties, though not from burghs since the passing of the Agricultural Rates, &c., Act, 1896. The roll used, however, is not necessarily uniform with the roll kept, or formerly kept, by the clerk to the Commissioners of Supply.

Mr. P. J. Hamilton Grierson, Advocate, Solicitor to the Inland Revenue, has favoured the writer with the following information as to the roll upon which land tax is collected:—

"There is in the hands of each collector of Inland Revenue a roll of the land tax of the county for which he is collector. These are the rolls, or copies of them, which were obtained from the clerks of Supply after the collection of the tax was, under the provisions of 5 & 6 Will. IV. c. 64, transferred to collectors appointed by the Treasury. It is not the practice to make up a new roll for each year, but the collector notes on the roll in his hands the changes in ownership from such information as he can obtain. He, of course, gives effect to any decree of the Sheriff dividing the tax, and it is the practice, I understand, to give effect to any agreement by owners for division produced to him. As to division into parishes there is not a uniform practice. In some counties the roll is divided into parishes, but where there are proprietors having property in several parishes, these properties and the tax effeiring to them are usually entered together under the proprietor's name, and in these cases the proportion in each parish is not always shown. On the other hand, where a proprietor acquires additional property the separate entry may remain, his name being substituted for that of the former proprietor. These rolls being in the hands of the collectors of Inland Revenue only for the purposes of the Inland Revenue, are not open to the public."

The case of *Robertson* v. *Murdoch*, Feb. 23, 1830, 8 S. 587, decided that the mere absence of a proprietor's name from the cess-roll did not prevent his being regarded as a heritor if he was truly a proprietor of lands, but the cess-roll now in use not being a public roll, the question arises in what way is the true valued rent of a parish to be ascertained so that what constitutes two-thirds in value of that rent may be known in order that § 1 of the Act of 1900 may become operative. It may be suggested that in cases where the valued rent (using that form of words as a technical expression) is the basis of assessment, it is probable that the Court would sustain the accuracy of the roll kept by the clerk to the heritors, if by admitted use and wont heritors had paid assessments upon the valued rent stated in such roll to be that of their lands. In *Durie's Trustees* v. *Ayton* (Dunfermline), Nov. 13, 1894, 22 R. 35, where certain parties denied liability for heritors' assessments because, among other reasons, they had no notice of their liability, Lord Wellwood, Lord Ordinary (whose judgment so far as regards heritors' assessments was concurred in), said, "No doubt the reason why they were not cited was because the valued rent had not been split up and their names had not been entered in the cess-books *or the books of the clerk to the heritors of Dunfermline.*" The clerk's roll is usually kept with accuracy, but the clerk has, of course, no authority to divide valued rent, nor has he any means of knowing when it has been divided unless the heritor who has obtained a decree under the Local Government (Scotland) Act, 1889, § 102, sends him the decree. As things stand, however, the clerk's roll is usually the best available evidence as to the valued rent of a parish. Whether it is to be accepted as conclusive as to the amount of valued rent in a parish so that a computation may be arrived at of what two-thirds amounts to, is a question which remains for decision. It is to be doubted, however, whether all the valued rent of 1660 is always represented in the clerk's roll of 1901. How properties omitted are to be restored, and when the roll is to be regarded as complete may well engage the attention of those most interested. If § 1 of the new Act is to be effective, there must be found for each parish an authoritative roll of valued rent. For the purposes of the Act it may be sufficient that two-thirds of the valued rent as represented at the meeting

(not an absolute two-thirds of the valued rent of the parish) resolve to impose an assessment on the valued rent; the section is not clear. It will, in the meantime, be judicious, when a property is sold, for the agent of the seller to intimate the change of ownership to the clerk to the heritors of the parish in which the subjects are situated, and request him to record the fact in the heritors' roll. This applies only to lands which lie in a parish where assessments on the valued rent may be competently imposed. (See Chapter III., The Heritors' Clerk.)

When heritors after 1st January, 1901, resolve to levy an assessment in any parish according to the *real rent,* the procedure introduced by the Ecclesiastical Assessments (Scotland) Act, 1900 (63 & 64 Vict. c. 20, § 3), must be followed. A resolution to impose such an assessment having been agreed to at a duly convened meeting of heritors, intimation of such resolution is to be made to the Presbytery of the bounds and to the kirk-session of the parish. The Act is silent as to who is to make the intimation, but presumably the clerk to the heritors will send to the clerk to the Presbytery and the clerk of the kirk-session a certified copy of the resolution in a registered envelope. "Thereafter" (the period is not specified), a scheme is to be made up showing the heritors proposed to be assessed and the amount of their respective assessments, and the scheme is to be open, free of charge, to inspection by any heritor or other party interested for a period of at least thirty days at some convenient place in the parish, and intimation of the place where, and the period for which, the scheme is open to inspection, and the amount proposed to be levied on the heritor to whom it is sent, is to be made by circular letter sent by the heritors' clerk to all the heritors prior to the commencement of such period. The preparation of the scheme will be in many cases a serious matter; as its basis may be taken the valuation roll, omitting "lands and heritages occupied solely as the church and accessory buildings or burying-ground attached of any religious body in Scotland, or as the dwelling-house, with offices or garden or glebe land attached, of the minister of such church," § 3, sub-sec. (1). But this does not give us the scheme on which the heritor is to be assessed, for sub-sec. (2) of the same section provides that from the rental of each heritor, whether his rental consists of one or more subjects, the sum of £50 is to be

deducted (in other words, that no heritor of a rental of £50 or under shall be liable in ecclesiastical assessments on the real rent, and that the remaining heritors shall receive an abatement of £50 on their rentals), provided, or in the language of the Act "when," "the amount of the deficiency which would be created in the total amount of the assessment by allowing such deduction [of £50] to every heritor has been paid to the collector of the assessment by the kirk-session." Upon this sub-section it may be observed that although there is no provision in the Act for communicating the scheme to the kirk-session (as the resolution was communicated) it obviously must be so communicated, and until the kirk-session pays (not undertakes to pay) the deficiency caused by the deductions of £50, the scheme cannot be exhibited. It will probably be best to incorporate the scheme by reference in the resolution to impose the assessment, and let the draft scheme accordingly accompany the copy resolution transmitted to the kirk-session, but there seems no reason for sending a copy of the scheme to the Presbytery, to whom, until the present Act, no intimation has been made as to the intention of heritors to impose an assessment, and who have no control of the manner of assessment or over its collection. There is no provision for advertising that the scheme is open to inspection, and this is to be regretted. The scheme is to be open for inspection for at least thirty days, dating apparently from the issue of the clerk to the heritors' circular-letter. It is to be exhibited at some convenient place in the parish. In former times it would have been affixed to the church door, and where the door is protected from the weather there is no reason why it should not be placed there now, unless it be that it is seemingly not to be regarded as a public document but as one only open to inspection by a heritor "or other party interested" (a term which would certainly include a heritor's solicitor). How the scheme is to be rectified should any error be discovered is not stated. It is provided that no heritor who by exemption under sub-sec. (1), or in respect of the deduction under sub-sec. (2), is relieved altogether from assessment in respect of the execution of any work, shall be entitled to take part in the discussion of, or to vote upon, any question concerning any plans for or the execution of the work, or the defraying of its expenses. If, however, the total amount necessary to be raised is inaccurately

calculated, or the amount collected under the scheme is not equal to the amount in the scheme, and a new resolution and new scheme are necessary to raise additional funds, is a heritor who at the time of the second levy is the owner of property assessed at a greater value than at the first levy, and who therefore pays assessments on the second levy, though he paid none on the first levy, to be debarred from attending a meeting of heritors and taking part in the discussion of, or to vote upon questions concerning the execution of the work for which he was not assessed under the first levy, but the defraying of the ultimate expenses of which work have brought him in under the second levy?

The present law may be summarised thus :—

(1.) Burghal parishes; all assessments on the real rent.

(2.) Burghal-landward, and landward parishes.

(*a*) Rebuilding a church falls on the real rent, unless by use and wont ecclesiastical assessments have been imposed on the valued rent, and two-thirds in value of the valued-rent heritors resolve that the assessment shall be imposed according to the valued rent.

(*b*) Repairing a church falls on the valued rent if the church was built prior to 1868, and the sittings are allocated among the valued rent heritors, or if, although the sittings were not allocated among such heritors, the heritors by use and wont have imposed assessments for the church's repair on the valued rent, and two-thirds in value of the valued-rent heritors resolve to impose assessments on the valued rent; if not, then on the real rent.

(*c*) Repairing a manse; the law is uncertain; if the manse be the pertinent of a church built prior to 1868 whose area is allocated among the valued-rent heritors, the assessment should, in the writer's opinion, fall on the same body of heritors as repair the church; the practice, however, in some parishes, is to assess the real-rent heritors for manse repairs under all circumstances.

(*d*) Rebuilding a manse falls on the real-rent heritors, unless it has been the use and wont to impose ecclesiastical assessments upon the valued rent, in which case two-thirds in value of the valued-rent heritors may resolve to impose the assessment on that rent.

(*e*) Churchyard walls, see (*c*) and (*d*).

Heritors may resolve to raise money for the erection, improvement, enlargement, purchase, or acquisition of churches, churchyards and their walls, and manses, by annual assessments extending over a period not exceeding ten years; the assessments may be assigned to a lender willing to give the required amount on a bond and assignation in security. If there is only one heritor in the parish, he may follow the same course; but he must, in the first instance, apply to and obtain authority from the Sheriff of the county (25 & 26 Vict. c. 58, as amended and explained by 29 & 30 Vict. c. 75).

It has been held that an assessment imposed by consent of heritors on 30th June, partly to meet debts incurred prior to Whitsunday and partly to provide for the expenditure of the year following, could not be charged against the executor of a heritor who had died on 16th May (*Maitland* v. *Maitland* (Cramond), Feb. 1, 1877, 4 R. 422). When a heritor has objections to the legality of an assessment imposed on him by the heritors of his parish, he must state the objections *tempestive*, and not after the lapse of years (*Trades House of Glasgow* v. *Heritors of Govan*, July 8, 1887, 14 R. 910).

In actions for unpaid assessments it is usual to ask interest at the rate of 5 per cent. per annum on arrears, the application of *Greig* v. *Magistrates of Edinburgh*, Mar. 12, 1879, 6 R. 801, may, however, properly be considered.

Heritors' assessments are not *debita fundi*;[1] they are, as has been said (Rankine, "Land Ownership," p. 626), "personal prestations incident to the ownership of land."

[1] On this ground Sheriff Lees decided that on the sale of an estate, the proprietor at the date of a resolution to repair a manse, not the proprietor when the heritors imposed the assessment to pay for such repair, was liable in the rate allocated on the estate (*Webster* v. *Hendrie and Graham*, February 2, 1885, Guthrie's "Select Sheriff-Court Cases," Second Series, 1894, p. 81).

NOTE.

The author has endeavoured to ascertain the state of the roll of valued rent in each parish, and by the courtesy of the county-clerks has been favoured with the following information :—

Aberdeen.—Cess-roll or roll of valued rent kept by county-clerk. Alterations made as directed by Sheriff under Local Government Act, 1889. "If, however, a division or allocation of the old valued rent of any lands is agreed upon by all parties interested, on a joint minute being submitted showing the division or allocation as agreed upon, authority is interponed thereto by the Commissioners of Supply."

Argyll.—The valued-rent roll dated 30th April, 1751, is in the custody of the county-clerk. "It does not appear to have ever been revised."

Berwick.—The roll is understood to be in the custody of the county-clerk at Duns, but as the county records were formerly kept partly at Greenlaw and partly at Duns the papers are not easily accessible. "The old cess-roll is never revised, but of course a valuation roll is made up yearly."

Banff.—The roll is under the control of the county-clerk. "The necessary corrections are made on it as occasion arises."

Bute.—One or two of the cess-rolls and rolls of valued rent are in the possession of the county-clerk. The minutes of the Commissioners of Supply of 24th July, 1838, contains the roll of valued rent given by the Commissioners to the officers of Inland Revenue.

Caithness.—The roll is in the county-clerk's possession. "It has not, however, been revised since 12th December, 1798."

Elgin.—The roll is in the county-clerk's possession. "The roll is revised annually by the Lands Valuation Assessor and the collector for lands tax purposes, but, of course, only in regard to names of proprietors; they do not interfere with the amounts."

Fife.—The roll is in the custody of the county-clerk. "It was last revised in 1884 and is revised only when the county authority directs it to be so."

Haddington.—The roll is in the custody of the county-clerk. "I have never come across any trace in the books of a revisal with the exception of a question of sub-division."

Inverness.—The roll is in the custody of the county-clerks. "When any splitting of the valued rent takes place or are intimated to us we enter them in the roll."

Kirkcudbright.—The roll is in the custody of the county-clerk.

Linlithgow.—In 1897 the county-clerk examined the county cess-rolls from 1678 downwards, "and prepared a roll showing the changes during that period and the present state of the ownership. The roll was printed by the council, and one guinea fixed as the price of a copy. It will always be acted upon now."

Nairn.—The roll was kept by the Clerk of Supply until May, 1890. The Commissioners "went through the form every year of imposing the land tax, and the roll of assessments corresponding with the minutes was inserted in the cess-book each year. This secured a revisal which appears to have proceeded on the knowledge of the Commissioners and the clerk, aided no doubt by the valuation roll." Since that date the revising of the valuation roll has ceased.

Roxburgh.—The roll is in the custody of the county-clerk. "There has been no revision for a considerable number of years."

Selkirk.—The county-clerk states "the cess-roll of the county is kept and revised by the collector of taxes, Peebles, as county-clerk, who attends to cases of disjunction when ordered by the Sheriff in terms of the Local Government Act. The Court orders intimation to the Inland Revenue."

Kinross.—The cess-roll is kept by the Commissioners of Supply, and is revised by the county-clerk from his own knowledge of the changes which take place in the properties of the district.

Peebles.—The roll is in the custody of the county-clerk. "The collector of Inland Revenue has a copy, and he alters it from time to time as occasion requires for cess collection purposes."

Wigtown.—The roll used to be made up by the clerk to the Commissioners of Supply and was revised every year, "but since the Inland Revenue took it on hand no new roll has been made up."

Lanarkshire.—The roll is in the custody of the county-clerk, "but no longer affords correct information as to the quotas of the tax payable out of the lands in the county. No person is charged with the duty of keeping it up to date." The roll shows the valuation of each parish separately.

Dumbarton.—The roll is in the custody of the county-clerk who writes, "I hold that the roll is merely a list of lands and of their valued rents, the owners' names forming no necessary part of it, and consequently I leave to the collector of land tax and any others interested in the valued rent to ascertain the names of the present owners of the lands. Where valued rent is sub-divided I enter the sub-division in the roll and that is all the revisal the roll has at my hands." The roll gives the valuation of the lands in each parish separately, except Luss and Arrochar, which are combined, and Kirkintilloch and Cumbernauld.

Ayr.—The roll is in the custody of the county-clerk; it has not been revised since 1816, although divisions of valued rent have been duly entered on a copy or working roll. One or two parishes do not appear at all.

Perth.—The roll is in the custody of the county-clerk. It consists of books of 1650, 1667, and 1802. There is also a book of 1842. "It is called a cess-book, but there is no cess shown in it. It was evidently a book made up showing the rentals and owners after the collection had passed over to the Crown," and in it any subsequent divisions of valuations are noted.

Renfrew.—The old valuation roll is in the county-clerk's custody, "but I have a good deal of difficulty in answering questions and do not vouch for the accuracy of the rolls." The roll shows each parish separately.

Forfar.—The roll is in the custody of the county-clerk. "The roll is altered only on production of extract interlocutor making a redivision of valued rent. The alteration takes the form of noting the date and substance of the uniformity at the end of the parish to which it applies."

Orkney.—The roll is in the custody of the county-clerk, but it has not been revised in his time or so far as he can ascertain for a very long time before.

Ross and Cromarty.—The roll is in the custody of the county-clerk. "The roll for the county of Ross was printed in 1854, and this roll, along with the record of subsequent splittings contained in the minute books of the Commissioners of Supply, now forms the valued rent roll of the county *plus* the valued rent roll of Cromarty, which was added to Ross by the Local Government (Scotland) Act, 1889. The collector of Inland Revenue who collects the cess or land tax makes up his own roll."

Zetland.—The county-clerk writes: "In my keeping there are (1) a 'Rental of all the merks of land in Zetland,' made up in 1828, which shows (*a*) merks rental lands in each room, (*b*) names of rooms, (*c*) proprietors' names, (*d*) merks udal lands, (*e*) merks feued lands, (*f*) merks umboth lands, (*g*) merks glebe lands, and (*h*) merks other lands, in each of the twelve parishes in the county, and (2) 'Zetland Land Tax Ledger,' showing each heritor's merks land and the amount of land tax payable therefrom. This ledger seems to have been made up between 1851 and 1856." [Room means a township or district, which may contain one or more holdings.]

Stirling.—The roll was carefully revised and printed in 1831: it was revised by the county clerks till 1890; it is divided into parishes.

CHAPTER III.

THE HERITORS' CLERK: HIS STATUS AND DUTIES.

It is only of recent years that the heritors of a parish have been accustomed to have a permanent official known as a clerk, who keeps the minutes of their body and attends to any correspondence connected with the affairs of the heritors as a quasi-corporation. There is no reference to a heritors' clerk in the cases reported in Morison's Dictionary or in Pardovan's Collections. Mr. Duncan observes that when a meeting of heritors is held a clerk should be appointed, and proceeds, "When there is at the time a person holding the office of clerk to the heritors, he will naturally officiate as such at the meeting. The appointment, however, of such an officer, who is merely a private servant engaged by the heritors at their convenience, is not a matter of requirement. Accordingly, the body of heritors of a parish have frequently no clerk. When this is so, or the person who holds the post is absent or otherwise incapacitated from acting, a special nomination of a clerk to the meeting is made. This course was adopted in the case of Cadder, where the oath *de fideli* seems to have been administered to the person appointed." The Faculty Collection, where alone the Cadder Case referred to (*Campbell* v. *Stirling*, March 4, 1813) is reported, contains no reference to the clerk, and Mr. Duncan must have derived his information from some other source.

The Glebe Lands (Scotland) Act, 1866, provides that when a minister, with consent and approval of the heritors and the Presbytery, grants leases of his glebe, "such consent and approval of the heritors and the Presbytery (shall) be signified by a certificate written on the lease or leases, and signed by the clerk to the heritors and by the moderator and clerk of such Presbytery" (§ 3). When the minister calls a meeting of heritors to consider an application by him to the Court for authority to

feu his glebe, then, if it is approved of by two-thirds in value of the heritors, "the clerk to the heritors shall grant a certificate to that effect under his hand to the minister" (§ 8). When the minister grants to his feuars any legal deeds, the consent of the heritors thereto is to be "certified by the clerk to the heritors and by the moderator and clerk of the Presbytery" (§ 20). The draughtsman of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, seems to have been uncertain as to whether heritors' clerks existed, although the Act of 1866 referred to them. It is true that § 3 provides for "the clerk of the heritors, by the authority of the heritors," sisting himself as a party to an appeal under certain circumstances; but § 5, which relates to the proceedings in such appeals, dubiously sets forth that the appellant is to intimate his appeal, *inter alia*, "to the clerk of the heritors, if there be such clerk." Yet § 22 provides that the heritors' clerk may, at his own hand, require the minister to call a meeting of heritors.

The clerk makes once a year a return of the heritors' receipts and expenditure in terms of the Local Taxation Returns (Scotland) Act, 1881 (44 & 45 Vict. c. 6 (sec. 2)) under a penalty of £20 (sec. 3). If there be no clerk, the return will be made by the person keeping the accounts.

In the present day, in most parishes, the heritors have a regularly appointed clerk. Sometimes he is a local schoolmaster, but it is much better that he should be a lawyer. His main business is to attend the meeting of heritors, and to record in faithful and full minutes the business done at such meetings. Undoubtedly, however, any such clerk must frequently be called upon to advise the chairman on points of order and law. To the fact that the clerk has frequently been unable to put before a meeting the duties and responsibilities of heritors, must unfortunately be attributed many of the misunderstandings which have afflicted rural parishes.

Under the Ecclesiastical Assessments (Scotland) Act, 1900, the clerk to the heritors has defined duties and duties which are not defined. In any parish where, according to use and wont, assessments fall to be imposed on the valued rent, it is to the clerk to the heritors that the request to summon a meeting of valued-rent heritors is to be addressed. The request, it may be assumed, need not be in writing, if the clerk is personally aware

that the person who asks him to call the meeting is in truth a valued-rent heritor. The Act provides that such heritor may "request the clerk to the heritors to summon a meeting of valued-rent heritors in the manner prescribed by section twenty-two of the Ecclesiastical Buildings and Glebes (Scotland) Act," but it may be observed that, under that Act, the clerk has no power to summon a meeting of heritors, though he may cause the minister to call such a meeting on his requisition. It is not likely to have been intended that the clerk should supersede the minister as the person citing such a meeting, and it is therefore to be understood that a meeting under the Act of 1900, and for the purposes of § 1, is to be called by the minister in the usual way ; a valued-rent heritor, however, must first require the clerk to call the meeting, and the clerk must call upon the minister to do so. Upon the importance which the Act of 1900 throws upon the accuracy of the roll of valued rent of the parish, observations have been offered above. It is upon the clerk that large responsibilities are likely to be devolved as to the accuracy of the roll, and what proportion of valued rent constitutes two-thirds of the valued rent of the parish. In the case of *Durie's Trustees* v. *Ayton* (Dunfermline), November 13, 1894, 22 R. 35—where, as mentioned in Chapter II., certain parties denied liability for heritors' assessments, because, among other reasons they had no notice of their liability—Lord Wellwood observed: "No doubt the reason why they were not cited was because the valued rent had not been split up, and their names had not been entered in the cess-books or *the books of the clerk to the Heritors of Dunfermline*."

When it has been resolved to impose an assessment according to the real rent, it must presumably be the clerk to the heritors who will make intimation under § 2 of the Act of 1900 to the Presbytery of the bounds, and the kirk-session of such parish, although no doubt the heritors may direct any one they choose to make such intimation. It is at all events the duty of the clerk to intimate by circular-letter to each heritor—(1) the amount proposed to be levied on him, and (2) the place where and the period for which the scheme of assessment will be open to inspection.

In addition to his duties as clerk the heritors' clerk is frequently appointed collector of assessments, and this is often

a convenient arrangement. Under § 3 of the Ecclesiastical Assessments (Scotland) Act, 1900, the collector of an assessment on the real rent is to receive from the kirk-session the amount of the deficiency created in the total amount of the assessment by allowing the deduction of £50 from each rental, and this is to be paid to him before the issue of assessment notices by the heritors' clerk.

It has been questioned whether a heritors' clerk or collector is entitled to sue in the heritors' name, but, as a rule, a heritors' clerk is instructed by minute to take action on their behalf, and when he holds such a minute the writer cannot see any good reason for disputing his right to sue in their name. If there are two separate classes of valued-rent and real-rent heritors in each parish there may be separate clerks for each, though such a duplication of offices seems undesirable, and would lead to confusion as to which clerk should grant certificates under the Glebe Lands Act.

Every interment in a parish churchyard should be made upon the authority of the heritors' clerk. The following is the form of book kept for the parish of Govan:—

No.	No.
Heritors of Govan Parish.	*Heritors of Govan Parish.*
Interment Order granted.	
	GLASGOW, 19
To	I authorise the interment in Govan Churchyard of
For interment of	
Aged On In Lair	in the Lair (*describe situation*)
Note. [As to date of last interment and parties on whose behalf a right of interment may be claimed in future, &c.]	on 19 , at o'clock. Fee payable to the Gravedigger—Ten shillings and sixpence.

PART II.

CHAPTER IV.

CHURCH.

"Church, a parochial building devoted to the service of God and the celebration of the rites of religion: the place of Divine worship of the inhabitants of a parish. Middle English *chirche, chireche*, Anglo-Saxon *cyrice, cirice*, later *circe* (whence English *kirk*), from Greek *κυριακόν*, a church, neut. of *κυριακός*, belonging to the Lord—from Greek *κύριος*, a lord, orig. mighty. The Icelandic *kirkja*, German *kirche*, &c., are borrowed from the Anglo-Saxon."

—SKEAT.

THE duty of providing and maintaining the parish church in each parish of Scotland is a burden laid by law upon the heritors of the parish. Historically the burden of maintenance fell upon the persons enjoying the church benefice. This might or might not be the holder of the cure, according as he was or was not in right of the benefice. A curate, for example, had no such obligation laid on him. If the share of the benefice laid aside for church purposes was inadequate, the parishioners were also required to contribute.[1] By Act of 13th September, 1563, the Lords of Secret Council ordained that parish churches should be maintained by the parishioners and minister ("the parochinaris and persone"), two-thirds of the cost being paid by the former, who were to assess themselves "for furnessing of the twa part of the expenssis to be maid in bigging and repairing of the saidis paroche kirkis." The parson's share was to be secured by the officers of the Queen's sheriffs sequestrating the

[1] Among the canons enacted by provincial councils in Scotland between 1237 and 1286 is one directing that the churches be built of stone—the nave by the parishioners, and the chancel by the rector. The diocesan synod of St. Andrews, which met at Musselburgh in 1242, directed that the chancel of a church should be kept in repair by the rector, the rest of the church by the parishioners.

fruits, teinds, and profits of the parish so far as might extend to the parson's share.

In 1572 the third Parliament of James VI. passed an Act "anent the reparation of the Paroche Kirkis," which states that the Act of the Secret Council "as yet hes not tane execution in na place, because of the sleuth and unwillingnes of the parochiners," who refused to choose persons to tax their neighbours. The Act provides that when the parishioners failed to see to their church, the archbishop, bishop superintendent, or commissioner of the kirks was authorised to interfere, and to appoint persons in every parish for making and settling the taxation, "as alswa for receiving of the samin." Any parishioners whose kirk had been destroyed were entitled to complain to the archbishop or bishop, superintendent or commissioner who was to take "just tryal in the said matter."

The question of relative liability seems to have been settled by a compromise. The parish minister or person in right to the teinds repaired the choir, and the heritors the rest of the kirk. If there was no choir, the practice was to require the minister to pay one-third of the cost of the repairs on the church (*Shaw* v. *Countess of Winton*, June, 1623, M. 7913). In the case of *Selkirk*, 1628, the choir was "not distinctly known from the body of the kirk." The Court held "the third part of the sum imposed [by the heritors for repair of the church] ought to be paid by the parson or his tacksman who meddles with the parsonage teinds, seeing commonly the quier (choir) is to be reputed the third part of the kirk; but if the quier be distinctly known from the rest of the kirk it may seem to be reasonable th atif the parson, or his tacksman will uphold the quier, that they ought to pay no part of the sum imposed" (*The Kirk of Selkirk* v. *Stuart*, November, 1628, M. 7913. See also *Relict of Minister of Ednam* v. *Laird of Wedderburn*, Jan. 16, 1663, M. 8499).

If the ministers of Scotland were successors in any legal order to the parsones or parsons of their parishes two hundred years ago, they would still be liable for the maintenance of one-third of the parish church. But they are not. By the Acts 1690 and 1693 the clergymen at those dates in charge of their respective parishes were removed, and the teinds transferred to the titulars of the teinds. But with the teinds was taken no burden

to share the cost of maintaining the church as the parson had done; the succeeding clergymen were not parsons, and participated neither in their liability nor in their teinds, and the whole liability for the erection or maintenance of parish churches fell on the parochiners or heritors. An attempt was made in 1738 to make out (*Heritors of Selkrig* v. *Duke of Roxburgh*, Feb. 9, 1738, M. 7915) that the titular of the teinds came in place of the parson, and was liable to maintain the third part of the kirk. The defence was, generally, that there was no law which made a titular liable. "Indeed, where there is a quire," it was pled, "it hath been found the parson is bound to repair it; and perhaps, on the same foundation, where there is another titular of the teinds than the parson, he hath been found liable; but where there is no quire, as is the case here, there is no instance known of either the one or the other's being obliged to repair the kirk." The Court found the titular not liable (except of consent, as it appears from D. 167, as upon his valuation), and the point does not appear to have been again raised.

Heritors are bound to maintain a parish church in such a state as will admit of the reverent and orderly meeting of the congregation for the worship of God and the celebration of the rites of religion sanctioned by the Church of Scotland. If they do not do so they can be made, on application to the Presbytery, to undertake the necessary work (*Minister* v. *Heritors of Dunning*, June 10, 1807, M., *Kirk*, Appendix 4). The Presbytery now exercises a similar authority in this matter to that formerly pertaining to the archbishop, bishop superintending, or commissioner of kirks, under the Act of 1572, c. 54.

It may be taken as an essential rule that the parish church should be within the parish, yet in exceptional circumstances the parish church has been outside the parish boundary. Thus in the case of the Old Church Parish of Edinburgh, Lord President Inglis said: "The church of the parish, at least for a good many years, has been a portion of the ancient cathedral church of St. Giles, but it is not situated within the parish of which it is the church, but at some distance from it. Notwithstanding, it was undoubtedly recognised and known as one of the parish churches of Edinburgh, and legally constituted as such" (*Murray* v. *Magistrates of Edinburgh*, Feb. 9, 1874, 1 R. 484).

Disrepair.—The question may not be an easy one for heritors

to determine, when is a church in a state of disrepair? "To amount to this there must, it would appear, be such defects, either in the fabric, or in the internal condition or arrangement of the building as involves risk of accident or injury to health, or actual and positive discomfort to those attending the church" (D. 173). In all cases the safe course for heritors to pursue is to remit to a man of skill to report. The main questions are: Is the church in a state of disrepair? If so, is it repairable? The answer to the first question is comparatively simple. The second is more difficult. If the cost of repair would be in the long-run more expensive to the heritors than the cost of building a new church, then the church should be rebuilt. Every case must stand on its own merits; the test is provision for a "safe and serviceable" church (*Murray* v. *Presby. of Glasgow* (Kirkintilloch), Dec. 11, 1833, 12 S. 192–93). The term "sufficient and serviceable" has been suggested as more appropriate. If the church is in a "repairable" condition the heritors must repair it (*Cunningham* v. *Deans* (Stewarton), December 12, 1811, F.C.; *Gordon* v. *Gordon* (Kincardine-O'Neil), Jan. 21, 1846, 18 Jur. 595; *M'Leod* v. *Curment* (Rosskeen), Feb. 9, 1830, 8 S. 475; *Earl of Glasgow* v. *Miller* (Neilston), Feb. 1, 1831, 9 S. 370, aff. 1834, 7 W. and S. 185).

The heritors cannot be called upon to *enlarge* a church simply because of its inadequacy of size. Not only so, but they cannot legally resolve to do this, even by a majority (*Lynedoch* v. *Smythe* (Methven), May 14, 1828, 6 S. 791; *Earl of Glasgow* v. *Miller* (Neilston), Feb. 1, 1831, 9 S. 370, aff. 7 W. and S. 185). To throw the burden of enlarging the church on the heritors, a state of disrepair involving substantial and extensive repairs must also be admitted. The two conditions of inadequacy and disrepair must go together. The heritors must consider if it will not be less expensive to rebuild the church. It does not appear that the heritors can be called on to enlarge as well as repair a church, if the purpose be to give accommodation to other than permanent dwellers in the parish; or if the inadequacy be trifling. As to state of disrepair warranting enlarging, see *Lerwick* case, Jan. 27, 1820; Connell, *Par.*, Supplt., 44–53, 125–30.

When a church is in an "unrepairable condition," *i.e.*, is either absolutely past repair, or it appears probable that repair-

ing it would in the long-run be the more expensive, or nearly so, of the two courses, it must be *rebuilt*. There must be no doubt about the necessity of the case; the heritors should be guided by the opinion of a man of skill, to whom a remit has been made at a meeting specially convened. If the cost of repairing the church would be about three-fourths of the cost of building a new church of similar size, the church must be rebuilt (*M'Leod* v. *Carment* (Rosskeen), Feb. 9, 1830, 8 S. 475; *Bertram* v. *Presbytery of Lanark* (Carnwath), July 20, 1864, 2 Mac. 1406). Since the passing of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, the repair or rebuilding of churches has been a matter for the decision of the Sheriff-Courts, with a right of appeal (rarely exercised) to the Lord Ordinary on Teinds. Unfortunately the decisions of the Sheriff-Courts are not always fully reported. The case of Shettleston, however, in which all the papers have been placed in the writer's hands, affords valuable information as to the present judicial view of the points necessary to be considered in regard to the repair or rebuilding of a church. Shettleston Church was built in 1671. The Presbytery of Glasgow, in February, 1896, pronounced a deliverance finding that the Church was in a ruinous and dangerous condition, and unsafe for the attendance of the parishioners on Divine service, and that it was incapable of being repaired so as to render it safe and suitable without incurring a cost practically equal to the cost of erecting a new church, and they decerned the heritors to take the church down and rebuild it. On appeal to the Sheriff-Court of Lanarkshire, Sheriff Strachan, Sheriff-Substitute, found that, "in accordance with the law as presently existing, it is expedient to repair the Parish Church of Shettleston, and that a new edifice must be erected." In his note the Sheriff observes:—

"The first question that arises for decision is this, is there any legal standard or criterion for determining whether a church is to be repaired or rebuilt? In regard to this matter it is held in the case of *Bertram* (Carnwath) that, although no definite arithmetical rule can be laid down on the subject, yet it may be considered as settled that if the expense of repairing a church will only be about one-half of the cost of building a new one, in that case a new church, generally speaking, cannot be asked for; but on the other hand, if the repairs will cost

three-fourths of the expense of a new church, then a new church may be asked for. If the expense, however, should fall in the large debateable land within these limits, the Court will be influenced one way or the other by special circumstances. And, further, it may be held to be settled that the two things to be compared are not the expense of repairing the old church and the cost of building a new one with adequate accommodation, but the expense of repairing the old church, and the cost of building a new one with the same accommodation as the old.

"The second point to be determined is the meaning to be attached to the word 'repairs' when used in connection with the question. Now I think it clear that it is not to be understood in the narrow or restricted sense of merely mending, refitting or restoring to a good or sound state something which has become decayed, or been destroyed or injured. It embraces alterations and additions usually falling under the term 'reconstruction,' where those are necessary for putting the church into a proper and efficient condition. Thus, in the case of *Bertram* above referred to, a large portion of the expense taken into account by the Court in determining whether or not the church should be repaired, consisted of the estimated cost of removing the gallery stair from the inside to the outside of the church.

"The third point is this: what is the criterion or standard by which the sufficiency of the repairs is to be determined? The heritors' contention on this question is that their duty is discharged if they put the church in as good a condition as it was at the time of its erection in 1751. The case, they say, is entirely different from that of a rich city congregation. The members of that congregation are spending their own money, and can do with it what they please, while the heritors being burdened with the cost of a church which the great majority of them do not attend, and in which they have no interest, are bound to do nothing more than provide a building in which the congregation can worship without any risk of injury to their health. In fact, they regard their obligation very much in the same light as the obligation to make provision for the poor, which is considered to be discharged by supplying them with the plainest food and the cheapest clothing. This is, in my opinion, an entirely mistaken view on their part. There

are, unquestionably, very great differences of opinion as to the justice or expediency of providing a church for a particular congregation at the expense of the owners of property in the parish; but there can be no doubt that so long as that is the law of the country, it must be administered in a fair, reasonable, and equitable manner. What the law requires on the part of the heritors is that they provide and maintain in the parish 'a suitable and comfortable place of worship.' There can, of course, be no formal standard by which the sufficiency of these equipments can be tested, that must be left to the Court to determine in each particular case. I do not think that I should go far astray were I to hold that the standard in the present case may be taken to be the condition into which a modern congregation, possessing the requisite means, would desire to put their own church."

Whatever course the heritors agree to follow, to repair and enlarge or to rebuild, the resolution should be come to at a special meeting, duly called for the consideration of the subject. Estimates should in all cases be obtained and approved before the work is proceeded with. The preses of a meeting of heritors should be authorised to sign the acceptance of estimates approved by the meeting.

It is not necessary, when the heritors act of their own accord (*i.e.*, without an order from the Presbytery), that any of the plans should be submitted to the Presbytery. The matter is entirely one for the heritors themselves. The only province of the Presbytery is to see that the church is of proper size for accommodating those who attend public worship (*Minister* v. *Heritors of Tingwall*, 1787, M. 7928). "With the nature of the structure of the church to be built, the Presbytery," said Lord Alloway in the *Barra* case, "had nothing to do if proper accommodation is provided" (*M'Neill* v. *Nicholson*, January 24, 1828, 6 S. 425).

It is, however, not unusual to submit the plans to the Presbytery for their approval. This course is particularly to be recommended, if the meeting of heritors at which the plans are adopted is not unanimous, or when the meeting is small.

It occasionally happens, especially in a burghal-landward congregation, that the parishioners, where the church is not in a state of actual disrepair, desire that a more suitable or ornate

building should be erected, and offer to erect a new church if the heritors will accept it in place of the old. In this case the plans are usually submitted for the approbation of the Presbytery, and the heritors when giving their consent stipulate—(1) that the plans as approved by the Presbytery and themselves, or by themselves alone (if the Presbytery has not been consulted), shall be strictly followed; and (2) that the amount required to provide for the completion of the work shall be deposited in bank in joint names, say two members of the congregational committee and two members of the heritors' committee; sometimes the heritors agree to accept the deposit of satisfactory letters of guarantee for amounts which the heritors themselves are only to receive on the completion of the work, but such guarantees should be carefully scrutinised.

A church, when enlarged or rebuilt at the expense of the heritors, should be capable of containing two-thirds of the "examinable persons,"—*i.e.*, parishioners not under twelve years of age (*Minister* v. *Heritors of Tingwall, supra; Lynedoch* v. *Smythe* (Methven), May 14, 1828, 6 S. 791; *M'Leod* v. *Carment* (Rosskeen), Feb. 9, 1830, 8 S. 475). Two-thirds of the parishioners is assumed to be the probable number of hearers. Two exceptional cases are *M'Neill* v. *Nicholson* (Barra), January 24, 1828, 6 Shaw, 422; *Hamilton* v. *Pres. of Hamilton* (Bothwell), Nov. 15, 1827, 6 S. 47.

The new church should be erected upon the site of the old church, or as near it as possible. The heritors have no discretion in the matter (*Gordon* v. *Gordon* (Kincardine-O'Neil), January 21, 1846, 18 Jur. 595). The materials of the old church may be used in the construction of the new church—the congregation meantime worshipping in any convenient place of meeting, or the materials may be sold and the price applied to the expense of the new church. It is sometimes necessary when enlarging or rebuilding a church to encroach upon the burying ground, and in the case of St. Cuthbert's, Edinburgh (*Steel* v. *Kirk-Session of St. Cuthbert's*, June 12, 1891, 18 R. 911), such encroachment by the heritors was approved; no private rights were interfered with, and, indeed, the churchyard had been closed as a burying ground. It is within the knowledge of the writer that, recently, in many parishes where the graveyard is not entirely closed, it has been necessary to interfere with lairs

when rebuilding a church. Where the minister and building committee have proceeded with delicacy, and have provided for the reverent removal of the remains and their re-interment in a suitable part of the churchyard, no difficulty has been experienced in adjusting matters. In cases of this kind, however, everything must depend upon the tact and forbearance of those charged with the erection of the new church. Sometimes, however, it will be found that the site of the old church is quite inadequate for the erection of a new church. In the case of *Shettleston*, the Sheriff found that the new church to be erected must be capable of affording accommodation for at least 1200 people, while the old church had provided inadequate accommodation for 800 people, and he remitted to an architect to examine and report "on the suitability of the present site of the church as a site for a new church of the aforesaid capacity, and also to examine and report on any other ground in the neighbourhood which, in his opinion, is suitable and convenient for the site of the new church, the said reporter to hear parties with reference to the matter hereby remitted, and to report *quam primum*." In his note the Sheriff observed: "It was maintained by the respondent that he had proved that a new site must be selected for the church because, as he said, he had proved that the old site was unsuitable in respect—(1) that the space was too limited; (2) that it was damp and extended above old coal workings; and (3) that it must encroach on ground in which interments had recently been made. The appellants, on the other hand, contended that the church must be built on the old site for two reasons. In the first place, they say that the point has been finally decided by the Presbytery who had ordered the old church to be taken down and rebuilt, which necessarily implies the reconstruction on the old site, and that order not having being appealed against by the appellant was now final. The contention is clearly untenable. The effect of the appeal was to sweep away altogether the proceedings before the Presbytery, and it would certainly be somewhat anomalous to hold that the site of the new church had been finally fixed by the Presbytery long before it was judicially determined whether the old church was to be repaired or a new one erected. In the second place, it was maintained that in his answers to the note of appeal the minister had averred that the present site was unsuitable for the reasons

therein stated, and that while a proof was allowed to the parties of their respective averments, no evidence was adduced by him as to the unsuitability of the present site, and as a necessary consequence it must now be held that he had failed to prove his averment. It is certainly the case that the respondent failed to adduce any evidence as to the unsuitability of the present site, although his attention was directed to the matter more than once in the course of the proof. He probably thought, however, that it was time enough to consider as to the site after it had been finally determined that a new church was to be erected, and I cannot say that he was in error in acting on this footing. Moreover, the failure to prove without any evidence would, to say the least of it, be a very unsatisfactory ground for fixing the site of a parish church. My opinion is that, on the one hand the respondent cannot contend that he has proved the present site to be unsuitable, and just as little can the appellants contend that it is finally settled that the old site must be retained. I think the question is quite open, and must now be determined under the eleventh section of the Act of 1868." A new site was found necessary by the Court.

When a new church is taken possession of by the minister, with the sanction of the Presbytery, this invests the building with the character of the parish church, and divests the old building of its parochial character (*Lynedoch* v. *Smythe* (Methven), May 14, 1828, 6 S. 791; *Duke of Richmond* v. *Earl of Fife's Trustees* (Urquhart), Feb. 17, 1844, 6 D. 701). The property of the church is in the heritors. A parish church, or a building which formerly was the parish church, cannot be used by dissenters (*Duke of Richmond* v. *Earl of Fife's Trustees*, *supra*), nor can it legally be applied to the use or accommodation of the public generally. Where, however, a public body has for long been accustomed to meet within the parish church, and where there is no other suitable place of meeting, it does not appear that any reasonable ground of objection exists to the church being used for such a purpose, provided the heritors consent. It is the heritors' duty, however, to guard in the strictest manner against any unseemly use of the church, and to prevent any chance of injury being done to the fabric or to the ecclesiastical furniture. Of course no rent can be charged for the use of the church, which indeed will only, it is thought,

be granted under exceptional circumstances for use for other than religious services, in which term Sunday schools may be justifiably included. In former times portions of the church were commonly used for ordinary school instruction, as, for example, in Mauchline (Edgar, "Old Church Life in Scotland," p. 10).

By 28 & 29 Vict. c. 62, churches, chapels, &c., were exempted from payment of poor rates. By 37 & 38 Vict. c. 20 (1874), the exemption was enlarged to all rates. The Act consists of but one section: "No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial, or other local purpose whatever, shall be assessed or levied upon, or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship, or upon or in respect of any ground exclusively appropriated as burial ground: provided also that such exemption shall continue although such church, chapel, meeting-house, or other premises, or any room belonging thereto, or any part thereof, may be used for Sunday or infant schools, or for the charitable education of the poor."[1] The Ecclesiastical Assessments (Scotland) Act, 1900, 63 & 64 Vict. c. 1900, by § 3, sub-sec. 1, provides that no assessment imposed on the real rent shall be 'levied upon lands and heritages occupied solely as the church, and accessory buildings or burying-ground attached, of any religious body in Scotland, or as the dwelling-house with offices, or garden or glebe land attached, of the minister of such church."

In the *Shettleston* case, Sheriff Strachan, Sheriff-Substitute of Lanarkshire, on 12th August, 1899, appointed the following details to be observed in the erection of the new church:—

"1, . . . 2, . . . At least 21 inches by 32 inches to be allowed in the pews for each sitter in all parts of the church; 3, [Width of passages]; 4, The side pews to be arranged for not more than seven sitters in each; 5, [Width of vestibule]; 6, [Direction as to window behind pulpit]; 7, Sufficient space to be provided for an organ either behind or at the side of the choir; 8,

[1] It has, however, been held in the Lanarkshire Sheriff-Court that the cost incurred by a Town Council in laying a pavement in front of a church was not an "assessment," but a charge for work done under the General Police Act, 1862, and consequently did not entitle the church to exemption from payment under the Act, 37 & 38 Vict. c. 20 (*Coatbridge Town Council* v. *Evangelical Union Church*, 1892, 8 Sheriff-Court Reports, p. 206).

[Accommodation for the choir]; 9, The Session-house to be of sufficient size to accommodate comfortably at least twenty persons; 10, [Lavatory accommodation and closets]."

The Sheriff refused to order the heritors to erect a church hall. He observed: "It is no doubt the case that no church of importance is now built without a hall, but that is for congregational purposes only, and not for any purposes directly connected with the administration of religious ordinances." Objection was subsequently taken to the fact that the plans approved did not give accommodation for 1200 sitters in addition to the choir. The choir, it was urged, must be regarded as acting in an official capacity, and not included among the ordinary sitters for whom accommodation had to be provided. The Sheriff found the contention not to be well founded. "The choir are sitters in the church as much as the ordinary members or adherents, and whether they are accommodated in the choir seats or the body of the church is quite immaterial."

A steeple is not a necessary pertinent of a church (*Earl of Home* v. *Heritors of Eccles* (Feb. 7, 1777), Br. Supp. 558), but a *bell* is (*Parish of Inverkeithing* v. *Lady Rosyth*, 1642, M. 7914). There is a decision that the Established Church alone is entitled "to assemble her members for public worship by the sound of a bell" (*M'Naughton* v. *Magistrates of Paisley*, Feb. 7, 1835, 13 S. 434–35), but this decision probably goes too far, and is not supported by practice.

On the rebuilding in 1779 of the parish church of Peebles, a parish partly burghal partly landward, it was agreed between the heritors of the parish and the magistrates of the burgh that a steeple should "be carried up on the east end of the church" at the sole cost of the burgh, which steeple, when finished, with the bells, &c., therein, to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town." The steeple was completed in 1784, and the burgh bells were thereafter hung in it.

It was decided by the House of Lords, affirming the judgment of the First Division—(1) that having regard to the circumstances of the contracting parties at the date of the agreement, and specially to the fact that the heritors were bound to provide a bell for the parish church, the agreement was to be construed as conferring on the parish the exclusive right to use the bells

for ecclesiastical purposes; and therefore (2) that the Town Council were not entitled to order the bells to be rung on Sundays, or national and parochial Fastdays, for the purpose of intimating worship elsewhere than in the parish church at such hours as might be fixed by the kirk-session (*Magistrates of Peebles* v. *Kirk-Session of Peebles*, June 7, 1875, House of Lords, 2 R. 117).

The Lord Chancellor (Cairns) observed: "The same law [Scots] would have thrown upon the heritors the obligation of providing or furnishing the new church with a proper bell; but the law would cast no obligation upon the heritors to provide a steeple for the reception of the bell, or to ornament the church in any way with a steeple as part of its architecture" (p. 119).[1]

[1] The commissioners from the Presbytery of Kirkcaldy to the parish of Kinglessie reported on 30th January, 1649, "That they having visited the said kirk fand the necessitie of repairing the Kirkyaird dykes *and Bell* house and dealt with the paroshiners that a stent might be made for that effect. The Presbyterie approves thair diligence" ("The Presbyterie Book of Kirkcaldie," p. 332). Again, 26th June, 1644, "Anent an questioun whidder it be lawful or not to demolish the steiple of Leslie (which is ruinous) for reparatioun of the kirk whilk is also ruinous and newlie to be repaired: anser, not; bot let them repair the steiple also seing it is ane old monument" (*Ibid.*, p. 271).

Of bells in country churches Mr. Eeles writes ("Church and other Bells of Kincardineshire," p. 8):—

"There are several peculiar uses which are undoubted survivals, and demand special attention. These are the times of the ringing of church bells (apart from immediately before services), and to a less extent, the times of ringing of town bells. In many parishes the practice still remains of ringing the bell at 8 A.M., or some other early hour, long before the time of the present service, and the hours at which this is done often give a clue to the times of the mediæval services, being in point of fact the ringing for them. In some churches the bell is rung at 8 and 10, the service being later. Here the first is probably the matins bell, and the second the mass bell—evidently a low mass, it being perhaps probable that there was also a high mass later. Those places where the bell is rung at 10 only, are usually of this class, the 8 o'clock ringing having been discontinued. In other churches, apparently those which are more out of the way, or of less importance, we find the bell rung at 9. Here there was probably only one mass, the 9 o'clock bell being for matins. In these cases the mass would have been about 11, hence there is no 10 o'clock bell, and the mass bell does not remain separate from the modern service bell, where that service is not very late; where, however, it is late, the mass bell does remain, being usually rung at 11, and occasionally at 10–30." In towns, church bells are frequently town bells as well. "Besides various meal-hours through the day, 5 or 6 in the morning, and 8, 9, or 10 at night, are the usual times for ringing of town bells or their substitutes. The early morning ringing seems to be simply to call work people, but the evening bell may well be the survival of the curfew. In the latter part of the 17th century at Elgin, both the great bell of St. Giles and

The parish church and parochial schoolhouse of New Monkland were entered on the *valuation roll* with the heritors as proprietors. They appealed, and alleged the parish church and school were not "lands and heritages," and did not constitute separate tenements, but were pertinents of the respective properties of the heritors, and were *extra commercium*, and of no value. The assessor stated that the statute required all lands and heritages to appear in the roll, without reference to the tenure or the purpose for which used. The Commissioners of Supply of Lanarkshire ordered the entries not to stand on the roll. The Court held that the Commissioners were wrong (*Heritors of New Monkland*, March 21, 1872, 11 Mac. 986). This decision was reconsidered in *The Heritors of Kingoldrum*, &c., April 2, 1877, 4 R. 1149, No. 123, where it was held that as parish churches cannot be the subject of a lease, they should not be put on the valuation roll. See also Armour on "Rating in Scotland," 1892, p. 185.

the Tolbooth bell were rung at 4 A.M. The Tolbooth bell at Aberdeen is now rung at 5 A.M. and 8 P.M., and also for meetings of the Town Council. The 10 P.M. bell remains in many places, among which are St. Andrews, Perth, Dundee, Montrose and Forfar. Ellon supplies a good instance of the way in which the adaptation of an old custom to modern needs has obscured the purpose of its introduction. There the church bell is rung at 8 P.M. in summer and 7 P.M. in winter, and this seems to be the remnant of the curfew. Now, however, it is looked upon as the signal for shutting the shops, and to such an extent, that since Wednesday became the 'shopkeepers' half-holiday' it has been rung on that day at 2 P.M." (*Ibid.*, pp. 10, 11).

CHAPTER V.

ORNAMENTA OF THE CHURCH.[1]

In the basilican churches of Rome, and in early Anglo-Saxon churches, the high altar almost always rose out of the middle of the pavement, quite by itself and far apart from the wall. Until the Reformation, "God's board" (as it is called in King Edward VI.'s Prayer-Book) was invariably described as an altar; from the tenth century its usual place was against the eastern wall, and the priest stood facing it—*i.e.*, with his back to the people. It early became one of the distinctive reforms that the Communion should be celebrated by such "a gathering round a table" as would recall the Last Supper and the practice of the Primitive Church.[2]

John Knox in his Confession, or "Vindication of the Doctrine that the Mass is Idolatry," delivered at Newcastle on 4th April, 1550, after drawing various distinctions between the Mass and the Lord's Supper, says:—

"In the Lord's Supper all sit at ane table; no difference in habit nor vestment between the minister and the congregation. In the Papistical Mass the priests are placed by themselves at ane altar (as they call it); and are clad in disagysit garments" (Works, Vol. III., 1854 edition, p. 66).

[1] "The word 'ornaments' but imperfectly represents the sense of the word *ornamenta*, which includes the necessary equipment and furniture of a church, whether it be of a decorative character or not" (Bishop Dowden, "Proceedings of the Society of Antiquaries of Scotland," vol. ix. third series, p. 287).

[2] The Pope when celebrating High Mass stands behind the altar. This is because he celebrates invariably in a basilica. The custom is strictly a personal or official survival in so far as no priest but the Pope celebrates at the high altar of a basilica. All other priests of the Roman Communion celebrate in a basilica at a side altar standing, as elsewhere, before the altar.

Knox at this time had not been on the Continent except as a French prisoner; he must be describing the usage of the English reformers, because the Reformation had not as yet taken form in Scotland.

In England the first prayer-book in the vulgar tongue appeared in March, 1549. The Communion service is headed, "The Supper of the Lord and the Holy Communion, commonly called the Mass." After the psalm for the day had been sung—

"The priest, *standing humbly afore the midst of the altar*, shall say the Lord's Prayer, with this collect."

Shortly afterwards the direction occurs—

"Then the priest, standing at God's board, shall begin—

"'Glory be to God on high!'"

After the offertory—

"Then so many as shall be partakers of the Holy Communion shall tarry still in the Quire, or in some convenient place nigh the Quire, the men on the one side and the women on the other side."

The words "altar" and "God's board" are used indifferently, but not "table."

The first prayer-book of Edward VI. was not long in use, for in 1552 the new prayer-book, in the preparation of which Knox took part, appeared. In it the word "table" is substituted for altar (in the marriage service the term "Lord's Table" is used). The rubric sets forth:—

"The table at the Communion time having a fair white linen cloth upon it, shall stand in the body of the church or in the chancel, where morning and evening prayer are appointed to be said. And the priest, standing at the north side of the table, shall say the Lord's Prayer, with this collect following."[1]

This rubric appears unaltered in Queen Elizabeth's prayer-book, and stands in the prayer-book of the Church of England

[1] "The term 'Communion Table' is not to be found in the Prayer-Book, the table being invariably viewed as the Table of the Lord, and not of the communicants" (Blunt's "Annotated Book of Common Prayer").

to the present day, although in Charles I.'s reign the practice of moving the table on communion days was given up.[1]

As regards Scotland, in 1557 the Lords of the Congregation ordered the second prayer-book of Edward VI. to be used. In 1562 the General Assembly by Act directed the sacraments to be celebrated according to the "use of Geneva." This was the order of worship drawn up by John Knox for his congregation at Frankfort, and printed for the use of his congregation at Geneva in 1556. Between 1562 and 1564 it was enlarged, and the remodelled version of the Book of Geneva is what is known

[1] Lord Chancellor Cairns, in giving judgment in *Ridsdale* v. *Clifton*, May 12, 77 L.R., Probate Division ii., at p. 339, observed :—.

"The rule by which the position of the minister during the celebration of the Holy Communion is to be determined, must be found in the rubrical directions of the Communion office in the prayer-book, there being, as to this matter, nothing in any statute to control or supplement those directions. In examining these directions their Lordships propose to put aside the argument, very much pressed upon them, that the proper, and only proper, position for the Communion table, is in the body of the church, or in the middle of the chancel, and that it is in a wrong position when placed at the time of the Communion service along the east wall. They think this argument has no sufficient foundation. No charge is made that in the church of the appellant the Communion table stood where it ought not to have stood, and, in the opinion of their Lordships, no such charge could have been sustained. The rubric, indeed, contemplates that the table may be removed at the time of the Holy Communion, but it does not in terms require it to be removed. Morning and evening prayers are, according to one of the early rubrics of the prayer-books, to be used in the accustomed place of the church, chapel, or chancel. In churches where it is customary to use both the chancel and the body of the church, or the chancel alone, for morning and evening prayer, the direction that the table shall stand 'where morning and evening prayer are appointed to be said,' is satisfied without moving it. That direction cannot be supposed to mean that the position of the table is to be determined by that of the minister's reading-desk or stall only, the service being 'used' and 'said' by the congregation as to the part in it assigned to them, as well as by the minister. The practice as to moving or not moving the table, has varied at different times. It was generally, if not always, moved in the earlier part of the post-Reformation period. When the reversion of 1662 took place, and when the present rubric before the prayer of consecration was for the first time introduced, it had come to be the case that the table was very seldom removed. The instances in which it has been removed may be supposed from that time to have become still more rare, and there are now few churches in the kingdom in which, without a structural rearrangement, the table could be conveniently removed into the body of the church. The utmost that can be said is, that the rubrics are to be construed so as to meet either hypothesis." See also "How the Communion Tables were set Altar-wise: a story of Excommunication," by Professor Sayce. *Contemporary Review*, vol. lxxiv. p. 270.

as Knox's Liturgy or Book of Common Order. "It embodies the law of the Church as to worship, from 1564 to 1645" (Sprott and Leishman's edition of "Book of Common Order," 1868, p. xv.).

The only rubric in Knox's Liturgy bearing upon the position of the table is :—

"The exhortation ended, the minister cometh down from the pulpit and sitteth at the table, every man and woman likewise taking their place as occasion best serveth." [1]

In 1871 Dr. Sprott printed for the first time the draft of a liturgy for Scotland, which was completed in the reign of James I., and sent up to London in 1629, if not earlier, only to be rejected by Charles I. and his advisers. It is in the British Museum. Part of the Rubric of the Holy Communion service is :—

"The table whereat the Communion is to be received being covered with a white linnen cloath shall stand in that part of the church which the minister findeth most convenient, and as soone as the minister enters into the pulpit, such as attend upon the ministration shall present the elements covered, and set them upon the table. . . . After sermon is ended the minister shall come doune from the pulpit to the table, and standing at the syde thereof shall use the short prayer, saying" (p. 66).[2]

In Laud's Scottish Prayer-Book of 1637, the Rubric stood thus :—

"The holy Table having at the Communion time a Carpet, and a fair white linen cloth upon it, with other decent furniture meet for the high mysteries there to be celebrated, shall stand at the uppermost part of the Chancel or Church, where the Presbyter standing at the north side or end thereof, shall say the Lord's Prayer," &c.

[1] "The absence of pews often admitted of several tables being set up side by side with that at which the elements were consecrated and first received" ("The Ritual of the Church," by Rev. Thos. Leishman, D.D., in "The Church of Scotland, Past and Present" (1891), vol. v.).

[2] The direction that the elements are to be brought forward when the minister "enters into the pulpit" as given in the MS., was probably in conformity with the practice at that time, though for a long period the custom has been to bring in the elements after the sermon, at the commencement of the communion service proper. The Rubric directs the minister to stand at the side of the table. This is, of course, to be understood of the side farthest from the people, and as equivalent to *behind the table*, with his face towards them ("Scottish Liturgies of the Reign of James VI.").

In 1645 the Westminster Directory was approved by the General Assembly, and it came gradually into general use,[1] but no Act ever formally laid aside the earlier orders.[2]

The Directory, under the heading of "The Celebration of the Communion or Sacrament of the Lord's Supper," sets forth that after the "exhortation"—

"The table being before decently covered, and so conveniently placed that the communicants may orderly sit about it, or at it, the minister is to begin the action with sanctifying and blessing the elements of bread and wine set before him (the bread in comely and convenient vessels, so prepared, that, being broken by him and given, it may be distributed amongst the communicants; the wine also in large cups), having first, in a few words, showed that those elements, otherwise common, are now set apart and sanctified to this holy use by the word of institution and prayer."

Dr. Sprott observes in the Appendix to Knox's Liturgy, at p. 353—

"We learn from Lightfoot that there was something in this place about the minister's coming to the table. The Record also mentions a debate about 'the minister's still keeping his place at the table' after the consecration, where the words are now simply 'being at the table.' As some of the extreme independents preferred to consecrate

[1] 9th July, 1645: "The Directorie sent over from Edinburgh with the acts of the last Generall Assemblie is appoynted to be practised be all the brethren in all the kirks within the Presbytrie, and to begin upon Sonday come fiftein dayes" ("The Presbyterie Book of Kirkcaldie," ed. by Rev. W. Stevenson, 1900, p. 288).

[2] When the table stands clear of the wall, this corresponds with the ancient Celtic usage as described by the Rev. David MacGregor in the Lee Lecture, 1895, where he says:—

"The eastern side of the altar was reckoned its front, and there the priest stood during the service. That he *faced* the people is proved by the many incidents in which the people are described as watching the play of emotion on the faces of the saints while praying at the altar in the eucharistic service." *Cf.* "The position of the celebrant was before the altar (*ante altare*), that is to say, facing the altar and with his back to the congregation. This we infer from the expression, *de vertice*, in Cuminius' description of the four brothers watching St. Columba celebrate at Iona, and seeing a strange light streaming down upon his head" (Warren's "The Liturgy and Ritual of the Celtic Church," 1891, p. 111). The discrepancy is more apparent than real. If the church was in the form of a basilica, as the celebrant stood behind the altar (see Dr. Rock's "Church of our Fathers," i. p. 213), the people might watch the play of emotion on his face. If it was not a basilica he very probably stood with his back to the people.

in the pulpit, it is likely that the objections which caused the one passage to be struck out, and the other to be altered so as to allow of the minister's remaining longer in the pulpit, came from that side of the Assembly. The following were the original words of the Directory in this place:—'The other officers attending that service, the minister is to begin the action with sanctification of the elements of bread and wine set before him, the bread in platters.' The clause about the officers of the Church was admitted in June, but was erased at some later stage."

Walter Steuart of Pardovan wrote:—

"Upon the day of the Communion, a large table being so placed as the communicants may best sit, and the congregation may both see and hear, the publick worship is begun as on other Sabbaths. And immediately after sermon the minister prays and sings a part of some psalm, then, having had an exhortation, he desires the elders and deacons to bring forward the elements, while he cometh from the pulpit, and *sitteth down* at the table."[1]

In modern times for good or ill, the use of a long table having been abandoned, a Holy Table of limited size is used for the consecration of the elements and should form part of the permanent furniture of every Scotch church. A stone Table is illegal in the Church of England, nor does a wooden Table with a stone top comply with the law;[2] in Scotland there is no prohibition of stone, and if the *mensa* is covered with a "fair

[1] "It is the singular privilege of the Pope, when he performs the office of consecration, to communicate *sitting*" (Shepherd, "Critical and Practical Elucidation of the Book of Common Prayer," vol. ii. 219). The writer has not been able to find corroboration of this statement, but it is believed that it either does, or did, record a fact indicative of the adherence to primitive usage, which is often found inbedded in the kernel of Roman ceremonial.

[2] It may be noted that while in England since the Restoration the general custom has been to revert to Laud's practice of keeping the table permanently against the eastern wall, the custom has had numerous local exceptions, particularly in the Channel Islands. In Scotland there are exceptional instances where the Table stands against the wall, but the practice is to move it forward when Holy Communion is celebrated, so that the minister may stand behind it. Again, while the custom of communicants remaining in their seats is sometimes supposed to be Scotch, it was far from unusual in England—*e.g.*, at Christ Church, Oxford, up to 1856 it was the custom for the communicants to remain in their seats while the officiants walked round to communicate each. "Dr. Pusey frequently communicated in this way" ("Church Folk-Lore," 1894, p. 62). Episcopalians and Presbyterians alike in the beginning of the eighteenth century "sat on the forms at the long table, the elements being handed round from person to person" (Graham, "Social Life of Scotland in the Eighteenth Century," 1899, ii. p. 13).

white linen cloth," a stone Table may not be objectionable (for the matter appears open), but to the writer a wooden Table seems more consistent with the usage of the Church of Scotland. At such services as marriage, admission of young communicants, setting apart of deaconesses and the like the minister is in use to stand before the table. There should therefore be a space of sufficient width (say 18 inches) in front of it.

According to the Directory of 1645, baptism is not to be administered "in private places or privately, but in the place of public worship, and in the face of the congregation, where the people may most conveniently see and hear, and not in the places where fonts, in the time of popery, were unfitly and superstitiously placed." Where were *fonts* placed "in the time of popery"? When baptism ceased to be given in river or stream, it became the custom to erect baptisteries—*i.e.*, special buildings, with a deep basin into which the person to be baptised descended, and received his baptism standing by dipping. This remained the custom of the Church for many centuries—in Italy, indeed, through the whole of the Middle Ages; in Germany, however, about the beginning of the ninth century (Lubke, "Ecclesiastical Art in Germany in the Middle Ages"), the custom arose of erecting a font in the church, and thus saving the erection of a special baptistery. In the plan of St. Gallen, which belongs to the beginning of the ninth century, the font is placed in the middle of the nave, "close to the western choir, and to the east of it; it is dedicated to John." Early church fonts were shaped like a barrel. The person about to be baptised stood up to his hips in water, and the priest poured water on his head; in 1124 seven thousand Pomeranians received baptism at Peysitz in a few days, standing in barrels temporarily sunk into the ground. As the custom of sprinkling (*infusio*) superseded dipping (*immersio*) such large vessels were not required,[1] and the beautiful ornamental fonts of the Middle

[1] "The practice of immersion, as against affusion, is proved by the large size of still surviving fonts, such as the font of sixth century workmanship found at St. Brecan's Bed, and another of twelfth century workmanship at Cashel, in the chapel of Cormac, King of South Munster (1123-38). Single immersion was the custom, *in tota diocesi Macloricusi*, in Brittany up to A.D. 1620. It prevailed in the sixth century in Spain, where Gregory I. advised its retention under the peculiar circumstances in which the Spanish Church stood at that time with regard to Arianism, and where a British bishopric existed at that date. It is left optional in the three extant *Ordines Baptismi* of the ancient Gallican Church, while a Rubric directing

Ages were erected. Lubke says, "The usual place for the font is, at the present day, at the western end of the north side aisle; it is only the Protestant worship which has generally removed the font from its old place, and placed it at the entrance to the choir." Pardovan observes: "The sacrament of Baptism is to be administrate in the face of the congregation after sermon, and before pronouncing the blessing. The child to be baptised, after notice given to the minister the day before, is to be presented, the pastor remaining in the same place where he hath preached, and having water provided in a large basin." The modern usage of Scotland, however, directly points to the convenience of having a font.[1] It may conveniently be placed at the entrance to the chancel to the south side, as the pulpit is placed to the north. (See Appendix VIII.).

In his paper on "Church Fabrics, their right arrangement in relation to the various ordinances and services of worship," in vol. II., of the second series of the Scottish Church Society Conferences, 1895, the Rev. E. L. Thompson, D.D., pleads for the erection of the font, if not at the principal door of the Church, at least at the door of the transept. "In this way the ancient and beautiful symbolism of Baptism being the gate into the Church could be preserved, while the administration of the rite could at the same time be visible to the congregation. The Scottish Church is insistent on the publicity of baptism, but some consideration is to be exercised as to the way in which this requirement should be carried out. It is surely not desirable that the baptismal rite should be administered before the people in the sense of being done immediately in front of the Lord's Table, or of the pulpit." The reasonable objection to erecting the font at the

trine immersion is contained in the earliest *Ordines Romani*. Trine immersion with the alternative of aspersion, is ordered in the earliest extant Irish baptismal office, in the composition of which, however, Roman influence is strongly marked" (Warren's "Liturgy and Ritual of the Celtic Church," 1891, pp. 64, 65, and authorities therein cited). In England there is a font for immersion in the parish church of Lambeth.

[1] In England, by Canon 81 of 1603 it was provided—"There shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual places." "This means set at the entrance of churches, for the entrance into the Church is through the sacrament of Baptism" (Phillimore's "Ecclesiastical Law of the Church of England," 1895, vol. I., pp. 486, 487).

entrance to a church is that a baptism cannot be "in the face of the congregation," unless, indeed, the pews are sufficiently wide to allow of the congregation standing and turning round so as to look over the pew-backs. A valuable paper by Mr. J. Russel Walker, architect, on Scottish Baptismal Fonts will be found in the "Proceedings of the Society of Antiquaries of Scotland," 1886–87, p. 346. Speaking of Scottish mediæval fonts, he says:—"Many of the bowls of the Scottish fonts are quite destitute of ornamentation. That is doubtless due in many cases to the poverty of the country, but in others it is just as certainly traceable to some superstition on the part of the inhabitants." A few pre-Reformation baptismal fonts have now been restored to use in Scottish parish churches. The moveable bowls for use instead of the font were of foreign Protestant origin[1]

Plain though the majority of Scottish churches are, there is nothing, as Dr. Sprott observes, in the Presbyterian system inconsistent with the noblest style of architecture, "nothing to prevent our utilising all the parts of a Gothic cathedral." "The parallelogram or simple nave, which is all we can look for in many parishes, is capable of being treated in a churchly way by devoting the east end to the pulpit, Communion Table, &c." ("Worship and Offices of the Church of Scotland," pp. 234–5). Dr. Rowand Anderson gives some excellent suggestions as to this in "The Divine Life in the Church" ("Scottish Church Society Conferences," Second Series, vol. ii., at p. 235).

Within recent years the *pulpit* has been more and more restricted to its proper use as a preaching place. It is best placed on the north side of the entrance to the chancel, or of the space before the Holy Table. As regards the appropriate place for the choir and *organ*, Dr. Rowand Anderson has emphatically written—"I am not prepared to specify the best place, because that will depend on the shape and extent of the auditorium, but I can specify the worst, and that is behind the pulpit, immediately in the face of the congregation. Noth-

[1] The older French Protestant churches to the present day have no fonts; the baptismal water is brought in a silver bowl. The newer churches, which have the pulpit to the left of the Table, have a font to the right of the Table. In Germany the font is invariably placed in front of the altar, but outside the rails; baptism is seldom performed during Sunday divine service.

ing can lower the religious sentiment of the building or the dignity of this part of the service so much as the placing of an organ, generally much too large for the work it has to do, in the position it would occupy in a music hall." The west gallery[1] is the old place for the "people's choir and organ." Dr. Anderson would add to the furniture of the Church a *lectern* from which the Bible may be read, and a *prayer-desk* "slightly elevated," so that "the minister should kneel with, and at the head of, the people, as that is the position of every leader, whether he is facing the foe or Him to whom the common obeisance is offered."

By Act 1617, c. 6, each parish church in Scotland was required to be provided, before February, 1618, by the parochiners—here meaning heritors—with *cups*, tables, and tablecloths for the celebration of the Communion, as well as with *basins* and *lavoirs* for baptism. The parish minister, his heirs and executors, are answerable for their loss or profanation (*Hamilton* v. *Minister of Cambuslang*, 1752, M. 10,570).[2]

Mr. Micklethwaite, writing of the Church of England in the year 1548, says of *pews*, "most churches had pews for the use of the people though they were not crowded with them as became the custom at a later date. They generally occupied only the eastern part of the nave and of the aisles (when there were any), the passages between the blocks being very wide. When a church had chapels at the sides of the chancel they also were often filled with pews, arranged so that they might be used by worshippers either at the high altar or at the altars of the respective chapels. Shut-up pews or *closets*, as they were called, were to be found in some churches. They were generally the enclosures about altars at which there had

[1] The writer assumes that the church stands east and west. While orientation is a very ancient custom (see Dr. Rock's "Church of our Fathers," 1849, vol. i. p. 220), and has been practically the rule in the Church of England for fifteen centuries, such orientation is neither universal nor obligatory in that Church, and it has been almost systematically disregarded alike by the Presbyterian Church of Scotland and the Roman Catholic Church both in England and Scotland since the Reformation. Among Roman Catholic churches which in their avoidance of orientation follow Presbyterian usage are the Brompton Oratory, the pro-Cathedral in Glasgow, and the new Cathedral at Westminster.

[2] An instructive paper on sets of Scottish Church plate, by Dr. Norman M'Pherson, formerly Sheriff of Dumfries and Galloway, will be found in the "Proceedings of the Society of Antiquaries," 1885–86, p. 398, with many illustrations.

been chantries, and were used by the patrons of the chantries as private pews. This use continued after the suppression of the chantries."[1]

Up to the middle of the seventeenth century there were few fixed seats or desks in churches in Scotland, and for a considerable time their erection was purely a matter of arrangement between persons who desired to provide fixed seats for themselves and the kirk-session who originally had the power to allow or forbid such erections.[2] A kirk-session now has no concern with pews or seat-rents (*Heritors of Falkland* v. *Minister and Kirk-Session*, Feb. 20, 1739, M. 7916; *Edinburgh Ecclesiastical Commission* v. *Kirk-Session of High Kirk, Edinburgh*, per Lord Young, July 18, 1888, 15 R. 961).[3] A church must

[1] "The Ornaments of the Rubric" (Alcuin Club Tracts), 1898, pp. 44, 45.

[2] There was, however, frequently an appeal taken to the Presbytery, many instances will be found in the "Presbyterie Book of Kirkcaldie," edited by Rev. W. Stevenson, —*e.g.*, 9th September, 1630. "The whilk day the brethren that wer sent commissioners to Auchterdirran declared thair diligence in putting the decreitt of the Presbyterie to execution in all things as they wer appoyntit, and that they putt in ane pairt of John Sinclair's seatt in the rowme asignit to him be east the pulpitt whereby they gave him possession thairof as also putt in ane foorme in the rowme asigned to Mr. John Scrimgeor and so gave him possession thairof, and markit the rowm thairof upon the wall to be betwixt the widdest of the bowells upon the north wall and the pillar upon the east. As also markit the rowme for the Laird of Kyninmonth upon the wall that he should come no further west than the east syde of the windo neirest the durr," p. 18. At a meeting of the same parish on 23rd April, 1640, "Anent the placing of the kirk seates, the minister declairs that thair is ane submissioun subscryvit be the haill heritors to that effect. The Presbyterie desyres them to put the samyne submissiaun to ane poynt betwixt this and Witsonday, otherwayes they well doe it themselfs" (*Ibid.*, p. 173).

[3] It would appear that when sittings were erected the heritor who put them up frequently sold or leased the pews. Thus under August 14, 1696, Cunningham of Craigends enters in his Diary, "Order of seats in my father's life in the kirk as he left them," and on Oct. 24, 1707, "I saw two papers, dated 1674, granted by my father, one to Wm. How [one of the persons mentioned in the list], with 8 mks. 4s. 8d. received, and for that getting them their above written seats to them and to their airs, but with this provision—That my father and his airs have liberty to redeem them by repaying the foresaid sowms whenever they please. This clause is in both the papers. I saw another paper to James Young, dated Feb. 17, 1677, getting a seat to him for six pounds with power to redeem the seat on payment of the said six pounds" ("Cunningham's Diary," Scottish Record Society, 1887, p. 25). Cromwell Lockhart acquired the "dasck or sait wellum the laigh church of Lanark, laitly pertaining to the lairds of Auchenglen," and thereafter disponed the seat of Captain Samuel Lockhart "upon the considerationе of the kyndnes the said Captain Samuel Lockhart had signallie witnessed to the said Cromwell Lockhart," 21st April, 1681 ("Lanark Burgh Records," 1893, p. 204). The fixed

be provided by the heritors with pews. The breadth and depth approved by the leading cases is about 29 inches wide, with seats of about 18 inches in breadth (Connell on Par. Supplt., 72; *Harlaw* v. *Merchant Maiden Hospital*, 1802, 4 Paton, 356; *Hamilton* v. *Presbytery of Hamilton*, Nov. 15, 1827, 6 S. 47). In the *Shettleston* case Sheriff Strachan directed that "at least 21 inches by 32 inches be allowed in the pews for each sitter in all parts of the church" (Interlocutor of 12th August, 1899). This means that there is to be a space of 32 inches between one pew back and another, and that the actual seat will be 21 inches in breadth. Kneeling boards are usually supplied in modern churches.[1]

By the present law in the case of a *landward* parish, the area of the church is divided among individual heritors (*Ure* v. *Ramsay* (Tillicoultry), June 5, 1828, 6 S., at pp. 917, 918).

Where the parish is *burghal-landward* the area is divided, and the sittings in each portion allocated among the respective heritors of the landward and of the burghal portions of the parish (*Harlaw* v. *Merchant Maiden Hospital* (Peterhead), 1802, 4 Paton, 356), the latter represented by the magistrates, who are themselves to allocate their share among the burghal community (see *Sinclair* v. *Heritors of Kinghorn*, 1761, M. 7918; *Lockhart* v. *Lockhart* (Lanark), Jan. 24, 1832, 10 S. 247).

A heritor is entitled to sittings not only for himself, but his tenants and servants. The sittings being first apportioned among the heritors, they have again a choice of sittings for their tenants.

As between tenants, it is the landlord who determines the seat each tenant should occupy (*Ure* v. *Ramsay*, *supra*).[2]

pewing of the Church seems only to have been resolved upon on 23rd November, 1717 (*Ibid.*, p. 297).

[1] The change in the position adopted in prayer must be allowed for in the pewing of modern churches. When the congregation stood at prayer, a narrower pew sufficed than now, when the people are supposed to kneel, and, in reason, should have space enough to do so.

[2] A tenant loses his seat with the expiry of his tack; the incoming tenant is not entitled as a matter of course to the same seat, but to a seat (*Kinnaird* v. *Mathewson*, 1802, 4 Paton 429).

In a Sheriff-Court case it was held that a heritor, as trustee for himself and the parishioners resident on his estate, was the right person to determine any questions between his tenants as to which of his sittings each should occupy, and that unless serious objection can be taken to the landlord's decision, the jurisdic-

In *burghal* parishes the allocation of the seats is in general a matter of arrangement, the magistrates, *qua* magistrates, having the first choice. The seats are not associated with lands (*Duff* v. *Brodie* (Elgin), 1769, M. 9644). Seats in a burgh church may be let for hire (*Clapperton* v. *Magistrates of Edinburgh* (Tolbooth), July 14, 1840, 2 D. 1402), and may even be sold by the magistrates (*Watson* v. *Watsons* (Dundee), 1760, M. 5431).

In all parish churches, the minister, by long usage, has a family pew assigned him near the pulpit.[1] By 7 & 8 Vict. c. 44, § 9, one pew is to be provided in *quoad sacra* churches, rent free, for the use of the minister's family, and one for the officiating elders. A superior, as before observed, is not a heritor, and has consequently no right to a sitting.

If heritors concur in an amicable allocation of the sittings in a parish church they may competently do so, without judicial interference. "The disagreement of the heritors having prevented an amicable division of the area when seated, a summons of division" was raised in the *Eccles* case (*Earl of Marchmont* v. *Earl of Home*, Dec. 17, 1776, M., Kirk., App. 1). It is scarcely necessary to say that the power of amicable allocation is confined entirely to the heritors; but with allocation, whether amicable or directed by a Sheriff, neither minister nor kirk-session have anything to do. Since the *Falkland* case of 1739 (*Falkland Heritors* v. *Minister and Kirk-Session*, Feb. 20, 1739, M. 7916) this has never been questioned. In the case of old churches there may be circumstances where allocation is to be presumed in the absence of a decree, or agreement (*Duke of Abercorn, &c.*, v. *Presbytery of Edinburgh* (Duddingston), Mar. 17, 1870, 8 D. 745).

Where no amicable division of the sittings in the order of the valuation of holding can be effected, application is made to the Sheriff of the county in which the parish is situated

tion of courts of law is excluded (*Reid* v. *Ferguson* (Perthshire), March 20, 1893, ix. Sh. Court Rep., 232). One of two joint-occupants is not entitled to remove *brevi manu* a label affixed to a church seat by another joint-occupant, whether the person affixing the label really had a true right or not. See *Reid* v. *Ferguson* (Scone Parish), Sheriff Court of Perthshire, ix. Sh. Court Rep. (1893), 232. Seats may be duly allocated without affixing a label; there are no labels in Govan Church.

[1] But so late as 1703 there was no set seat for the minister's family in Mauchline parish church (Edgar, *supra*, p. 20).

to make a judicial division, and it is thought that nowadays such a judicial allocation will be found most satisfactory. The procedure is as follows:—A committee of heritors is appointed with power to apply for judicial allocation. The petition states succinctly the facts of the case. The Sheriff orders intimation by advertisement, and by notice from the pulpit, of a diet when all parties interested may meet with him. After hearing parties, a remit is made to a man of skill to prepare a scheme of allocation among the heritors according to their respective rights and interests, and to meet the parties or their representatives in the church and to hear their views and to report. On receipt of the report another diet is fixed, of which intimation is given in the same way as before, and after hearing parties the Sheriff allocates and divides the sittings according to the plan of sittings and relative scheme as approved, with or without modification.[1] Past possession of a particular pew in the old church is a material element in the claim to a corresponding seat in the new church (*Sinclair* v. *Magistrates of Kinghorn*, 1761, M. 7918). Sitters in an old church have right to an allocation in the new church even when such church is erected voluntarily by one of the heritors (Lord Gordon in *Duke of Roxburgh and Others* v. *Miller* (Jedburgh), June 29, 1877, 4 R. (H. of L.) 76).

A re-allocation of the seats is not permissible. This was decided in the *Kirriemuir* case, where it was held that an application to the Sheriff for a re-allocation of the seats in a parish church among the heritors was not competent where the church was merely reseated (*Stiven* v. *Heritors of Kirriemuir*, Nov. 14, 1878, 6 R. 174). The church seats had been allocated under a decree-arbitral in 1795. The Lord President (Inglis), in giving judgment, said: "I always understood that it was settled as matter of law and practice that the division of a parish church, when once settled in a competent form, cannot be disturbed so long as the structure remains." (See also *Jedburgh* case, *Duke of Roxburgh* v. *Miller*, 1877, 4 R. (H. of L.) 76). From the report of the case of *Kinghorn*, *Kinghorn Heritors* v. *Kinghorn Magistrates*, Mar. 12, 1897, 24 R. 704, it appears that the

[1] For procedure, form of interlocutor, &c., see *James Myles and Others* (Committee of Heritors of the Landward Parish of Govan, &c.), Mar. 17, 1890, Sh. Court Reports, vol. vi. p. 198.

church of that parish, which was very old, was reseated in 1853, and the heritors asked the Sheriff to allocate the landward heritors sittings, and this he did. Lord Adam, p. 712, expressed doubts as to what authority the Sheriff had to entertain the application.

While a re-allocation is not permissible, a re-distribution certainly is, when a church is reseated. The reseated area and galleries must be distributed among the heritors in the same proportions as the sittings were held prior to the alteration of the church. Lord President Inglis evidently contemplated such re-distribution as distinguished from re-allocation, from certain observations he made in giving judgment in the *Kirriemuir* case.

A heritor cannot sell his lands and retain his seat in the parish church. The circumstances in the case of *Stephen* v. *Anderson* (Elgin) (Nov. 18, 1887, 15 R. 72) were as follows: Mrs. Jane Sutherland or Anderson was the owner of certain house property in Elgin, and of pew No. 22 in the parish church of Elgin. In 1875 this lady conveyed "all my right and interest in and to the pew numbered 22 of the area of the parish church of Elgin, with the said pew itself, in so far as I have right thereto," to another lady, Miss Anne Stephen, and the pursuer in the action was the nephew and heir-at-law of Miss Stephen. Mrs. Anderson disposed of her residence in 1876 to Robert Anderson, Elgin. After Mrs. Anderson's death the parties quarrelled as to who should sit in pew 22 of Elgin parish church. As it appears from the condescendence that both used the pew, the state of matters must have been unsatisfactory. Ultimately Dr. Stephen, the heir-at-law of Mrs. Anne Stephen, the disponee of the pew, raised an action in the Sheriff-Court of Elgin against Robert Anderson, the disponee of the lands, to interdict him from entering pew 22. The Sheriff decided in favour of the defender, and Dr. Stephen appealed to the Court of Session. The First Division decided that he had no case. The church area in 1826 had been judicially allocated among the heritors of Elgin in their order. "What then," asked the Lord President, "is the result with regard to the sittings? I do not think that it is doubtful, because, according to Erskine, they are parts and pertinents of the estate in respect of which the allocation is made. They are also inseparable parts of the estate, for

the obvious reason that if they could be sold to a stranger the consequence would be that the inhabitants of the property would be deprived of their right of occupying seats in the parish church. . . . Proprietors, both large and small, hold sittings, not absolutely in property, but in trust for themselves and the persons on their estates, and therefore it is that sittings cannot be disjoined from the properties, because if they were it would be a breach of trust on the part of the proprietors. I am very clearly, therefore, of opinion that this seat was an inseparable pertinent of the property to which it was attached at the time the church was divided." The other judges concurred. The case, indeed, left no room for doubt. It should be borne in mind, in places where lavish expenditure has induced a need of money, and a need of money has tempted a kirk-session (who, as already observed, have properly nothing to do with church seats) to annex unoccupied heritors' pews, and let them. If a heritor does not use his seats or allow the use of them to others, he may place them at the disposal of the church; but free seats they are to him in respect of his lands, and free seats they must remain, whoever uses them.

A church seat case of much more public interest than the above was that of St. Giles (*Edinburgh Ecclesiastical Commissioners* v. *Kirk-Session of the High Kirk, Edinburgh*, July 18, 1888, 15 R. 952). All the pew rents of the parochial churches of Edinburgh are by the provisions of the Act 23 & 24 Vict. c. 50. received by the respective kirk-sessions, and paid over by them to the Edinburgh Ecclesiastical Commissioners, who, out of a common fund, pay all the Edinburgh parochial clergy. When St. Giles was restored, the area formerly separated and used as the church of West St. Giles was incorporated with the High Kirk, and became its nave; the old pews of West St. Giles were removed, but as the congregation of the enlarged church increased, the kirk-session of the High Kirk placed chairs in the nave, which were paid for. The Ecclesiastical Commissioners claimed the right to receive the seat-rent of these chairs just as they received the seat-rents of the pews. The kirk-session contended that it was incorrect to say the chair-holders were made to pay "pew rents." "The chair-holders gave a donation or subscription to the funds of the church." This was no good argument. If the Ecclesiastical

Commissioners are entitled to the seat-rents of one portion of the High Kirk, they are entitled to the seat rents of all portions. The Second Division decided in favour of the Commissioners, and in view of the clear provisions of the 1860 Act, no other decision could be looked for. Lord Young's exposition of ecclesiastical parochial law as regards church-seats, kirk-sessions, &c., is particularly instructive.

If a heritor sells his lands to more than one party, the disponees are entitled to share his sittings in proportion to their respective holdings.

Seat-rents cannot be levied for the personal benefit of heritors (*Clapperton* v. *Magistrates of Edinburgh*, July 14, 1840, 2 D. 1385). The rent must be applied "to the support of the poor, or to some other appropriate pious use within the parish." Magistrates may let that portion of the church allocated to them; the money received should be applied to the cost of church repairs, and of providing for the due celebration of public worship within it. The money cannot be applied to the ordinary revenue of the burgh (*Clapperton, supra*), and the opinion has been expressed that it is only so far as money is required for the church that it is leviable. In the case of *Brechin* certain seats were in 1807 allocated to various corporations of the town. The corporations let the seats, and as the corporations decayed in importance, the revenue from seat-rents came in certain cases to be their only revenue, and were spent in an annual supper, or in some similar way unconnected with any church purpose. Ultimately, the minister of the first charge, and certain of the elders, purchased the rights of the corporations to the seats, and notice was given in December, 1886, from the pulpit, that the seats would be allocated to the then seatholders and others, and the rents would be applied to meeting the purchase-price, and keeping the seats in order. It was also intimated that when the purchase-price was paid up to the elders, and the seats were thus free of debt, the seats would be handed over to the kirk-session, to be held for the good of the congregation. Disputes afterwards arose with parties who claimed that no power to levy seat-rents had been acquired by the purchasers, and the purchasers raised an action against those parties to have them interdicted from occupying the seats without charge. The Second Division of the Court of Session

refused interdict, holding that the pursuers did not, by the purchase of the seats, acquire any legal right to allocate them as they might choose, or to exclude any parishioner from occupying any seat in the parish church (*Mackay* v. *Wood* (Banff), Nov. 7, 1889, 17 R. 38). The Lord Justice-Clerk (Kingsburgh) observed that although each corporation became a kind of trustee in 1807 for its members, holding the seats for the purpose of apportioning them among the members, they had no right to deal with the seats for purposes of general gain, and as the purchasers in 1886 could not take over the trust, which was committed to the corporations as such, neither could they by purchase acquire right to allocate sittings or to levy seat-rents.[1]

The High Church of Montrose was at one time a mensal church of the Bishop of Brechin. The parish is partly burghal and partly landward. About the middle of the last century the church was rebuilt, and the area in the new fabric distributed, one-third to the owners of land in the parish, and two-thirds to the owners of seats in the old fabric; and the expense of rebuilding the church was apportioned in the same manner. It appeared that during the last forty years the seats in the portion of the church apportioned to the owners of seats in the old building had been passed, sometimes by writings containing dispositive words, and sometimes by simple receipts for the price, and that it had been the custom to include them in the inventories of the personal estates of persons deceased. The Court held that they were *heritable* in a question between heir and executor (*Milne* v. *Wills* (Montrose), Jan. 20, 1869, 7 Mac. 406).

The seats are the property of the heritors; persons sitting therein have a right of occupancy alone. It seems scarcely necessary to observe that to padlock or otherwise secure a pew door in a parish church is utterly foreign to the theory of parish worship, which contemplates by allocation of seats merely the seemly placing of accommodation for parishioners, not the creation of private rights as against public need for accommodation. This is clearly indicated by the words of Pardovan, who says: "The keys of the seats are to be kept by

[1] This case is the subject of an article in the *Juridical Review*, vol. ii. (1890), p. 194.

Beddals, that when the proprietors are absent, such as want seats, or throng the seats of others, may be accommodated for the time. But in case the owners be so little concerned with religion as not to countenance the public worship of God, or averse to serve such as attend upon it with their empty seats, the people that want accommodation cannot be blamed to possess and occupy that void in their absence. And if the owners, or others by their order, shall offer to dispossess them violently, especially in time of divine service, they should be prosecuted, as disturbers of public worship, both before the civil magistrate and church judicatories" (bk. ii. xiii. 8).[1] The observations made on this and the preceding pages refer to sittings in parish churches only.

The bookboards of the pews, or a sufficient number of them to accommodate the members of the congregation expected to communicate, are covered on Communion Sundays with narrow white cloths.[2]

No opinion is expressed by the author of this book as to the strict liability of heritors to provide the ornamenta mentioned

[1] Pardovan previously observes: "It would look more impartial like, and resemble more that humility, love and simplicity recommended to Christians by the Apostle, and would look liker the subjects of Christ's Kingdom which is not of this world, if church members would take their seats in the church without respect to their civil character, as they do at the Lord's Table" (bk. ii. xiii. 7).

[2] It is not impossible that those white cloths are the survival of the pre-Reformation houseling cloth, "a long linen cloth held by clerks in front of the communicants when receiving the Sacrament, or sometimes laid upon a bench at which they knelt. In some cases it seems to have been long enough to reach all across the nave and aisles of the church. In a manner it took the place of the altar rail of modern times, though Communion was not necessarily given at an altar." The rail was not used in England until early in the eighteenth century. "The houseling cloth was ordinarily of linen, but on state occasions it was sometimes of silk. Its use continued long after the Reformation, and is even yet not quite extinct" (J. T. Micklethwaite, F.S.A., "The Ornaments of the Rubric" (Alcuin Club Tracts), 1898, p. 39). The old country Acts of Shetland contain the following enactment, "That none miscarry or lay down the *Cross* under a penalty of ten pounds *Scoto quoties*." Mr. Gilbert Goudie annotates this "The Cross: For summoning meetings at the church or elsewhere, or for the king's service" ("Proceedings of the Society of Antiquaries of Scotland," vol. ii., third series, p. 196). It would therefore seem that long after the Reformation the Cross may have survived among ornamenta though only of course for use as a parochial symbol for a quasi-secular purpose. Yet the survival of the use of the processional cross is curious. Such a cross in England was not kept in the church, but in the sacristy.

in this chapter, with the exception of the Table, pulpit and pews, and necessary articles for the celebration of the sacraments.

There is a distinct want in the Church of Scotland of some guidance in questions of ritual and ornamenta, always keeping in view the judicious observation of Lord Chancellor Selborne in *Mackonochie* v. *Lord Penzance*, 1881, that the object of ecclesiastical law is not so much "the punishment of individual offenders, but the correction of manners and the discipline of the Church" (L.R. 6 App. Cases, 433). It is true that the Presbyteries are charged with disciplinary powers, but the training, tastes, and varied duties of the members have as yet seldom encouraged them to deal with assured knowledge with such questions.[1]

[1] A difficulty as to ceremonies is very clearly put by Tyndale in his "Fruitful and Godly Treatise Expressing the Right Institution and Usage of the Sacrament of Baptism and the Sacrament of the Body and Blood of our Saviour Jesus Christ," written after April, 1533; printed, 1573:—

"He that, being of a lawful age, observeth a ceremony *and knoweth not the intent*, to him is the ceremony not only unprofitable, but also hurtful, and cause of sin; in that he is not careful and diligent to search for it, and he there observeth them with a false faith of his own imagination, thinking, as all idolaters do and ever have done, that the outward work is a sacrifice and service to God. The same therefore sinneth yet more deeper and more damnable. Neither is idolatry any other thing than to believe that a visible ceremony is a service to the invisible God" (Tyndale's "Doctrinal Treatises," Parker Society, 1848, p. 362). The Directory gives no precise directions as to ceremonies. It sets forth "such things as are of Divine institution in every ordinance; and other things we have endeavoured to set forth according to the rules of Christian prudence, agreeable to the general rules of the word of God; our meaning therein being *only* that the *general* heads, the sense and scope of the prayers, and other parts of publick worship being known to all there may be a consent of all the churches in those things that contain the substance of the service and worship of God."

CHAPTER VI.

CHURCHYARD.

Churchyard—a space of ground, as near as possible to the parish church, in which all parishioners have a right of interment.

"CHURCHYARDS are dormitories for human bodies," says Pardovan, "and ordinarily that spot of ground within which the church stands" (bk. ii. tit. iii. 2).

Where there is no graveyard, or one of insufficient size, the burden of providing a graveyard rests on the heritors (*Ure* v. *Ramsay* (Tillicoultry), June 5, 1828, 6 S. 916; *Heritors of South Leith* v. *Scott*, Nov. 23, 1834, 11 S. 75; *Town of Greenock* v. *Stewart*, 1777, M. 8019). If this is not done voluntarily, both the Presbytery and the parishioners are entitled to require the heritors to do so; the parishioners act by application to the Presbytery, which may, however, of its own accord move in the matter. If the deliverance of the Presbytery is disregarded, that body can select what land is needed, intimate this to the heritors generally, and to the heritor who is proprietor of the selected ground. If the heritors refuse to implement their obligations, the Presbytery will, by civil action against the heritors and kirk-session, vindicate its rights and those of the parishioners.

Parochial burying-grounds are regulated partly by statute and partly by common law.

In the great majority of parishes (exclusive of parishes erected *quoad sacra*) there is a sufficient parish graveyard. The right of interment belongs not alone to the heritors, nor to the congregation worshipping in the parish church; all who are parishioners, as residents in the parish are entitled to be buried there.

The property of the solum of the churchyard is vested in the

heritors (*Fraser* v. *Turner* (Dunfermline), Dec. 13, 1893, 21 R. 278); they hold the churchyard as they hold the church, *i.e.*, in virtue of their position as a *quasi*-corporation, but more especially they hold the ground in trust for the parishioners. It is their duty to see that the graveyard is maintained in a decent and orderly fashion, with sufficient walls—if walls are necessary—to guard against encroachment on graves,[1] and to provide convenient means of access. The kirk-session are associated with the heritors possibly in some cases as co-guardians, more usually as their representatives always familiar with the course of parish events, to see that these obligations are observed.[2]

Cattle may not graze in a parish graveyard,[3] nor can a right of way be constituted through it. It may be used for purposes of sepulture, but for no other purpose.

While every parishioner has a right of interment, no one is in theory entitled either to claim that in perpetuity a certain plot should be his burying-place alone, or that by long continued usage his forefathers and he have acquired right to interment in a certain special plot.

Erskine, in his Principles, when treating of the second head

[1] The first decree of the diocesan synod, held at Musselburgh in 1242, set forth that churchyards should be "properly enclosed and protected against wild animals." At a visitation of the parish of Auchterdirran by the Presbytery of Kirkcaldy, April 23, 1640, "the minister compleanes that the kirkyaird dykes are not built. The brethren recommends that to the heretors" ("The Presbyterie Book of Kirkcaldie," p. 173).

[2] Heritors are not owners of a churchyard in the sense of the Burgh Police Act, 1892. See *Elie Heritors* v. *Elie Police Commissioners*, July 27, 1893, Sheriff-Court of Fifeshire, 10 Scottish Court Reports, 81.

[3] "If the heritors allow the minister to pasture his cattle in the churchyard, they allow what they have no right to do; for, although the churchyard may be the property of the heritors, as every subject must have a proprietor, yet it is a property *sub modo*, and cannot be either ploughed or pastured," per Lord Hailes (*Grierson* v. *Ewart*, June 26, 1778, Hailes' Decisions, p. 800). The grass may be sold and the proceeds applied to pious uses (*Town of Greenock* v. *Stewart*, 1777, 2 Hailes, 758); but the grass or the rent for has also been held to belong to the minister (*Spence* v. *Darling* (Old Cambus), Dec. 1, 1808, F.C.). It is not to be computed as minister's grass (*Beaton* v. *Dallas*, 1734, Elchies, Glebe, 1). It is minuted in the Session Records of 1750 of Mauchline parish that "the kirkyard grass, according to use and wont, belonging to the minister especially as not being sufficiently provided in grass according to law, was rouped and set for the ensuing season at eighteenpence, which the minister gave in compliment to the poor" (Edgar, "Old Church Life in Scotland," p. 49).

"of things that fall not under commerce," says—"*Res universitatis*, things which belong in property to a particular corporation or society, and whose use is common to every individual in it; but both property and use are subject to the regulations of the society, as town-houses, corporation halls, market-places, churchyards, &c." (Bk. ii. tit. 1–2).

The right of each parishioner, in short, is but to a place to sleep in till his body has returned to dust, just as in life he had a right to his place in the market-place as a citizen. He had no property in the market-place, and he has no property in the grave. This subject was treated by Lord Stowell, when Sir William Scott, in his judgment in the very singular case of *Gilbert* v. *Buzzard & Boyar*, July 19, and November 8, 1820, and May 4, 1821, 2 Hag. Consist. Reports, 333. The husband of a lady parishioner of St. Andrew's parish, Holborn, wished to bury her in an iron coffin. The churchwardens refused permission, and an action was raised against them. In his judgment Lord Stowell summarised modes of burial from the earliest times, and quoted Sir Thomas Browne, Cicero, and other learned men, coming to the conclusion that uncoffined interments had been by no means unusual in England. "The rule of law which says," he observed, "that a man has right to be buried in his own churchyard is to be found, most certainly, in many of our authoritative text-writers, but it is not quite so easy to find the rule which gives him the right of burying a large chest or trunk in company with himself. That is no part of his original or absolute right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner. When these purposes are answered, his rights are, perhaps, fully satisfied in the strict sense in which any claim, in the nature of an absolute right, can be decerned to extend" (p. 348). Again—"The legal doctrine certainly is, and has remained unaffected, that the common cemetery is not *res unius aetatis*, the property of one generation now departed, but is, likewise, the common property of the living and of generations yet unborn, and subject only to temporary appropriation. There exists in the whole a right of succession, which can be lawfully obstructed only in a portion of it by public authority, that of the ecclesiasti-

cal magistrate, who gives occasionally an exclusive title in such proportion to the succession of some family, or to an individual who has a fair claim to be favoured by such a distinction, and this, not without a just consideration of its expedience, and a due attention to the objections of those who oppose such an alienation from the common property. Even a bricked grave, granted without such an authority, is an aggression upon the common freehold interests, and carries the pretentions of the dead to an extent that violates the rights of the living" (p. 353). Ultimately the use of metal coffins was allowed, subject to payment of an increased rate for interment.

The judgment has been frequently approved by the Scottish Courts. While, however, a parishioner has not a right of property in his lair, but only a right of occupancy till dissolution, which depends on the nature of the soil (but twenty-five years should be more than sufficient), he has undoubtedly a patrimonial interest in the place where his forefathers are laid, and that, it would seem, whether he intends himself to be laid beside them or not. In *Hill* v. *Wood*, January 30, 1863, Macph. 360, the plans of a new church for the parish of Coupar-Angus showed that the session-house and vestry were to be built over a family burial-place. The heritors whose forbears lay there raised an action of interdict against the committee of heritors, and alleged an allocation, though never formally, of from "time immemorial, at least for sixty years or thereby." The suspender was non-resident. The Court held that he had a patrimonial interest which he was entitled to protect, and that no case of necessity had been made out for occupying the burial-place, and granted interdict. Lord Cowan, who gave the principal opinion, observed, "That an heritor, who has assigned to him a portion of the churchyard of the parish as a family burying-place, has no right of absolute property in the ground cannot be disputed. The property right rests with the heritors, with whom also rests the power of allocation and regulation of the churchyard. The existence of a place of sepulture for the use of the family in the several parishes of Scotland has been recognised from the earliest times. In the statute of 1563, soon after the Reformation, care was expressly taken by the Legislature that the churches and the churchyards within the parishes of Scotland should be looked after and provided for by the Privy Council.

That led to certain regulations by the Privy Council, which, it will be seen from the Act of 1572, have been either disregarded or neglected. The Act of 1572 was passed in order to regulate matters in reference to the erection of parish churches; and in that statute there is no reference to churchyards, although in the earliest statute they were specially referred to and recognised as subjects which the heritors ought to attend to as much as parish churches. But, in a subsequent statute, the burden of taking care of the churchyards within the parishes is thrown on the heritors, inasmuch as the expense is laid on them of enclosing the ground, so as to prevent any encroachment or trespass on the places where the remains of the families of the parish lie buried. While, therefore, it cannot be said that there is anything more than a right of use in the party to whom ground has been allocated—and the proprietary right may be viewed as in the heritors as a body—still, their right is not absolute. The churchyard is held by them in trust as a place for the burial of the dead. It is for that purpose alone that they are possessed of administrative and regulative powers. Where the ground is allocated, and the right of use for that special purpose is recognised to be in any heritor and his family to whom a portion of it has been allocated, the law will not permit the ground to be arbitrarily interfered with by the heritors. Nor will it be any answer to his objection to the violation of his burial-place that a right of sepulture elsewhere in the churchyard will be awarded to him. That offer was made in this case by the heritors to Mr. Hill, and that seems to be dwelt on by the Lord Ordinary as really meeting the exigencies of the case, and destroying, to a great extent, the essential objection that Mr. Hill had to what was proposed to be done with regard to his burial-place. But I apprehend that it is to mistake the character of the right to call it merely a right of sepulture to be exercised in future. It was justly observed by Lord Curriehill in a recent case—'Where ground so allocated has been used for the interment of one's family and kindred, he is entitled to prevent their graves from being violated or disturbed, and the ground from being encroached upon, for the law goes far to save those feelings of regard which are deeply implanted in the human heart for the remains of deceased relatives.' And of the view the law takes of this kind of right,

no stronger illustration can be found or desired than occurred in the case of *Wright* v. *Lord Mansfield*, which went to the House of Lords, and was affirmed on the 17th March, 1824. In that case the suspender complained of the obstruction of his free access to a family burial-place, caused by the removal of the church and churchyard from their old site, which was within the Scone Palace grounds and the enclosure of the grounds. He sought the sanction of this Court to the proposal that this ground, which was the burial-place of his ancestors, should be surrounded with a wall, and that he should have free access to it whenever he thought fit to visit the resting-place of his relatives. That claim was resisted, but the right was recognised by the Court of Session, and the judgment was affirmed by the House of Lords. Further, I need not remind some of your lordships, at least, of the recent case we had in this Division—*Wilson* v. *Brown*, 30th June, 1859—in which Lord Wood delivered the opinion of the Court, and which was decided on the same legal view of the legal right which a parishioner or an heritor has to the burial-place of his ancestors in the parish churchyard, effect being given to that right, although it was only orally constituted. Now, in this case, Mr. Hill and his family have used this burial-place from 1798. Various of his near relatives and friends have been buried in it, and it was as much and as effectually allocated as if there had been a written title granted to him for its special use as a burial-place for his family."

Lord Benholme said, p. 373, "It is true there is no absolute right of property in such individual, the fundamental feudal right of property remaining to the heritors. But if it be not a feudal right, at all events it is a *quasi* right of property. The feudal right in the churchyard is held in solemn and sacred trust for behoof of the parties whose ancestors lie there, and who have had this churchyard divided by express or tacit allocation, so as to give each of them a very interesting right to a particular portion of the churchyard. That right involves, in the first place, the duty and privilege of seeing that no desecration is committed on the remains of the dead. It includes the right of revisiting these places of sepulture, and adorning them with such monuments as they may be inclined to erect to the memory of the dead. But further, it involves

the very interesting right that their own remains and those of their near relations shall be laid where their ancestors lie. All these rights combined together are inseparably connected with a burying-ground."

Lord Neaves further gave it as his opinion, p. 375, "Every one who has a place of sepulture which he and his family have possessed for a considerable time, has a legal interest in, a patrimonial interest, I think, as well as an interest of feeling and attachment. It is not a right of property; it is certainly not a right to sell; but it is an interest of a strong and high character. It is a right that has been protected by a special individual contract, for we all know that in the middle of extensive estates, and even of pleasure grounds, there are burial-places preserved, under certain conditions, for the use, or in reverence to the feelings, of those families who originally devoted them to that sacred purpose. These feelings the law recognises, and, founded as it is on human nature, it would be false to its own principles if it did not recognise them."

And the Lord Justice-Clerk said, p. 377, "I think that the right of Mr. Hill to this burial place, like the right of any other heritor to a separate portion of the churchyard of which he is in exclusive possession, though it is not a right of feudal property, nor perhaps a right of property in any strict or technical sense of the term at all, is yet such a right as he is entitled to defend—a right of which he cannot be deprived even by the general body of the heritors administering the affairs of the parish, except on the grounds of some absolute necessity or some such high expediency as in such cases, and in many other departments, the law considers as equivalent to such necessity. But it appears to me that, when the heritors proceed on this ground to invert the possession of burial-places within the parish churchyard, they are bound to address their minds to the consideration of the question fairly and deliberately—to weigh, on the one side, the rights and interests with which they are going to interfere, and the necessity and expediency, on the other, which they think justify the interference; but, in the present case, as your lordships have very well pointed out, nothing of the kind has been done. It is quite clear on the face of this proof, as we now have it, that the

interference of the heritors with this place of sepulture, and the proposal to erect a building on it, was a procedure taken by the heritors, or perhaps, more correctly, by the building committee of the heritors, *via facti*, without the slightest deliberation, without the least regard to or consideration of the rights of individual heritors on the one hand, or of the kind of necessity or expediency which would justify it on the other."

In *Wilson* v. *Brown*, June 30, 1859, 21 D. 1060, one of the cases referred to with approval by Lord Cowan, the allocation of Wilson's lair had been made in 1833 in an informal way by the minister of Muckhart on behalf of the heritors, and he buried an aunt of his wife there in 1833; subsequently this lair and another lair, which, in 1845, Wilson had acquired from the clerk to the heritors and the beadle, were allocated by the heritors to Mr. Gibson, a heritor of the parish. The Court held that the heritors were not entitled without necessity to make this re-allocation, and interdict was granted against Mr. Gibson. Lord Wood, who gave the leading opinion, said that, although the proceedings by which Wilson acquired his right might not have been strictly regular, "he was entitled to maintain it and to oppose the acts of the respondents by which his possession was intended to be disturbed." Lord Cowan said, p. 1065, "though the allocation to the petitioner was by these functionaries and not directly by the heritors, it is not therefore to be held to be bad; on that footing all the allocations of burial-ground that took place while this kind of delegated management subsisted by the tolerance of the heritors would be held invalid. I cannot accede to an arrangement that must lead to such a result. Such as it was, the petitioner certainly got a right of sepulture in those lairs."

Lord Kinnear (Lord Ordinary) in *Russell, &c.*, v. *Marquess of Bute*, Dec. 8, 1882, 10 R. 302, observed: "The heritors have undoubtedly very large powers of regulation and contract. In the exercise of these powers they may allocate particular portions of the churchyard as places of sepulture to particular heritors, and the heritor in whose favour such a grant has been made may acquire a patrimonial interest in the portion of the burying-ground set apart for him, of which he cannot be arbitrarily deprived. But it would be contrary to all the authorities to hold, either by express grant or use, he can acquire a right of

property which will enable him to exclude the administration and control of the body of heritors."

In *Turner* v. *The Committee for the West Church, Greenock*, February 16, 1869, 7 Macph. 538, it was held that the non-resident representatives of a family had a sufficient title and interest to raise an action to protect a family burial-ground in a closed churchyard. In *Steel* v. *Kirk-Session of St. Cuthbert's Parish, Edinburgh*, June 12, 1891, 18 R. 911, the churchyard had been closed to interments for seventeen years when the heritors were authorised to encroach upon the burying-ground in enlarging the church, no private rights or feelings of individuals being interfered with. It was observed in this case by the Lord President (Inglis), that a singular successor has no right to the place of sepulture which has belonged to the family of the former proprietor of the lands.

In the case of *Fraser* v. *Turner*, December 13, 1893, 21 R. 278, relative to the Abbey Churchyard of the parish of Dunfermline, it was held that it is within the power of the heritors who hold the property of the *solum* of the churchyard as trustees, with a duty to use it and see that it is used only as a churchyard, per Lord Young, "to compromise questions regarding its extent with conterminous proprietors, subject to the control of the Court of Session at the instance of any one having a legitimate interest." It is neither usual nor necessary to allocate the area of a graveyard as a whole, but when this is done the order of charge among the heritors in a landward parish is the same as when seats are to be allocated. A heritor is entitled to burial-place for his tenants and servants, just as he is entitled to sitting-room for them in the church.

As to objections by lairholders to heritors lowering the level of a churchyard about the walls of the church, see *Robertson, &c.*, v. *Salmon, &c.*, March 24, 1868, 5 S.L.R. 405.

A heritor is not entitled to subvert the ordinary uses of a parish graveyard. Thus, in the *Tulliallan* case, it was held by Lord Adam, Ordinary, that certain heritors and parishioners were entitled by interdict to prevent another heritor from converting the family mausoleum in an old parish churchyard into an Episcopal chapel (*Wright, &c.*, v. *Lady Elphinstone*, July 20, 1881, 8 R. 1025).

The old churchyard of Overton in this case had been the

graveyard of the parish of Tulliallan till 1672 or 1673, when a new one was formed, but the old graveyard was occasionally used, and was never abandoned or given up.

"Heritors," said Lord Adam, "hold the churchyards in trust for the parishioners, and are bound to see that they are administered for the purposes for which churchyards were instituted by the law of Scotland. I think the heritors have the fullest right of administration in connection with the churchyards and the tombstones which may be erected in them. They can prevent even the erection of a mausoleum if they think fit, or anything that interferes with the free use of the churchyard. But it is quite a different matter to say that the whole of the heritors can combine together—or that one can do it with the approval of the others—to use the churchyard for purposes foreign to it. No consent of the whole heritors can authorise such a step, because that would be a breach of trust, and that is really what this case comes to. If it is a breach of trust, then I hold that the parishioners, and I should think also those parties having land in the parish, although they may not at the moment reside in the parish, would be entitled to interfere; they are entitled to do so if there is a misuse by the heritors as trustees of the property under their charge" (*Ibid.*, p. 1028).

No one has a right to erect a tombstone or monument of any kind without the heritors' permission (*M'Bean* v. *Young*, Jan. 22, 1859, 21 D. 321), and its design should be approved by them or a committee of their number.[1] The reason for this is twofold: (1) the preservation of the reverent and decent aspect of the place; (2) to guard against the intrusion of the plot by persons other than those to be commemorated, or the undue occupation of ground suitable for interments to the effect of reducing the usual area. The erection of elaborate monuments in parish churchyards is to be deprecated, if only because if such a monument fall into a state of disrepair, and the representatives of the person commemorated by the monu-

[1] "I think the heritors have," said Lord Adam in the Tulliallan case, "the fullest right of administration in connection with the churchyards and the tombstones which may be erected in them. They can prevent even the erection of a mausoleum, if they think fit, or anything that interferes with the free use of the churchyard" (8 R. 1028).

ment are unwilling or unable to pay for its restoration, or cannot be traced, no liability for its upkeep can attach, it is thought, either to the heritors or to any other parochial authority, and the seemly aspect of the churchyard is liable to be disagreeably affected by masses of decaying stone, with undecipherable inscriptions.

The custom of erecting any tombstones, indeed, is rather sanctioned by custom than by right.

That a tombstone has remained on a graveyard for a considerable period has been held to sanction its remaining there, even though not erected by the nominal owner of the lair.

A mother erected in the Allanvale cemetery, parish of Old Machar, Aberdeen, in memory of her son, a tombstone on his grave, the ground for which had been purchased with his own funds. The stone was erected without consulting the deceased's brother, his sole next-of-kin and executor [who had taken the receipt for lair in his own name], two years after the death. Two years after the stone had been erected, the brother removed it. It was held that the mother was entitled to have the stone restored (*Wright* v. *Wright*, Oct. 20, 1881, 9 R. 15). In this case Lord Young said: "We are not required to enter on the question whether the mother could, in a question with him, have established a right to erect the stone" (p. 17). Where authority is sought to disinter a body, it is usual to apply to the Sheriff of the county in which the churchyard is situated. There is a form for such a petition in Lees' "Sheriff-Court Styles," 3rd ed., p. 161. In *Mitchell*, June 28, 1893, 20 R. 902, the First Division remitted such a petition to the Sheriff, "to inquire into the facts set forth in the petition, with power to proceed as shall be just."[1]

Heritors are not entitled to charge for lairs (*Town of Greenock* v. *Stewart*, 1777, 2 Hailes, 759). The kirk-session occasionally makes a charge under the name of charge for the use of mort-cloths. If by long custom this payment is recognised and admitted in a parish, the money received by the

[1] The mother of an illegitimate child *foris familiated*, who had been buried by friends who had a charitable interest in her, presented a petition to the Sheriff to have the body disinterred and buried elsewhere. It was held she had no title to sue (*M'Gregor*, Nov. 16, 1898, Sheriff-Court of Inverness-shire, 15 Sh. C. Reports, 38).

kirk-session must be applied to the relief of the parish poor (*Heritors of South Leith* v. *Scott*, Nov. 23, 1832, 11 S. 75; but see also *Wilson* v. *Brown* (Muckhart), June 30, 1859, 21 D. 1060).

Burials in a church are regarded as illegal (*Hamilton* v. *Heritors of Linlithgow*, 1817, Connell, *Par.*, Supplt., 107; *Kirk-Session of Duddingston* v. *Halyburton* (Duddingston), January 17, 1832, 10 S. 198, footnote; Erskine, Principles, bk. i. t. iv. § 8, footnote t. (49), 1886 ed.). (See Acts of Assembly, 1588 and 1643.) Where, as in Glasgow Cathedral, the building is under the care of the Commissioners of Woods and Forests, permission is occasionally obtained from them for an interment. There is no statutory prohibition of such interments, but heritors without doubt exercise a right discretion in refusing permission for interments in churches.[1]

When the churchyard has become overcrowded, the heritors may resolve to enlarge it or to obtain a new place of interment. The former is preferable, as, apart from all other considerations, the nature of the ground is likely to be similar to that of the present yard. If ground contiguous is not obtainable at a reasonable cost, or is geologically unsuitable by reason of its rockiness or dampness, the heritors must look elsewhere. The soil sought for should be dry (*Town of Greenock* v. *Stewart* (Greenock), M., Kirkyard, Appendix 1). It should be as conveniently situated to the church as possible. The extent of ground for either an enlarged or a new yard can only be ascertained by a calculation of the average rate of mortality of the parishioners.

A heritor in a landward parish, a portion of whose land is designated for churchyard purposes, appears to be entitled to relief from his co-heritors according to the valued rent of their respective properties, but there is no decision on the point. It has been suggested that in the case of burghal-landward parishes a reasonable and just rule of relief seems to be to allocate among the heritors *inter se*, on the one hand, and on the urban community on the other, according to their respective real rents, the price of the ground provided, in proportion to

[1] Great difficulty was experienced by Presbyteries in enforcing observance of the Acts against burial in churches. See "The Presbyterie Book of Kirkcaldie," at pp. 252, 274, and 290.

the extent to which each individual heritor on the one hand, and the urban community on the other, obtains or requires an allocation of the ground, deducing this rule from the principle of assessment adopted by the House of Lords in 1802 in deciding the *Peterhead* case regarding the rebuilding of a church (D. 241; *Harlaw* v. *Merchant Maiden Hospital*, H. of L., 1802, 4 Paton, 356).

An extended or new graveyard may be designated by the Presbytery, or by constructive designation, such as use for forty years, or a clear intention to destine it for the burial of parishioners (but the case of *The Laird of Philorth* v. *Heritors of Rathan*, June 28, 1666, M. 5620, may be consulted). When the Presbytery pronounce a designatory deliverance, a copy of this duly certified, should be preserved among the records of the kirk-session.

There is a broad distinction between a public parochial burying-ground, whether attached to the parish church or in some other situation, and a *cemetery*, which, although in one sense public, is established by private parties for their own profit and emolument.

None of the statutes cited "apply to the case of a cemetery established by private parties, and the common law rules regarding parochial burying-grounds seem only applicable to the case of a cemetery, in so far as they form part, or may be held to form part, of the contract entered into between the proprietors of the cemetery and those who purchase lairs or the right of interment therein. Indeed, the whole rights, whether of proprietors or of lairholders, in a cemetery may be said, with strict accuracy, to arise *ex contractu*, the one party giving and the other receiving exactly what is bargained for, and nothing more" (Lord Ordinary (Gifford) in *Cunningham et al.* v. *Edmiston et al.*, June 23, 1871, 9 Mac. 869).

An excambion may be effected; a heritor giving a portion of ground and taking the old graveyard in exchange; but the old graveyard must not be used for secular purposes. "No one has a right to break up the ground of interment to the remotest period of time There the dust must for ever remain" (*Mansfield* v. *Wright* (Scone), H. of L., 1824, 2 Shaw, App. 104).

The law as to the excambion of churchyards was discussed in the *Rothesay* case. There the heritors had executed a contract of excambion, by which they conveyed to one of their number,

subject to certain conditions as to excess, a ruined chapel, situated in the middle of the parish churchyard, which had, from time immemorial and until recently, been used as a place of sepulture, together with the *solum* upon which it stood, in exchange for a large piece of ground contiguous to the churchyard. It was held that the conveyance was *ultra vires* (*Russell, &c.*, v. *Marquess of Bute*, Dec. 8, 1882, 10 R. 302).

The Lord President (Inglis) observed: "I am not to be understood as saying that an excambion or exchange of a portion of a churchyard for other more convenient and more extensive ground, with a view of improving the churchyard, will in all cases be unlawful. I can quite understand circumstances in which such an excambion might be very properly carried out by the heritors. For example, if there was a portion of the churchyard inconveniently situated for the purpose of burial, and which had not been used for burying for a very long period —say for a century—and additional land elsewhere was offered in exchange for it—by which I mean on the other side of the churchyard—I am by no means prepared to say that the heritors might not lawfully make such an exchange. Or supposing that there was ground embraced within the walls of the churchyard which never had been used for burying purposes, and was not well suited for the purpose, there again an exchange for other and more suitable ground would, I think, be within the power of the heritors" (*Ibid.* pp. 309, 310).

Lord Shand pointed out that had the heritors allocated to Lord Bute the ground referred to as a place of sepulture, this would in his view have been quite competent, and any objection would have been met by the fact of the addition to the burying-ground.

Private burial-grounds are not unusual in Scotland. They are not reckoned *inter res religiosas* (Craig, "*Jus Feudale*," l. i. dieg. 15, § 11; Bank, i. 3, 12; D. 279). Where the burial-ground is within an estate, it is usual, in any disposition of the lands, to insert a clause declaring the burial-ground to be the inalienable property of the disponer, and reserving right at all times to him and his heirs to obtain access for interments or otherwise. In the case of *Scone*, an action to enforce right to access originated in a summary petition to the Sheriff (*Mansfield* v. *Wright*, 1824, 2 Shaw, App. 104).

THE TRANSFER OF A GRAVEYARD TO A PARISH COUNCIL.

By the provisions of the Local Government Scotland Act, 1894, § 30 (6), the heritors of any parish may transfer the property of any churchyard which they hold to the parish council, and the parish council, if they accept such transfer, shall thereafter hold such churchyard for the same purposes and subject to the same rights for, and subject to which it was held by such heritors, and shall have and may exercise and perform all the powers and duties before such transfer vested, in or imposed on such heritors in relation to the churchyard transferred (except any power or duty of enlarging or extending such churchyard and assessing for the cost of such enlargement or extension), provided that the costs of maintenance and management of such churchyard after such transfer shall, if and so far as they require to be defrayed out of any rate, be a charge upon the poor rate: and provided also that such transfer shall not alter or transfer any liability to assess for the repayment of any debt or the incidence of any assessment levied for such repayment. After such transfer the powers and duties transferred shall no longer be exercised and performed by such heritors.

Advantage of this provision has been taken in many parishes. Questions, however, have sometimes arisen as to whether, in the case of parishes where the graveyard was in use before the Reformation, the heritors are the sole custodiers, or whether the minister and kirk-session have any say in the matter.

Many churchyards were unquestionably in use for the interment of parishioners long prior to the Reformation. At that time the churchyards of parish churches were regarded as the property of the local clergy, and fees were paid them for interment. Such is still the law of the Church of England. The position of the question in the Church of Rome may be judged from Smith's "Elements of Ecclesiastical Law" (adapted specially to the discipline of the Roman Catholic Church in the United States, but containing a sound digest of Romish law and practice), 1887, p. 434. "Rights of parish priests relative to funerals.—The rights on this head may be reduced chiefly to two—namely, the right—1, to bury or have a burying-

ground (*jus sepeliendi*); 2, to receive certain emoluments or burial dues (*jura funeraria*), &c., &c."

After the Reformation we find provision made for the upkeep of pre-Reformation graveyards in Scotland in the Act, 1563, c. 76 in 1682 ed. of statutes; c. 12 in Thomson's Statutes:—

"It is statute and ordanit for uphalding and reparelling of paroch kirkis and kirk yairdis of the samin for burial of the deid within this realme. That the Lordis of Secreet Counsall put ordure thairto and consult how the samin salbe done and uphaldin in tymes to cum" (Thomson, ii. 539).

The Council appear on 13th September, 1563, to have made an order for "bigging, mending, and reparatioun of paroche kirkis," but nothing is said about churchyards. This order was ratified by the Act, 1572, c. 54, 1682 ed.; c. 15, Thomson's Statutes, iii. 76. In 1597 another Act was passed, which "decerns and ordains that all parochineris of everie paroche kirk within this realme, build and repair the kirkyard dyikis of thair awin paroche kirk with stane and mortar to the heiche of twa ellis, and to mak sufficient stillis and enteres in the saidis dyikis to pas to the kirk and kirkyard thereof" (Act, 1597, c. 232, 1682 ed.; c. 3, Thomson's Statutes, iv. 131). "Parishioners are, by 1597, c. 232," says Erskine, "ordered to repair the churchyard walls of their own parish and, 1617, c. 6, they must provide communion cups, lavers, and other utensils necessary for the administration of the sacraments. But now by long custom this burden, at least that of repairing church and churchyard walls, is transferred from the parishioners and parson to the landholders, who must bear the expense of repairing and even rebuilding the parish church according to the value of their respective lands." Institutes, Nicolson's edition, i. 588, 589. Stair observes (Institutes, More's edition, i. 200)—"Kirks and kirkyards are not only allodial without an acknowledgment of a superior, but they are destined for pious purposes, and are ordained to be upheld and repaired (Parl., 1563, c. 76)." If before the Reformation churchyards belonged to the Church, and after the Reformation they were transferred to nobody, is the property still in the Church, as represented by its local court, the kirk-session, and the minister, as successor of the pre-Reformation parson? Stair says (ii. 3. 39), "They have no casualties which were

mortified to the Church which dieth not but abideth as an incorporation," and it might seem that an evidence of this ownership is seen in the parson's right to the present day, to cut the grass in the churchyard and to hinder anyone else from doing so. Against this, Lord Hailes' view of the law may be cited. In 1777 the Court of Session decided the case of the *Magistrates of Greenock* v. *Shaw Stewart*, when it was held that an additional plot of ground for burying-ground must be furnished by the heritors. Lord Hailes reports his own observations as follows:—"This question could never occur in our ancient law; for, as the Popish clergy reaped great emoluments from burying the dead, they were always ready to furnish burial ground. There is no doubt that the churchyard belongs to the heritors, *subject* to the single burden of interring the dead. The grass of it is theirs, and the trees planted in the churchyard are theirs. They have connived at the kirk-session drawing the emoluments arising from what is called layers, because this is applied by the kirk-session for the use of the poor, for whose maintenance the heritors are ultimately liable. I think that the heritors must furnish the ground for an additional churchyard, and that the ground so furnished will continue theirs, and that they will have all the profits arising from it" (Hailes' Decisions, 1826, ii. 758). But this decision is not so authoritative as it at first seems. The parish of Greenock, to the churchyard of which an addition was being made, was *post*-Reformation. See Connell on "Parishes," 1818, p. 5. Such a churchyard, as it was provided by the heritors, undoubtedly belongs to the heritors. As to the grass and trees belonging to the heritors, Lord Hailes undoubtedly goes too far. Sir George Mackenzie is said by Brown, "Supplement to Dictionary of Decisions," 1826, Vol. V. p. 414, to state this doubt—"*Query*—To whom a coal found in a churchyard or trees growing there will belong—whether to the heritors, the poor, the patron, or the minister?" Forbes' Institutes, p. 86, says, "*the minister has right during his incumbency to the churchyard*, and may shear the grass in the churchyard but not cut the trees." Pardovan in his "Collections," p. 174, says, "the only right that ministers have to the grass growing in the churchyard is that they may cause their servants cut it, and hinder others from doing so."

Brown, v. 414, observes: "It is said that there is a decision

of the Court of Session finding that the tree in a churchyard belongs to the heritors, but I cannot find any such collected." He reports a case, *Hay and Low* v. *Williamson*, 2nd December, 1778, which was one between the minister of Arngask and two of his heritors, where it was held "that the minister was only entitled to cut the grass in the churchyard, but not to pasture his bestial thereon, and therefore discharged him from doing so." See also the case of Old Cambus, *Spence* v. *Hall*, December 1, 1808, F.C. Mr. Nicolson, in a note (*d*) i. 589, to the paragraph cited above from Erskine's Institutes, says, "the management is in the hands of the heritors, *subject, however, to a control,* the extent of which is not well ascertained, by the Presbytery, and ultimately by the Court of Session." Duncan, "Parochial Ecclesiastical Law," suggests, p. 265, that the radical right of ownership in the ground may possibly be regarded as belonging to *the Church,* that vested in the body of heritors, or the kirk-session, being of a fiduciary character merely, to the effect of enabling them, *qua* guardians, to protect and administer the subject. He quotes *Cunningham* v. *Alex. Cunninghame,* 5th December, 1778; this was a case between Cunningham and his relatives as to Cunningham's right to cover his wife's grave with a gravestone. The relatives objected, on the ground that it amounted in effect to withdrawing so much of the ground from being employed for the purpose of burying. After sundry procedure, Lord Covington remitted to the Sheriff with the instruction "that he find that the property of the churchyard, as of the church itself, belongs to the heritors having property lands in the parish as part and pertinent of their property lands, *for the interment* of those in their respective families and other inhabitants upon their several properties; and those who neither are heritors nor reside within the parish have no right to be buried, or to bury those of their families who did not reside in the parish, in the church or churchyard without the consent of the heritors" (*Ibid.*, p. 416). Duncan emphasises Lord Covington's opinion that the property of the churchyard belongs to the heritors *for the interment* of their families. He also cites *Heritors of South Leith* v. *Scott*, 11 S. p. 78, where Lord Medwyn said, "It is only since the Reformation that the burden of maintaining churches and churchyards, and furnishing additional ground for the latter,

where necessary, has been laid upon the heritors, and they have, in consequence, come to have a right *of a qualified nature* in these subjects." In *Mansfield* v. *Wright*, 1824, 2 Shaw, App. 104 (not rep. in C. of S.), it appeared that authority had been obtained from the Presbytery of Perth in 1784 to remove the church and the churchyard of the parish of Scone, situated on the Moothill, belonging to Lord Stormont. A new church having been built elsewhere, surrounded by a piece of ground which was enclosed and used as a churchyard, authority was again obtained from the Presbytery to take down this church and build it in another part of the parish. In this action, raised to vindicate a right of access to the last-mentioned burial ground, Lord Craigie remarked, p. 107, "From 1784 to 1804 every person dying in the parish had right to be buried there; but in that year a new churchyard was furnished, and the ground of the former one being no longer occupied, returned to the Earl free and unburdened, excepting that it should not be disturbed till the remains of the bodies there interred should have returned to their original dust."[1]

As an instance of the rights of *quasi*-ownership of the *kirk-session* in a churchyard, reference may be made to the monopoly enjoyed by the kirk-sessions in keeping mort-clothes and letting them out for hire within the parish. See *Parish of Kippen*, M. Dict. 8013, and *Burgh of Dumfries*, *ibid.* 8018.

In recent cases the *monopoly of ownership* by the heritors has not been recognised by the Court, though it has been repeatedly claimed. Thus the heritors of Muckhart pled in 1859 that the churchyard was "under the management of the heritors who had the sole power to regulate its use" (21 Mac. 1061); but Lord Wood, in giving the decision of the Court, was general in his remarks—viz., "that the heritors *have a large superintending power* and control in the distribution of lairs in the parish churchyard, so as to make it available for the use of the parishioners, . . . cannot be disputed. But it is unnecessary to inquire with any anxiety, or to define with precision the limits of their power, because in the present case, if it be the fact," &c. (*Wilson* v. *Brown*, June 30, 1859, 21 Mac. at p. 1064). As to a conveyance granted by heritors being *ultra vires*, there is

[1] Duncan on p. 265 refers to certain alleged observations of Lord Kaimes in the *Greenock* case, but the reference is a mistake.

the *Rothesay* case of *Russell* v. *Lord Bute*, December 8, 1882, 10 R. 302, where Lord Kinnear, as Lord Ordinary, said, pointedly, "*the heritors are not proprietors of the churchyard* in any sense which will enable them to give to others a feudal right of property in the *solum* of the whole or any part of it. They are *administrators* of the churchyard for parochial purposes. But they hold it as trustees, and the alienation of a part of it appears to me to be a breach of trust." The graveyard of Rothesay is pre-Reformation. On the other hand, Lord President Inglis observed in *Steel* v. *Kirk-Session of St. Cuthbert's*, 18 R. at p. 917, "the position of the kirk-session in regard to the church and burying-ground of any parish in Scotland may be described as administrative merely. But the position of the heritors is different. They are the proprietors of the church and of the churchyard."

A memorial for the opinion of Mr. John Rankine, Q.C., Professor of Scots Law in the University of Edinburgh, was submitted on behalf of the minister and kirk-session of a parish the graveyard of which was in use before the Reformation, and counsel's opinion was asked on the following points:—1, Does a distinction exist in law between the ownership or administration of *pre*-Reformation and *post*-Reformation churchyards? 2, Do the heritors of a parish having a pre-Reformation churchyard "hold" such churchyard exclusive of the parish minister and (or) the kirk-session, and can they, without the consent of either the minister or kirk-session, transfer such a churchyard to a parish council? 3, Heritors, not being a corporation, can they validly convey a graveyard, without the consent of their whole number? 4, In the event of the churchyard of A being transferred to the parish council, what rights of administration over the churchyard would belong to the minister or kirk-session, and what would be their remedy if such rights were not admitted by the parish council?

The writer is permitted by Mr. Rankine to print his Opinion.

1. It is, I think, the fair, though not the only possible, reading, of the opening words of the Local Government Act, 1894, § 30 (6), that the Legislature assumed the property of the churchyard of every parish in Scotland, which possesses a churchyard, to belong to the heritors of the parish in trust for certain well-known purposes. It is, moreover, in my opinion, clear from a consideration of the authorities

referred to in almost exhaustive detail in the Memorial, that the question whether the ownership of the heritors extends to pre-Reformation as it undoubtedly does to post-Reformation churchyards, has not been raised in any recorded form; and that in practice no distinction, springing from the date of their origin, has been made in regard to the management of churchyards by the heritors. It may, nevertheless, be true that such a distinction does and ought to exist; and the history of the ownership of churchyards is so obscure that in my judgment the memorialist has acted only in the exercise of ordinary prudence and caution in seeking legal advice before allowing a transfer to take place which must be irrevocable and may be fraught with important consequences to the parish. I have found the question to be attended with much difficulty; but in the end I have reached the conclusion that the first query put to me falls to be answered in the negative.

It is, I think, a principle of our law that no land in Scotland can be without an owner, even if it be a *res sacra* or *res religiosa*. Again there seems to be no trace in historical times of lands or other heritages in Scotland being held by the church as a corporation directly in property: so called church property has all along been held in each locality by a local trustee or by local trustees. Further, I think that, not only in the Canon Law, but also in our Municipal Law, as well as in that of England, the churchyard—as its name indicates—has all along been regarded as an adjunct of the church, and governed by similar rules in so far as difference of physical constitution and the use to which they were respectively dedicated would allow. It is, I think, well established that church and churchyard in pre-Reformation times belonged (subject to certain religious trusts and to certain ecclesiastical supervision) to the rector of the parish; and of this the present right of the stipendiary minister to cut and take away the grass growing in the churchyard may be a modern reminiscence. It is certain that for a long period after the Reformation, rectors or "parsons" still existed, though the active incumbent came in most cases to be a stipendiary; and that it was not till 1690 that "parsons" finally disappeared by force of an Act of Parliament. There is, so far as I am aware, no distinct authority in regard to the mode in which "parochiners" came to undertake the whole burden of maintaining the parish churches, which burden had theretofore been shared with them by the parson, whether an individual or a religious house; or as to the time at which these "parochiners" were fixed down as the body, which came to be known as the heritors of the parish. But in some way a change took place and with it arose the co-relative rights of the heritors in the whole

area of the church. In my opinion the transfer of the churchyards must be presumed to have marched *pari passu* with the transfer of the churches. And it is not surprising that no documentary trace of the process now exists, seeing that both subjects are exempt from the feudal law and might pass without charter or sasine. In addition to the authorities cited in the Memorial, I may refer to the Act 1690, c. 20; Thomson's Acts, V. 278 A.; Ure, 6 S. 916; Wright, 8 R. 1025; Bain, 12 R. 62; Fraser, 21 R. 278.

2. I think so, for the reasons given above.

3. The body of heritors has in many, perhaps in all respects, the privileges of an administrative and an executive body. In particular it speaks through a majority voting at a properly called meeting, and it is not necessary that there should be unanimity. It suffices that the resolution come to is not *ultra vires* (Boswell, 13 S. 148). In the present case this proviso does not arise, seeing that direct parliamentary authority can be pleaded for anything the heritors may do within their statutory powers.

4. I am not aware that a kirk-session has ever had any direct control over or part in, the administration of the churchyard. It is true that the servant of the kirk-session has not uncommonly the care of the ground entrusted to him so far as manual labour on it is concerned. But this is purely by a delegation which might at any time be withdrawn. Ever since the Reformation, the proper protector of the ground, in the interests of religion and decency, has been the bishop or the presbytery of the bounds. So that if the minister or an elder or any parishioner were to be dissatisfied with some illegal inversion of the uses to which a churchyard can alone be put, his proper course would be to put the Presbytery in motion, and also in case of emergency to seek interdict in the Sheriff-Court or suspension and interdict in the Court of Session.

The Opinion of
(Signed) JOHN RANKINE.

EDINBURGH, 1*st November*, 1897.

The transfer by the heritors will be sufficiently effected by a minute of meeting resolving and purporting to make such transfer, duly intimated to and accepted by the Parish Council, whose letter of acceptance should be engrossed in the minute-book of the heritors.

That the area of a graveyard is exhausted may be recognised by a resolution of the heritors, or by direction from the Presby-

tery to the heritors, to provide a new graveyard; but by the provisions of the Burial-Grounds (Scotland) Act, 1855, another method of procedure became lawful. For the purposes of this Act parishes are divided into two classes:—

(1.) Parishes partly within and partly without the limits of a burgh sending or contributing to send a member to parliament.

(2.) Other parishes.

In the first class, which necessarily includes all burghal-landward parishes, any two members of the parochial board of the parish, now the Parish Council, *or* any ten members assessed for relief of the poor within such parish, *or* any two or more householders residing within one hundred yards of any burial-ground (or proposed burial-ground) within such parish, may apply to the Sheriff of the county in which the parish or the greater part of the parish is situated, to have it determined whether the parish is within or without the limits of the burgh for the purposes of the Act, which the Sheriff may do after giving notice by advertisement in the *Edinburgh Gazette*, and such newspapers of local circulation as he may deem fitting; and, after hearing any parties having interest, the Sheriff's interlocutor is declared to be as valid as if set forth in the Act. It is not competent to make any new application to the Sheriff for his determination in respect to a parish till after the lapse of five years from his last interlocutor (§ 3).

In the second class, any of the parties mentioned above in the foregoing section may present a petition to the Sheriff of the county within which a burial-ground or proposed burial-ground is situated, setting forth that a burial-ground within such parish or such distance (*i.e.*, 100 yards of petitioning residents) is or may be dangerous to health, or offensive or contrary to decency. The Sheriff shall thereupon fix a day, not less than ten nor more than twenty days after such petition is presented, for inquiring into the allegations of the petition, and appoint intimation to be made by advertisement in the *Edinburgh Gazette*, and in such newspapers of local circulation (not necessarily local newspapers, if it is thought others are likely to be as fully circulated in the locality referred to in the petition; but *prima facie* local newspapers are the most suitable). On hearing the petition the Sheriff will permit all parties whom he judges to

have an interest, to appear and be heard in such manner as he shall deem fitting, and if, on such hearing, he is of opinion that any of the allegations in the petition are true, he will pronounce an interlocutor to that effect, and transmit a copy to one of the principal Secretaries of State. For circumstances in which it was held that a churchyard was offensive, and contrary to decency, and ought to be closed, see *Petition, Ayr Town Council*, Feb. 20, 1890, 7 Sh. C. Reports, 196. It is not competent to present another such petition (with reference, that is, to the same ground), except with concurrence of the Procurator-Fiscal,[1] till the lapse of five years from the date of any petition,[2] to the like effect having been dismissed (§ 4).

If the graveyard is to be closed, this will be effected by an Order in Council fixing the date of the closure, due preliminary notice being given of the Secretary of State's recommendation as to closure, by intimation to the Crown Agent in Edinburgh and the Sheriff-Clerk of the county in which such burial-ground is situated, and by notice in the *Edinburgh Gazette*, and notice fixed on the doors of the church of, or on some other conspicuous place within, the parishes affected, one month before the proposed Order is considered by the Crown (§ 5). After the date of closure, any person interring, or assisting or permitting any interment, in any such burial-ground (unless a special licence has been obtained from a principal Secretary of State) (§ 8), is liable, for each offence, to imprisonment for a period not exceeding two calendar months, or to a penalty not exceeding £20 (§ 6). No Order in Council is to be deemed to extend to any burial-ground used solely by the Society of Friends (in the Act referred to as "the people called Quakers"), or by Jews, or to a private non-parochial burial-ground, unless such ground is expressly mentioned in the Order (§ 7).

When any burial-ground is closed by Order in Council, it is the duty of the Parish Council forthwith to provide a suitable and convenient burial-ground for the parish, and to make arrangements for facilitating interments therein; if this is not

[1] In the case of a burgh the Procurator-Fiscal of the burgh under the meaning of the Act, in any other case, the Procurator-Fiscal of the county in which the parish is situated, would be the proper person.

[2] *I.e.*, the date of the interlocutor dismissing the petition.

done within six months of the Order, the board, or any ten or more persons assessed for relief of the poor in the parish, or any two or more members of the council, may apply by summary petition to the Sheriff, to have a suitable portion of land designated for the purposes of a burial-ground. The Sheriff will examine such witnesses and make such inquiry as he thinks proper—keeping a note of the evidence adduced; and, if he thinks fit, he will designate and set apart such portions as he may deem necessary of any lands in the parish suitable for the purpose; such designated portion must not be part of any policy, pleasure-ground, or garden attached to any dwelling-house, or nearer than a hundred yards to any dwelling-house, without the consent, in writing, of the owner of such dwelling-house.[1] Some days, at least, elapse between the Sheriff's intimation of the portion of ground he intends to designate and the actual designation, for ten days' notice must be given to the owner of the lands, that he may be heard for his interest before the designation is actually made. From the Sheriff's judgment an appeal may, within fourteen days of its date, be taken to any of the Lords Ordinary of the Court of Session, whose decision is final (§§ 10, 11). See *Bain* v. *Lady Seafield*, *infra*. As to powers of Sheriff or Sheriff-Substitute, see Lord Deas's observations in *Fulton* v. *Dunlop*, May 31, 1862 (Largs), 24 D. 1032.

Even without an Order in Council closing an old burial-ground, a new one may be provided by the Parish Council, Upon the requisition in writing of ten or more persons assessed for relief of the poor, or of any two or more members of the Parish Council, the inspector of poor of any parish not within burgh, or the town-clerk in the case of a parish within burgh, is bound to convene a special meeting of the Parish Council of the parish for the purpose of determining whether a burial-ground shall be provided under the Act for the parish, and if a majority of such a meeting shall so resolve, a new burial-ground falls to be provided in the same manner as if an old burial-ground had been closed by Order in Council. If the Parish Council fail to provide a new burial-ground within six months

[1] Unless the ground designated is already a cemetery (§ 11), which may be read to mean a non-parochial burial-ground.

of the requisition, the procedure is the same as in the case where the burial-ground has been closed by Order in Council—viz., by summary petition to the Sheriff (§§ 9, 10).

Any ground required for forming a burial-ground under the Act, or for making additions to it when formed, may be purchased from a cemetery company, subject to the rights in vaults and graves, and other subsisting rights which may have been previously granted in the ground; or, in lieu of providing a burial-ground, the Parish Council may contract with any cemetery company, or persons having title to the cemetery ground, for the interment in such cemetery or cemeteries, either in an allotted part or otherwise, on such terms as the council may think fit, of the bodies of persons who would have had a right of interment in the burial-ground of the parish had there been one provided (§ 12).[1]

Parish Councils may unite to provide one common burial-ground for the common use, in which case the councils of the parishes will, for the purpose of providing and managing such one burial-ground, and taking and holding land for the same, act as one joint-board, with joint-office, clerk, &c. (§ 14).

When the new burial-ground is provided, the "parishioners and inhabitants" (the significance of the former one being apparently still further restricted) of each parish have the same rights of sepulture therein as they would have had in their parish burial-ground (§ 15); and the burdens upon, and liabilities attaching to, the closed burial-ground, attach to the new ground, and its revenues are liable for them "in like manner as the revenues of the burial-ground so closed were liable."[2]

The Parish Council has the management, regulation, and control of the burying-ground: it may, with the sanction of the Sheriff, appropriate a part of the ground (not exceeding one-half) specially for sale to parties; they may dispose of the exclusive right of burial, either in perpetuity or for a limited period, and also of the right of constructing any chapel, vault,

[1] By § 13 the Land Clauses Consolidation (Scotland) Act, 1845, is, with certain exceptions, declared to be incorporated in the Act. By § 25 the provisions of the Cemeteries Clauses Act, 1847, with reference to the protection of the cemetery, are also incorporated.

[2] § 16. Properly speaking, there was no revenue derivable from a parish graveyard, and the burden of maintenance was upon the heritors.

or place of burial, with the exclusive right of burial therein in perpetuity or for a limited period, and also of the right of erecting and placing any monument, grave-stone, tablet, or monumental inscription in such burial ground (§ 18).

The limitation as to the appropriation of not more than one-half of the churchyard has been repealed. By Act 44 & 45 Vict. c. 27, it was provided that the provision in § 18 should not apply to any additional burial-grounds provided by the Parochial Board, "if the Sheriff, having regard to the requirements of the parish, or united parish, is of opinion that the said provision should not be enforced." This Act, and the proviso of the 18th section of 1885, were repealed by the Burial Grounds (Scotland) Amendment Act, 1886 (49 Vict. c. 21), on the narrative that "it has been found by experience that it is unnecessary and inconvenient that the power to sell exclusive rights of burial should be limited to one-half of any burial-ground."

The Council may make arrangements for facilitating the conveyance of bodies of the dead to the burial-place (§ 19), and provide mortuaries, subject to regulation by the Secretary of State (§§ 20, 21); it may enclose, lay out, and embellish the burial-ground "in such manner as may be fitting and proper" (§ 23).

The Parish Council, subject to the Sheriff's approval, charge such fees for interments as they think fit. A printed table showing the fees must be affixed to and at all times continued on some conspicuous part of the burial-ground (§ 24), generally the gate. Such expenses as are not met by the price of plots sold exclusively, or fees for interment, are raised by assessment levied in the same way, and with the same power, by the Board as the assessment for relief of the poor (§ 26). The Council may borrow money, and charge future assessments with the payment of such money and interest, but in addition to the yearly interest, one-twentieth of the principal sum borrowed must be repaid annually, until the whole is discharged (§ 27). Of course the interest will be reduced proportionally.

A register book is kept by an officer appointed by the Council to the duty, in which shall be registered all burials, distinguishing in what parts of the burial-ground the several bodies are buried; where the burial-ground is used for more than one parish, the register is to be kept or indexed so as to facilitate

searches for entries in such books, in respect of bodies from the several parishes,[1] but it seems advisable that even where the burial-ground is for the exclusive use of a particular parish the register should be indexed.

It has been held that the provision that no ground not already used as, or appropriated for, a cemetery, shall be appropriated as a burial-ground or as an addition to a burial-ground under the Act, nearer than one hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house (§ 11), has no application to the erection of a mausoleum by a private person on ground belonging to him contiguous to a churchyard, as there was no appropriation of ground for a burial-ground, or addition to a burial-ground, under the Act, and interdict was refused against the erection of such a building at the instance of the proprietor of a house situated within one hundred yards of the proposed site (*Bain* v. *Lady Seafield*, Nov. 6, 1884, 12 R. 62).

[1] Such register books, "or copies or extracts purporting to be thereof," are receivable in all Courts as evidence of the burials entered in such register.

CHAPTER VII.

MANSE—GLEBE—MINISTER'S GRASS.

"Manse appears originally to have signified a portion of ground, from Low Latin *mansa*, a farm, derived from Latin *mansa*, fem. Cf. *mansus*, pp. of *manere*, to dwell."—SKEAT. The manse as a dwelling for parochial clergy appears to have been introduced in Scotland about the thirteenth century.

THE 12th canon of the code of canons enacted by Provincial Councils of the Scottish Church between 1237 and 1286, has a proviso for "a proper parsonage-house to be built near every church within a year's time;" and the 12th statute of the Provincial Council of 1557, held at Edinburgh, provided that every curate in charge of a parish church should have a manse and garden, with a stipend of twenty merks annually in the dioceses of Aberdeen, Moray, Ross, Orkney and Caithness, and twenty-four merks in the other dioceses.

Under the existing law ministers of a burghal parish are not entitled to have a manse provided for them by the heritors.

Ministers of a landward parish are entitled, under the Act 1663, c. 21, to have manses. The law on both points is not open to doubt.

Ministers of a burghal-landward parish claim a right to a manse under the Act 1649, c. 45, and reading this Act as practically incorporated in the later 1663, c. 21, their right, though only after many decisions, has been admitted—Lord Mackenzie, in the *Elgin* case, 1841, saying: "There can be no doubt that in a parish partly burghal and partly landward the heritors are liable to provide a manse. This was settled by the decisions in the cases of *Dunfermline* and *Ayr*, and must therefore be considered a shut point" (*Magistrates of Elgin* v. *Gatherer*, Nov. 17, 1841, 4 D. 37). The cases referred to are *Minister* v. *Heritors of Dunfermline*, 1805, M.; *Manse*, App. i., aff., 1812,

5 Paton, 593; *Magistrates of Ayr* v. *Auld*, June 16, 1825, 4 S. 99; reversed 1827, 2 W. and S. 600.

Lord Moncreiff (Lord Justice-Clerk), in the *Annan* case, confirms this: "It is conceded that the minister of a parish partly burghal and partly landward is entitled to be provided with a manse, and if so, that his right rests on the statute 1663, c. 21" (*Downie* v. *M'Lean* (Annan), Oct. 26, 1883, 11 R. 51).

Where there are two clergymen in one parish—*i.e.*, where the charge is collegiate, only the first minister is entitled to a manse. Lord Auchinleck, in 1769, put the matter in a very clear form: "It is a general regulation that ministers are to have manses; but it does not follow, if there are many ministers in a parish, each minister is to have a manse. I consider a second or third minister no more than an assistant, and not entitled to a manse" (*Heritors of Elgin* v. *Troop* (Elgin), 1769, M. 8508; 1 Hailes, 283). Yet the case of a second minister having a manse, where the first minister has none, has been referred to within recent years. In *Robbie* v. *Meiklejohn*, Dec. 19, 1868 (7 Mac. 296), in the Registration Appeal Court, Lord Ardmillan said: "Let me suppose the case of a double charge, where the first minister has £400 and no manse, and the second minister has £200 with a manse, and where, on the death of the first minister, the second minister steps up into the vacant place, and consequently loses his manse. Is he not to be registered because his title to the manse is defeasible at any moment by the occurrence of an event which is entirely beyond his control? I could never so hold." There does not seem to be any parish in Scotland where such a state of things exists. There are at present eighteen collegiate parishes, but in all, save two—Elgin, and St. Cuthbert's, Edinburgh—the charges are distinct and separate from each other, so that, on the first becoming vacant, the minister of the second cannot pass to the first without being specially elected and admitted to it. In Elgin and St. Cuthbert's, Edinburgh, where the minister of the second charge steps into the place of the minister of the first charge when it becomes vacant, the second charge has a glebe but no manse attached to its benefice. There is, however, one case, that of Hamilton, where the minister of the second charge has a manse, and the minister of the first charge has not, but

there the charges are quite distinct and separate as above mentioned.[1]

On the same principle which indicates that the church of a parish should be within the parish, the manse should be within the parish. The convenience of both minister and parishioners is thus ensured. It is believed that the occasional modern practice of ministers residing beyond the bounds of their parishes is entirely contrary to the theory and practice of parochial ecclesiastical administration, which should not be departed from except for very exceptional causes. It is essential to the preservation of the parochial character of the Scottish church that ministers (whether of parishes *quoad omnia*, or *quoad sacra*) should live among their parishioners. The indefensible practice referred to is most noticeable in large towns where there are no manses, but it may be observed that the clergy of the Roman Catholic Church in Scotland in every case reside within their "missionary districts" or parishes, and there seems no reason why any contrary practice should be sanctioned by the Church of Scotland.

The obligation to provide and maintain a manse is a burden upon the heritors, in the senses in which it has been stated the word is applied in landward and burghal-landward parishes. Persons merely occupying seats in the parish church are not liable (*Farie* v. *Leitch* (Rutherglen), Feb. 2, 1813, F.C.). The burden is a parochial, not a public one, see *Kinross* case (*Bruce Carstairs* v. *Greig*, 1773, M. 2333, aff. 3 Paton, 675; *Nicoll* v. *Hunter* (St. Leonard's), Feb. 27, 1829, 7 S. 479).

In a parish partly landward and partly burghal, the magistrates, as representing the community of the burgh, are primarily liable, along with the heritors of the proper landward district, in the expense of maintaining a manse, and the burden cannot be laid directly on the individual proprietors within the burgh territory (*Lockhart* v. *Lockhart* (Lanark), Jan. 24, 1832, 10 S. 243; *Magistrates of Elgin* v. *Gatherer*, Nov. 17, 1841, D. 25). *Quære*, Does this apply to the case of *building* a manse? —see Lord Cowan's observations in *Duddingston* case as to the distinction between "building" and "repairing" a church; although the heritors assessed may be individually benefited by

[1] See Report to the General Assembly by the Committee on Collegiate Charges, May, 1890.

rebuilding a church, and the increased accommodation thereby provided, they cannot be beneficially affected by a new manse, the enjoyment of which is to the minister alone. It may, however, be assumed generally that the law relative to churches is the law also relative to manses. See *Highland Railway Co.* v. *Heritors of Kinclaven*, 8 Mac. 861, and *Govan* case (*supra*).

The question has at all times been a difficult one of the cost of the manse. The Act 1663, c. 21, on the preamble that "diverse ministers are not *sufficiently* provided with manses and glebes," directed that "where *competent* manses are not already built," the heritors of the parish should "build competent manses to their ministers, the expenses thereof not exceeding £1000, and not being beneath 500 merks." This is Scots money. In pounds sterling the sums are £83, 6s. 8d. and £27, 15s. 6d. Obviously, even the larger of these sums would not now build a manse.[1]

In 1760 this difficulty came before the Court in the *Inverury* case, and the Court ordained the heritors to rebuild the manse at a cost of £2000 Scots (*Minister of Inverury* v. *Leith*, 1760, not reported); the Lord Ordinary (Coalston) had ordained the heritors to build a "competent" manse (D. 429). See also *Mercer* v. *Williamson* (Lethendy), 1786, 3 Paton, 43. In more recent cases the view has been taken by the House of Lords that the section of the statute of 1663 above quoted refers only to the case of the erection of *new* manses where there has been *none* previously, and that for rebuilding a manse there is no sum fixed (*Dingwall* v. *Gardiner* (Aberdour), Nov. 27, 1816, F.C., aff. 1821, 3 Bligh, 72, 1 Shaw, App. 10; *Magistrates of Elgin* v. *Gatherer* (Elgin), Nov. 17, 1841, 4 D. 25).

No decision has been pronounced regarding the erection of a manse in a parish where no manse has formerly been, to the effect of incurring a greater cost than the Act of 1663. The point may be considered as still undecided. If the question should arise, however, the manifest impossibility of procuring the erection of a competent manse at the cost of £83, 6s. 8d. is likely, it is thought, to weigh with the Court, for the

[1] The "compt of expenses debursit be Mr. David Martin, minister at Auchtertule, in building and repaireing his manse" is engrossed in minute of the Presbytery of Kirkcaldy, 30th August, 1636, see "Presbyterie Booke," pp. 102–4.

spirit of the Act was obviously that a manse adequate to the comfortable housing of the minister and his family should be provided by the heritors. See *Insch* case, 1869, cited *infra*.

A Free Manse.

Stuart of Pardovan, remarking upon the repair of manses, says, p. 174: "As the minister is obliged to leave the manse in as *good condition* as he entered to it, so before he can be made liable so to do, the heritors ought to move the Presbytery to pass an Act in their favours, to declare it a Free Manse; but before they can pass any such Act, a Committee of their number must visit it, after it is built or repaired, and find upon the depositions of four discreet workmen who understand that work, but have not been employed therein, two whereof to be chosen by the heritors, and other two by the minister, that the building or reparation is *sufficiently finished*." Erskine, Prin. bk. t. v. § 15, observes: "Every incumbent is entitled at his entry to have his manse put into *good condition*; for which purpose the Presbytery may appoint a visitation by tradesmen, and order estimates to be laid before them of the sums necessary for the repairing, which they may proportion among the heritors, according to their valuations. . . . The Presbytery, after the manse is *made sufficient*, ought, upon application of the heritors, to declare it a free manse, which lays the incumbent under an obligation to uphold it in good condition during his incumbency, but they are not bound to make up the loss arising from the necessary decay of the building by the waste of time" (ed. 1895, p. 49).

The statute on which both expositions are founded is the Act 1663, c. 21, which sets forth, *inter alia*, that "diverse ministers . . . do not get their manses *free* at their entry," and that "therefore our Sovereign Lord, with advice foresaid, statutes and ordains that where competent manses are not already built, the heritors of the parish, at the sight of the bishop of the diocese, or such ministers as he shall appoint, with two or three of the most knowing and discreet men of the paroch—[*i.e.*, probably men of skill]—build competent manses to their ministers, the expenses thereof not exceeding £1000, and not being beneath 500 merks; and where *competent manses* are already built, ordains

the heritors of the parish to relieve the minister and his executors of all cost, charges and expenses for repairing of the foresaid manses. Declaring hereby that the manses being *once built and repaired*, and the building or repairing *satisfied* and paid by the heritors in manner foresaid, the saids 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 stipend."

This Act of 1663 was not the first relating to the repair of manses, but it was the one which used the word "free." To the use of the words "free" and "competent" in that Act Mr. Duncan (p. 437) alleges a twofold legal meaning—viz., "1st, that *quoad* its structural condition, the manse is in a complete state of repair; and 2nd, that, *quoad* its size and accommodation, it is 'commodious' or 'sufficient,' or suitable as a place of residence for the incumbent." He goes on to remark that "sufficiency of repair implies not only that the fabric of the building is wind and water tight, but also that the internal parts and fittings of the house, including windows, shutters, skirting boards, doors, and plaster work, are all complete, and of sound, as opposed to decayed or decaying, material. Elegance of design or finish is not essential; but completeness of finish, together with sound material, seem to be so, inasmuch as it is only through their co-existence that dilapidation, other than that consequent on decay through time, can be prevented. The repair of such dilapidation ought to fall on the heritors, and not on the minister, even in the case of a 'free manse.' But the reverse will, to some extent, almost certainly occur, if an incumbent be compelled to 'uphold' a structure, which is, to any extent, in an unfinished or decaying condition when his occupancy of it commences."

The minister of Botriphnie was admitted in 1774. The manse was in very bad condition, and he applied to the Presbytery who gave decree for the necessary repairs. The heritors thought it advisable to build a new manse, which was completed in autumn 1777. In October, 1778, the Presbytery made a visitation and pronounced the following interlocutor: "The Presbytery having considered the accommodations of manse and office-houses erected by the heritors for the minister of Botriphnie, *judged them sufficient* accommodation for

Mr. Angus, and his successors in office; and, therefore, they did assoilzie the heritors of the parish of Botriphnie from a decree of repairs of the old manse and office-houses formerly pronounced by them; and appointed that thanks should be returned by the moderator to the heritors, for their having erected such proper accommodation to the minister of Botriphnie." In 1804 the new manse was in disrepair; the minister applied to the Presbytery, and the Presbytery, after appointing an inspection by tradesmen, gave decree for £120. The heritors brought this judgment before the Court of Session and pled that the Presbytery had declared the manse *free*. The minister answered that the Presbytery's decreet was without the usual and essential words of declaring the manse free in terms of law, and that the procedure which had actually taken place left doubts with regard to the Presbytery's intention of declaring the manse to be free; in illustration of this argument the minister, says Connell ("Parishes," 311), founded on the circumstance that the manse was built of home-grown timber, was covered with thatch, and was erected in a damp situation. The Lord Ordinary held that the manse had not been declared free, and the Court on appeal adhered. In the subsequent case of *Avondale* or *Strathaven*, a manse built in 1761, it was argued by the minister before the Court of Session that "before a manse could be declared free, it must be rebuilt from the foundation, or be put into such a state of repair as to afford a rational prospect of affording a comfortable habitation during the minister's incumbency." Lord Eldon in giving judgment in the House of Lords on July 13, 1813, said, "The heritors might relieve themselves. The mode of doing it was by ordering a new manse to be built if necessary, or the existing manse to be repaired in such a manner as entitled them to call for that species of declaration which discharged them; not merely a declaration that the manse was for the time *sufficient*, but a declaration that it was *free* in this sense, that they were liable for no future ordinary repairs during the incumbency" (Dow's Reports, at p. 402).

When the heritors apply to the Presbytery to declare a manse "free," the Presbytery visit the manse. A deliverance following such visitation declaring the manse to be "free," throws the burden of upholding the manse on the minister. It would save much trouble to all parties if the

heritors would in every case where a vacancy occurs in the cure of the parish, cause repairs to be thoroughly done at the time, and have the manse declared a free manse at the time of the minister's admission to the benefice. This course would in all probability in the end save much expense to the heritors, and prevent petty and disagreeable questions as to repairs arising between the minister and the heritors in future years. It is also desirable that any articles supplied by the heritors should be inventoried. The use of the word "free" and not "competent" or "sufficient" in the deliverance is recommended (D. 439; *Heritors* v. *Minister of Botriphnie* (Botriphnie), 1805, 1 Dow, 399; *Strathaven* case, *supra*). A manse may become constructively a free manse by long acquiescence or acceptance of the building, *qua* manse, by the minister (*Mackenzie* v. *Mackenzie* (Lochcarron), June 30, 1835, 13 S. 1014; *Elliot* v. *Hunter* (Kirkton), July 12, 1867, 5 Mac. 1028).

Under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (§ 12), after the completion of works ordered in any proceedings under the Act, for the building, rebuilding, or repairing of any manse, it is competent for any heritor of the parish to move the Sheriff to declare it a "free manse;" notice to the minister of the presentation of the petition should be ordered by the Sheriff and opportunity given him to appear for his interest. If he does, he will probably ask that a remit be made to a man of skill, at the petitioning heritor's expense, and this is not unreasonable. If the Sheriff is satisfied that the manse "is in a state of thorough repair," he finds and declares accordingly, and his decree has the same effect as a decree of Presbytery, but has effect only for fifteen years from its date, or until the appointment of a new minister to the parish, whichever event first happens. The Sheriff may be required to make a personal inspection (§ 13).

A minister's liability for upholding a free manse is for ordinary tear and wear, not for reconstruction, or such repairs as in fact make the building better than it was at the time it was declared free. If he neglects its upkeep and the building is deteriorated, his representatives may be held responsible. This only applies to free manses, not to manses generally, though there is the doubtful case of *Donaldson* v. *Brown* (Dolphington), Feb. 20, 1694, M. 471, where the Court found

they would "not take cognition in what case the manse was at the minister's entry in 1664, so as to burden his executors after twenty-nine years' silence, though the legal prescription in these cases is only forty years." This may or may not refer to a manse constructively free, against the state of which the heritors did not complain during the minister's incumbency. In the writer's opinion, the heritors are entitled to a right of occasional inspection by a man of skill (of course after proper notice, and keeping in view the convenience of the minister's household), to see that a free manse is being duly kept up by the minister.

It has been held incompetent for a Presbytery to make an order on the heritors to execute repairs on a manse which has been declared a free manse only two years before (*Heritors of Pitsligo* v. *Gregor*, June 18, 1879, 6 R. 1062).

Manse Repairs.

(1.) *Additions.*

Under what circumstances are heritors entitled to make additions to a manse, or a Presbytery or other Court to order such additions?

We seem to find the answer in the case of *Kirkton* (*Elliot* v. *Hunter*, July 12, 1867, 13 S. 1028, that unless there is "a condition of disrepair involving structural renovation," or there is admittedly "serious defects in the building," or that the repairs which are required are "considerable," a Presbytery is not entitled to order additions.

In the case of *Dalmeny*, July 28, 1788 (*Robertson* v. *Lord Rosebery*, Morison's Dict., 8515), the manse was built for the parish minister from the foundation; after a few years he found "from the increase of his family" that the manse was not sufficiently large. He made application to the Presbytery who, besides some trifling alterations, directed a new kitchen to be built. Lord Rosebery raised an action in the Court of Session, and the Court gave effect to his contention that while the law has authorised Presbyteries "in case of any negligence or unwillingness on the part of the heritors to direct the rebuilding or reparation of manses," it was never intended that

ministers should be entitled to require from time to time "such alterations as might be thought necessary for their peculiar exigencies. Besides rendering the burden on the landholders infinitely more heavy than is at all requisite, this would open a door for continual disputes between ministers and their parishioners, to the diminution of the respect due to that class of men, and consequently extremely hurtful to their general usefulness."

In the case of *Channelkirk* (*Shiells* v. *Channelkirk Heritors*, June 18, 1818 (but not reported till 1835), 13 Shaw, 1018), the minister who had been admitted in 1809, applied in 1814 to the Presbytery. The heritors offered various repairs and the addition of one room of the full breadth and of half the length of the manse floor, besides closets, a kitchen and milk-house, and four bedrooms on the second floor, with well-finished garrets above. The Presbytery held that two additional bedrooms were necessary as well as the new public room, and ordered such additions and repairs, to cost £730. The Court of Session held that the Presbytery had exceeded their powers in ordering not only repairs but additions to the manse which was said to have been built about thirty years before, and to be a substantial building, though in need of some repairs. The Court also held that the heritors' offer was a fair one. There seems to have been some division of opinion among the judges as to whether the case of *Dalmeny* was not special, the manse having been built in the incumbent's lifetime.

In 1827 the case of *Strathblane* was decided (*Strathblane Heritors* v. *Hamilton*, July 10, 1827, 5 Shaw, 913). The manse was stated to have been built in 1732, that it was incurably damp, in a state of great disrepair, and most incommodious, there being only two public apartments on the lower, and four bedrooms in the upper floor, besides kitchen and offices. The Presbytery found that the manse, even if repaired, "will not afford suitable accommodation to the minister . . . there is required the additional accommodation of two public rooms of moderate dimensions," and they therefore ordained such an addition to be made. The First Division found that the Presbytery were acting within their powers. Lord Balgray said the manse was "quite insufficient for the accommodation of a clergyman and his family, and for those who must necessarily

reside in the house on the occasion of dispensing the sacrament." The Lord President (Hope) reverted to the *Dalmeny* case, in which he had been counsel, to say that it was altogether different; "the (Dalmeny) manse was not ten years old, and it did not require any repairs; but the minister thought it was too small for him, and therefore he wished to have an addition. The Court, however, were of opinion that the manse had been too recently erected to warrant any such additions, and therefore they refused to allow them." Lord Craigie observed that he had reported the *Dalmeny* case, and thought the rule there laid down was general. As a matter of fact, the heritors wisely rebuilt the whole manse, as the judges in the opinions advised should be done.

We now reach the case of *Lochcarron* (*Mackenzie* v. *Mackenzie*, June 30, 1835, 13 Shaw, 1014). In 1821 the heritors agreed to make additions and repairs to this manse, and at a visitation by the Presbytery the minister was asked if he was satisfied with the accommodation and he answered he was. In 1832 he applied for a further addition and repairs, which the Presbytery ordered. The Court decided that the minister and Presbytery having expressed themselves satisfied in 1821, there was no ground in 1832 to support an application for any addition. The Lord Ordinary (Jeffrey) in his opinion refers to the influence of the *Strathblane* case, where all the circumstances were very different from those of *Lochcarron;* in the one case there was an old and rotten manse, in the other a manse accepted as satisfactory only eleven years before.

Two years later the case of *Symington* was decided (*Carmichael* v. *M'Lean*, May 25, 1837, 15 S. 1020). The circumstances more nearly resembled those of *Strathblane* than of *Lochcarron*. The manse had been built in 1790; in 1824 a washing-house was added and some repairs executed, the work in all costing £50. The whole valued teind was £75, and the minister's stipend was made up to £150 by a supplement under the Small Livings Act. The minister was admitted in 1834, and long and tedious negotiations followed. The heritors consulted a man of skill, and then declined to carry out his recommendation. The minister brought the matter before the Presbytery, who delayed action for some time on the hope of some arrangement being come to. The heritors then intimated to the Pres-

bytery that they would "restrict themselves" to this offer—viz., "to put the manse and offices in a complete state of repair according to law." The Presbytery took the advice of the architect consulted by the heritors, who presented to the Presbytery a copy of the report prepared for the heritors, to which he adhered. *Inter alia*, he stated that, even despite alterations which might be made, "the accommodation would be too limited for the proper accommodation of the minister." There were a kitchen and back-kitchen and two closets on the ground floor, and four rooms and a closet on the bedroom floor, with a garret which contained a sleeping-room and a lumber-room. He recommended the addition of two new rooms and a new staircase. The Presbytery decerned for said repairs and additions. The heritors contended in the Court of Session that when a manse is capable of being repaired, it is incompetent to decern for additions. The Lord Ordinary (Moncreiff) reported the case to the Second Division, with a note in which he observed that the case was "extremely similar to that of *Strathblane*, which established a principle." He added, "The heritors bring the case before the Court in a very unsatisfactory form. To state, in answer to the specific demands made by the Presbytery and the minister, that they will do what the law may require of them, and neither to put in the records of the Presbytery, or even in their own minutes, any precise proposal of the repairs which they will execute, nor to produce any report, specification, or estimate of work to be performed, which it was clearly their duty to obtain when they objected to those approved of by the Presbytery, seems to be a very unreasonable way of asking the interposition of this Court." The Second Division remitted to a man of skill to report, and on its receipt sent the case to the Lord Ordinary who approved of the repairs, alterations, and additions referred to in that report. The Lord Ordinary observed that, although a minister is not entitled to have a manse added to simply to conform to the fashions of the time, or because some repairs may be necessary, yet he held it to "be equally settled that, where a manse has, either from original insufficiency or by the lapse of time, come to be in such a state that it requires extensive repairs to render it even habitable, it is then competent for the Presbytery, and for the Court in reviewing their sentence, to consider not merely what is absolutely essential to render the

old building habitable, but what ought reasonably to be done, by alterations and additions, to render the manse a suitable residence for the minister in the circumstances of the parish." Both parties reclaimed, but the Court adhered.

In the *Kingoldrum* case (*Heritors of Kingoldrum* v. *Haldane*, Jan. 24, 1863, 1 Mac. 325), Lord Jerviswoode in an elaborate and careful judgment reviewed the various cases as to manse-additions. The *Dalmeny* case he was disposed to regard as proceeding on the application of law to particular facts, and not as setting forth a general principle of law. Kingoldrum had less than 500 inhabitants and the stipend was £165. The accommodation was two public rooms, three bedrooms, dressing-room, two attics, kitchen, servant's room. The Presbytery ordered an addition of new drawing-room and dining-room, two new bedrooms, porch, bathroom, water-closet and new staircase, to cost in all £731. An architect to whom the Lord Ordinary remitted, reported that a new drawing-room, porch, water-closet, &c., should be built, and the height of the attics raised. The Court held that the Presbytery were justified in ordering addition, but not to the extent which they had ordained. "In the opinion of the Lord Ordinary such operations as are designated as repairs ought truly to consist merely in replacing in good condition that which had previously existed and which by wear and tear, and by lapse of time, had fallen into bad condition, that is into disrepair.... At this moment the manse in question is not fit for the minister as a residence, not merely through disrepair, but through original misconstruction in various important respects; and if so, the alterations, and what are called repairs, are truly of a class which, as the Lord Ordinary thinks, would have warranted the Presbytery to have ordained a new manse to be built had such a case been brought before them; unless the heritors could have satisfied the Presbytery that by alterations and repairs their obligation might be satisfied, and the manse rendered in all respects truly sufficient. But if this be the sound view of the abstract law of the case, then the question comes truly to this—whether, seeing this is not a case, in any view which can be justly taken of it, of mere repair, but of substantial alteration and change in the character of the building, there does not arise that right in the Presbytery, which has been recognised in such cases as those of *Strathblane* and of *Car-*

michael v. *M'Lean*, to ordain additions which will truly render the manse a suitable and fit residence for the minister of the parish. On the whole, the Lord Ordinary thinks that there is here ground to warrant an approval of the repairs and additions recommended by the man of skill.

There is no inconsistency between that decision and the decision in *Eliott* v. *Hunter*, July 12, 1867, 5 Mac. 1028. The manse of Kirkton was built in 1841. In 1856 Mr. Martin became minister, and in 1866 he asked the heritors to build an addition and make certain repairs. The matter came before the Presbytery, who pronounced a deliverance ordering, *inter alia*, an addition. The heritors refused to make the addition. The Second Division held that the heritors were right and that a Presbytery has no power to order heritors to build an addition to a manse which is insufficient in point of accommodation if it be in a good state of repair. The Lord Justice-Clerk (Patton) said, "If the manse were in such a condition of disrepair as to involve structural renovation—if there were serious defects in the building—it may be that the claim (for an addition) might fairly come under consideration. It is not here, and consequently the obligation, in my view, does not subsist." Lord Cowan laid stress on the fact that the repairs which the minister wanted would cost "no more than £17." He held that "the repairs necessary must be considerable ere the Court will recognise any power in the Presbytery to order additional accommodation to be erected at the expense of the heritors."

The case of *Insch* (*Heritors of Insch* v. *Storie*, Dec. 18, 1869, 8 Mac. 363) is important. The manse was built in 1769, and a wing was added in 1822. In 1860 it was repaired, and some trifling additions made, such as coal-cellar, washing-house, &c. In all £270 was spent. The Presbytery of Garioch about 1868 or 1869 found that the manse consisted of dining-room, sitting-room, study, three bedrooms, one dressing-room, three attics, kitchen, servant's bedcloset, pantries, closets, &c. On the report of a man of skill the Presbytery ordered the erection of a new wing, to contain dining-room, drawing-room, and two bedrooms, one of the existing bedrooms to be added to the lobby, and a new study made out of another, altogether the alterations and additions were estimated to cost £702, 3s. The heritors offered repairs to cost £216, 19s., but refused additions. The First Division

held that the condition of the manse was such that the Presbytery were entitled to order not only repairs but additions. The Lord President (Inglis) said, "It appears to me that the cases in which a Presbytery may order additions to a manse which is clearly unsuitable in capacity and accommodation for the minister are those in which it has either become impossible to keep it up at all without structural alteration, or in which the extent and expense of the repairs, even assuming that they do not involve structural alterations, are very large, and approach to the cost of what is necessary to convert it, by additions and alterations, into a suitable residence." Lord Deas thought the sensible thing to do would be to build a new manse altogether, but that was a matter for the heritors. "All that we can decide is, that this is a case for alterations and additions and not merely for repairs."

Lord Kinloch said, "I think it clear—(1), that the Court has not, in the case of the manse, applied the rigorous rule on which they have largely acted in the case of the church—viz., that they cannot order an enlargement unless repairs are necessary to such an extent as would cost nearly as much as the construction of a new church; (2), That they have considered the fact of extensive repairs, though not rising to this magnitude, being necessary to make the manse habitable, as sufficient to let in consideration of the question whether additions, greater or smaller, should not at the same time be ordered. The necessity of structural renovation in one or other parts of the building is naturally an important element; but I do not consider this indispensable to admit the interposition of the Court, provided the repairs necessary are of a substantial and extensive description. The jurisdiction thus originated is necessarily of a discretionary character; but this element imbues to a large extent our whole jurisdiction in this matter. The principle to which I have alluded, besides being exemplified in other cases, is substantially the ruling ground of decision in the case of *Kingoldrum*, 24th January, 1863; and although this was only the decision of a Lord Ordinary, the judgment has been approved of in other cases. The more recent case of *Elliot* v. *Hunter*, 12th July, 1867, does not conflict with the other, because in that case the repairs necessary were estimated to cost only £17, and the case was therefore clearly outside the

legal category. In the present case the repairs necessary to make the manse habitable are of an extensive description, including to some extent structural renovation. They are estimated to cost upwards of £200. And it is by no means to be left out of view that only about nine years ago repairs and alterations, at the cost of £270, had been found necessary on this manse. The fact speaks volumes as to the character of the fabric, and it warrants the Court in stating on the one side of the account more than mere amount of repairs falling to be laid out at the moment. I am satisfied that, applying soundly the principle applicable to the case, the Court is entitled, in ordering repairs, to order additions also. In this way the main reason of suspension of the Presbytery's decree entirely falls to the ground. It would have been with much regret had I found myself compelled to come to any other conclusion. It is of great importance that the residence of the minister of the parish should be suitable to his position, and comfortable for his family; not merely as a tribute due to a most valuable and useful class of men, but with reference also to those moral influences which are very closely connected with suitable and comfortable dwellings. The manse of a minister should be the dwelling-house of a gentleman. This is very properly attended to in construction of new manses. But there survive too many old fabrics like that in the present case, which, utterly unfit as they are for comfortable or even decent residence, have strongly-built walls, and obstinately refuse to go into decay. These often resist, and resist successfully, the judicial hand which would amend them. It is fortunate if, when unable to order a new manse, we can at least authorise those additions and alterations which will to some lesser extent enable the old building to discharge its proper function, and exhibit the true character of a clerical residence."

Mr. Duncan, the second edition of whose book was published in 1869, before the *Insch* case was decided, observes in a summary of earlier cases (p. 451):—

"To impose on the heritors the burden of enlarging the manse, these two conditions must, as a general rule, co-exist—viz., (1) a substantial state of disrepair; and (2) deficiency of accommodation. The deficiency of accommodation must, it would

appear, be such as is predicable of the manse, as a residence for the successive incumbents of the parish generally, or *qua* class, as opposed to a deficiency more or less personal to a particular incumbent, arising, it may be, from exceptional wealth, or from domestic circumstances,—as his having an unusually numerous family. Deficiency of accommodation must be tested, not by special cases, but by a general standard; and that accommodation only can be held defective which falls sensibly below the average amount assigned as adequate to the domestic necessities and comfort of persons occupying the social position of parish clergymen. The requisite relative proportions in which the two elements now adverted to must be realised, it would be impossible to define. This much, however, appears deducible from the various decisions bearing on the point—viz., that in proportion as the extent of deficiency of accommodation is, in a given case, small, the extent of disrepair must be relatively great, in order to subject the heritors in the obligation of enlarging the manse."

(2.) *Repairs or Rebuilding.*

A minister, when in doubt, always wishes a new manse to be built: heritors always wish to repair. The question to be decided is, which resolution will, in the long run, be best for the heritors—*i.e.*, for the parishioners who would be assessed for either repairs or rebuilding. The condition of many old manses, however, is such that it is difficult to decide the question.

In the case of *Kirkliston*, the Lord Ordinary, Lord Meadowbank, remitted (11th July, 1805) to an architect to report—1st, how far the manse is defective in safety, comfort, and accommodation for the use of a minister of that parish; 2nd, whether by any, and if by any by what, reparations, alterations, and additions it may be rendered a sufficient manse, and at what expense; 3rd, at what expense a sufficient new manse, affording proper accommodation to the minister, could be furnished (Connell on "Parishes," p. 296). His Lordship gave the following instructions:—"In making this inspection and report, the architect will have in view that no minister is entitled to have a new manse or his present one altered merely from the size, form, or arrangements of the apartments being ill-suited to the improved fashion of the times, but that he has a right to have

a substantial dwelling, not unsuitable to the revenue of the benefice, and decently and comfortably finished without and within; and that if an old manse has become ruinous in whole or in part, so that renovation rather than reparation has become necessary, such renovation may, with propriety, be adapted to the taste of the times—moderation in dimension and simplicity in ornament being always rigidly observed."

In the case of *Anwoth*, the architect to whom the remit was made reported that "the manse is in a state capable of being repaired at a moderate expense. I also find that the manse consists of only four rooms and two closets, and a small closet at the stairhead, with an addition of a kitchen. Being too small for the comfort and accommodation of the minister, I would suggest that an addition of two rooms should be added thereto, as laid down in a plan made out by me and sent herewith." The Court decerned for those additions (5th March, 1812, Connell, p. 306). In the *Dunnichen* case, 1813, the architect reported that the manse, though in a state of great disrepair, might be repaired, "but not so as to render it a suitable and comfortable residence for the minister." He said, "In my opinion that manse is capable of being repaired, but not so as to render it a suitable and comfortable residence for the minister. So far as I can judge that is hardly possible in the miserable situation in which it stands; that is very near the churchyard, where the surface of the burying-ground is nearly, if not fully, as high as the top of the side walls of the manse. Besides this, the ground rises considerably up from the entrance door to the south, and also at no great distance behind, so that when it rains no doubt much water, and that of different descriptions, must get in about the manse; and I am convinced from what I saw that at times the ground floor will be under water. At the present time the house is damp both below and upstairs; if so now, what must it be in winter? In a word, the situation is beyond description bad. Add to this, the accommodation is certainly confined for a gentleman's family. Therefore, upon the whole, my opinion further is that it will be for the interest and benefit of all concerned to take down and rebuild that manse and offices in a more comfortable and healthy situation." The Lord Ordinary, and afterwards the First Division, found the minister entitled to a new manse, although the

principal heritor offered a continuous and strenuous opposition, pleading that, as the architect reported the old manse was repairable, a new manse should not be given (3rd December, 1813, *Dempster* v. *Headrick;* Connell, pp. 301, 302).

In the case of *Dalyell* (*Hamilton* v. *Clason*, March 9, 1825, 4 S. 543), the Presbytery, on the ground that, in all the circumstances, the manse could not be repaired so as to afford competent and comfortable accommodation for the minister and his family, and that it would be expedient for the advantage of all concerned that the manse should be taken down and rebuilt in a suitable and substantial manner, appointed a new manse to be built, and further, "considering that the present situation of the manse is very damp, immured, uncomfortable, and unhealthy, they appoint it to be erected on another part of the glebe pointed out by them." The case came before the Lord Ordinary on the contention of the principal heritor that part of the old manse was capable of repair, and that the erection of a new manse on a new site was therefore unnecessary. On a remit being made to Mr. Burn, architect, to report whether the manse was "capable of being repaired so as to render it a suitable and comfortable residence for the minister, and whether it should be altogether rebuilt," Mr. Burn reported that "it is capable of being repaired or made a suitable and comfortable residence for the minister, with the exception of that part of the building in which the dining-room is situated; that that part would require considerable repair, but is capable of being repaired and made comfortable, though, from the difference of level, not well adapted for having a convenient addition made to it;" on the whole, he recommended an entirely new manse. The Lord Ordinary, on receipt of this report, repelled the heritor's reasons of suspension of the Presbytery's deliverance. The heritor reclaimed, and the Second Division of the Court of Session again remitted to Mr. Burn to report, specially—1. How far the manse was defective in safety, comfort, and accommodation for the use of the minister of the parish? 2. Whether, if by any, by what repairs, alterations, and additions it might be rendered a sufficient manse, and at what expense? 3. At what expense a sufficient new manse, affording proper accommodation to the minister, could be furnished? 4. To report on the plans and

estimates of additions and repairs given in by the objecting heritor, and that of the Presbytery for a new manse. In his second report, Mr. Burn stated that the manse was "defective in safety and accommodation, and that, in addition to the discomfort arising from the state of total disrepair of the present building, he considered it extremely doubtful if the comfort of the manse can be effectually secured when the area around is so confined and limited, and the churchyard continued in its present situation." He estimated the expense of repairs on the most recent part of the manse and of additions, at £650, and the cost of an entirely new manse in the new situation, at £678. The Court adhered to the Lord Ordinary's interlocutor, but restricted the expense of the new manse to £678. In the *Olrig* case (*Heritors* v. *Minister of Olrig*, July 10, 1851, 13 D. 1332), Lord Fullerton observed: "Where, in a case involving the obligation of heritors to rebuild, a comparison is instituted between the expense of rebuilding and that of repair, the latter must be understood to be a total and efficient repair, which will place the building nearly in the same situation as to comfort and stability as if it were rebuilt. It must be a repair such as will leave the manse what is called 'free,' and impose on the incumbent the obligation of keeping it up." See also *Heritors of Insch* v. *Storie*, December 18, 1869, Macph. 369.

As regards the comparative cost of rebuilding and repairing a manse, reference may be made to the case of *Carnwath* (*Bertram, &c.*, v. *Presbytery of Lanark*, July 20, 1864), which referred to the repair of a *church;* the Court ordered it to be rebuilt. Lord Neaves, who gave the leading opinion, said (2 Mac. p. 1413), "Before speaking to the particular circumstances of this case, it may be desirable to consider what the law on the subject is. It is clear, in the first place, that the reparation of a church (the fact that repair is possible) will not entitle a minority of the heritors to say that the church must be repaired. There is scarcely anything that may not be repaired; a building which is in ruins may be restored altogether by a process of repairing. It may not be possible to lay down any exact rule on the subject, but the questions seem always to be as to the *reasonableness of repairing*, in reference to the considerations by which reasonable men would

be guided I doubt whether any definite arithmetical rule can be laid down, but it may be considered to be settled that if the expense of repairing a church will only be about one-half of the cost of building a new church, in that case a new church, generally speaking, cannot be asked. On the other hand, if the repairs will cost three-fourths of the expense of a new church, that is a case for ordering a new church. There is a large debateable land between these two limits. But it also appears to be settled that the two things to be compared are not the expense of repairing the old church and the cost of a new church with adequate accommodation, but the expense of repairing the old church and the expense of building a new church with the same accommodation as the old one." Again, on p. 1414, "Another thing that weighs with me is, that Mr. Bryce (the reporter appointed by the Lord Ordinary) says that a new church would last twice as long as the old church repaired, and that for fifty years the old church would probably cost twice as much to keep it in repair as a new one, and after that four or five times as much. On the whole, this is a case in which men of ordinary prudence would not think of making repairs, but would, without hesitation, prefer to rebuild. It is, besides, an element to be taken into account, that we have here only two heritors in the field objecting to the new church, the other heritors who formerly objected having discontinued their opposition."

Lord Neaves, *inter alia*, referred to the case of *Rosskeen* (*Macleod, &c.*, v. *Carment*, February 9, 1830, 8 Shaw, 475), as a positive authority for rebuilding if repairs would cost three-fourths of the cost of a new church. There, at p. 479, Lord Pitmilly observed: "The general question always is whether it is more prudent or expedient to repair or to rebuild; for there is no building utterly incapable of being repaired. That is the only question; and when that is attended to, there cannot be any embarrassment at all. . . . In this case I think the church should be rebuilt. We have the opinions of the local architects and Mr. Smith (to whom the Lord Ordinary had made a remit) that there must be a great repair at an expense of £950. Then, if they rebuild of the same size, all the expense will be £1200, so that there is only a difference of £250, keeping out of view additional accommodation." In the case of *Kirkintilloch*

(*Murray* v. *Presbytery of Glasgow*, December 11, 1833, 12 S. 191), Lord Neaves regarded as decided that, if the cost of repairing was only half that of a new church, there could be no new church. The estimate for repair was £660; for rebuilding £1280. Lord Glenlee said, at p. 197, "I think it would be very reasonable to prefer repairing the present building, though at a distance of twenty-five or thirty years they would have to build a new one."

Can it, however, be said that financial calculations applying to the rebuilding of a *church* apply also to the rebuilding of a *manse?*

The writer thinks so. In *Dundas* v. *Nicolson*, July 2, 1778, Hailes' Decisions, 802, Lord Braxfield said, "The case of repairing the manse is the same with the case of building a church." Mr. Duncan, speaking of rebuilding a church, says, p. 636, "As is the case with the church, so is it with the manse." That a rule of repair applicable to a church must be applicable to a manse also, is the more evident in respect that upon re-erection a manse may be declared free, while a church never can be.

The question is—(1) Is a manse *practically unrepairable* in law—*i.e.*, "not only when the building is in such a state of ruin or dilapidation or structural unsoundness as to render practically impossible or unsafe the operation of introducing into or engrafting upon the existing fabric the new materials required in its reparation, but also when the outlay on repairs required to put the church in a sufficient and serviceable condition would, in the circumstances, and having regard to the probable endurance of the building in a state of sufficiency after it is repaired, be an injudicious expenditure" (Duncan, pp. 181, 182); or (2) "when it ought not to be repaired consistently with motives of prudence" (Duncan, p. 635). One item to be taken into account is "the estimated cost of upholding the old building after being repaired, and the probable period of its maintenance in a sufficient state."

It is unfortunate that, since the passing of the Ecclesiastical Buildings (Scotland) Act of 1868, which made the Sheriff-Court the proper Court for deciding as to repairing or rebuilding churches and manses, with appeal to the Lord Ordinary on Teinds, the cases which have been decided are not reported. In the recent case of *Biggar*, decided by Sheriff-Substitute

Fyfe on 2nd April, 1896, after a three days' proof, the minister of Biggar had asked the Presbytery to find that the manse was incapable of being repaired, and that the site was improper, and to order the erection of a new manse on a new site. After the Presbytery had obtained a report from a man of skill (who ordered extensive repairs on the existing fabric), the cause was removed to the Sheriff-Court of Lanarkshire at Lanark, where the Sheriff found that the manse was not "a safe, suitable, and commodious residence for the minister, and that, in the circumstances of the case, the present dwelling-house ought to be taken down and a new one built." The Sheriff, *inter alia*, observed: "It was pressed upon me that the minister's petition is for a new manse *and* a new site, and for nothing else, and that the minister in the witness-box stuck to that, and that unless I am of opinion that the present site should be discarded, I must dismiss the appeal. I cannot accept this view. I think the present process is something more than a mere litigation between an individual minister (who might leave the parish to-morrow) and a body of heritors (whose personality is constantly changing). Upon the authorities, as well as upon the express terms of the Act of 1868, I hold that, the case once brought before the Court, the Court not only has the right to consider, but has the duty laid upon it to consider and to decide what in the whole circumstances of the case is best for the interests of the parish and of all concerned, and what is best calculated to avoid in the future a renewal of the conflict between minister and heritors. . . . In my view the house should contain a dining-room, drawing-room, parlour or nursery, and study, and at least five good-sized bedrooms, with proper bath-room, servants' accommodation, stores, and pantries; and the heritors recognise that this extent of accommodation is not an unreasonable demand. The heritors will no doubt see it their interest to avoid future disputes by now taking a liberal view of the accommodation requisite. . . . Upon the whole evidence, I think it is established—(1) that, while repair of any fabric may be tried, in this sense the manse may practically be said to be irrepairable; (2) the attempt to bring this building into harmony with present-day ideas of sanitary and residential requirements would be attended with risk, and might prove a failure; and (3) even assuming it could be done, the difference

between the cost of such efficient repair and alteration and addition as is necessary and is proposed by the heritors, and the cost of pulling it down and erecting an entirely new fabric would not be more than about £500 or £600. The heritors could never hope to get the old fabric declared a free manse; and, taking a common-sense and reasonable view of the whole matter, I am satisfied that it is not in the interest of the parish to attempt a reconstruction of the present manse; that it is not a building on which the reasonable and prudent would spend the large amount of money indicated; and that it is within the ordinary rules of prudence and good management that the heritors should pull down the dwelling-house and build another." The decision, it will be observed, is strictly consistent with the earlier cases decided by the Court of Session, and the observation of Lord Kinloch in the *Insch* case, that "the manse of a minister should be the dwelling-house of a gentleman." (See decisions in Appendix).

A manse should have a stance of half an acre, and its legitimate adjuncts are a stable, barn, byre, and garden; in modern cases the accommodation as regards outhouses has been increased by washing-house, poultry house, pigstye, garden wall. It also appears reasonable that where gas can be introduced into the manse, the minister should have it; he, of course, pays for the supply in the same way that he pays for water-supply. A minister occupying a free manse would not, it is thought, be entitled to put the heritors to expense in procuring a supply of gas. Sheriff-Substitute Scott Moncrieff held in *Macfarlane* v. *Watson* (Sheriff-Court of Stirlingshire, 1890, 7 Sheriff-Court Reports, p. 19), relative to the manse of Slamannan, that heritors were not bound to supply grates, gas-fittings, blinds, and a heating apparatus for a bathroom. As a matter of fact, however, it is quite usual for heritors to supply fittings which are necessary for the house of a gentleman. The learned Sheriff gave no reasons for his selection of articles which it was *ultra vires* of the heritors to provide. A more recent case relating to the same parish is instructive, because this was not a case where straitness of accommodation either in the manse or offices (except as regards the washing-house) was averred. The minister sought repairs and structural re-arrangement of accommodation

for suitability of habitation Sheriff-Substitute Russell Bell, of Falkirk, by interlocutor of 31st May, 1898, ordered "a washing-house and a scullery—separate and not combined—may be safely said to be parts of the dwelling of a gentleman," but with regard to the bathroom, while he ordered the construction of a new one, he refused to allow the introduction of a hot water supply. "Granting a sufficient supply of water, it may not unreasonably be maintained that the filling of the boiler is a matter which concerns the occupant of the house, and that if the objections were merely to his failing to do so, no country house with a private water supply raised by manual labour could have the benefit of hot water. And it is a hard saying that in days when every flat of houses now erected in towns, occupied by workmen of the better class, is furnished with hot water, such is not a necessary adjunct of the house of a parish minister. But the objection here is one founded on the situation of the manse in a locality not furnished by a general water supply, and is an inconvenience resulting from the situation. No doubt every new manse built in these days would be provided with a hot water supply, but as yet there is no precedent for its introduction into a manse where it did not formerly exist, so, with reluctance, I find myself compelled to conclude that the heritors cannot be required to furnish it." The interlocutor is given in the Appendix.

It does not seem that the view taken by the learned Sheriff-Substitute in this case as to the introduction of a hot water supply would necessarily commend itself to other judges. As a rule a hot water supply is now provided without demur. In the case of *Moonzie*, 1868, the Court held that a force-pump for a water-closet was a mere accessory to the water-closet which the heritors were bound to provide: it was not of the nature of an addition to the manse; opinion was reserved as to a case where water for the water-closet could not be obtained except at great cost (*Earl of Glasgow and Others* v. *Murray* (Moonzie), October 16, 1868, 7 Mac. 6).

A minister has been frequently found entitled to a garden wall (*Maxwell* v. *Presbytery of Langholm* (Half Morton), Nov. 9, 1867, 40 Jur. 13, 5 Scot Law Reporter, 16; *Elliot* v. *Hunter* (Kirkton), July 12, 1867, 5 Mac. 1028). "The manse garden, in so far as regards vegetables and fruit, does not require to be immediately adjacent to the manse; and as to a flower

garden, or plots for flowers, a wall is not required or desirable" (per Lord Justice-Clerk (Patton) in *Elliot* v. *Hunter, supra,* at p. 1032. In the *Half Morton* case it was averred there was a good hedge; the Presbytery admitted there was a partial enclosure hedge, but explained that a wall was required for protection from hares and rabbits. Wall was ordered.

That a minister may *let* his manse for a short period has been decided in the case of *Aberdour*, where the minister for several years had let his manse furnished for two months in summer while he took his family to another part of the country for change of air. The duties of the parish were discharged by a substitute who did not reside in the manse, and the minister came occasionally to preach on Sundays. The heritors having raised an action against the minister, concluding for declarator that he had no right to let the manse, and for interdict against his doing so, held that, as the letting of the manse did not injure it, the heritors had no interest or title to interfere (*Heritors of Aberdour* v. *Roddick,* Dec. 14. 1871, 10 Mac. 221).

The Lord Justice-Clerk (Moncreiff) observed: "I do not think the heritors have any title to insist in this declarator, apart from their interest as liable to maintain the building. They are not proprietors of the manse. Neither are they, in any sense, the trustees of the property. In virtue of their resulting obligation they have a title to see that the property is duly administered with a view to its being kept in repair. But they have nothing more; they have no right beyond this to interfere in any way with the minister's possession or administration. Their right in the church and churchyard stands on an entirely different footing, for as regards them the minister has no patrimonial interest in either, and the heritors have the property as administrators-in-trust. But a minister's right to his manse and glebe is entirely otherwise. He is more than occupant. He represents and administers for the series of incumbents who are collectively the proprietors. He cannot affect the interest of his successors; but subject to this condition he has all the rights of a proprietor, at least so far as necessary for the complete enjoyment of the subject for the period of his incumbency. . . . His right is precisely of the same kind as his right to the glebe. I give no opinion as to how far the minister can virtually alienate the manse during his incumbency, or let

it for a prolonged term to his own exclusion. I can conceive cases in which this might not be an unreasonable exercise of his power. I can also conceive cases in which it would be entirely inadmissible." Illustrating his argument as to the right of a school-master to let his house, Lord Young observed in a recent case: "The manses of parish clergymen are often let in summer. That is quite lawful, though no doubt the Presbytery would interfere if the thing were done to the prejudice of the parish (*Eckford School Board* v. *Rutherford*, Feb. 2, 1889, 16 R. at p. 382). The minister's right is not merely a right of personal residence, but can be turned into money (per Lord President Robertson, *Inland Revenue* v. *Fry* (Girvan), Mar. 9, 1895, 22 R. 425).

If the heritors refuse or delay to deal with a question connected with the sufficiency of manse accommodation, the matter may be brought before the Presbytery. The Presbytery will inspect the building, and after a report by a man of skill will ordain the heritors to repair, repair and enlarge, or rebuild the manse, as the case may require. (See chapter on Procedure under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868.) If the heritors disregard the Presbytery's deliverance, that body will themselves carry it into force, make contracts, and see them executed. The Court of Session will grant warrant to enforce payment by the heritors of the cost of the repairs decerned for by the Presbytery. But a deliverance by a Presbytery in regard to the repairs of a manse may be removed to the Sheriff-Court under § 3 of the Ecclesiastical Buildings Act; and the Sheriff's judgment thereon cannot be appealed to the Inner House, but only to the Lord Ordinary on Teinds.

While the manse is being rebuilt the minister is entitled either to another suitable residence, or to a payment to enable him to provide for himself. If there is no manse in the parish when the minister enters upon the charge, he is entitled to "maill" till it is provided. The Presbytery have no power in this matter; the minister must make his claim good in the ordinary Civil Courts (*Potter* v. *Heritors of Kippen* (Kippen), Jan. 31, 1708, 4 Br. Sup. 691; *Steel* v. *His Parishioners*, 1712, M. 8502). Manse-maill in a burghal parish may be a set sum, part of the benefice which is paid to the minister in lieu of providing a residence.

Whether a minister is entitled to manse-maill when he is required to remove from the manse to allow of extensive repairs —or even when papering and painting have to be done—would seem to be a matter of circumstances. In the writer's experience such claims are rare. As the papering and painting, in particular, are done for the minister's own comfort, and probably at his request, he should show himself as little disposed to be querulous as possible. In former times manses were neither painted nor papered.

When a new manse is to be built, its situation should be as near to the church as circumstances of healthy situation, convenience, &c., may permit. The parties mainly interested are the minister, who wants a comfortable and healthy abode for himself and his family, and the heritors who wish to be assured that its situation will not cause unnecessary expense, and that its maintenance will be, from circumstances of soil or position, as little burdensome to them in future as possible. Yet it appears that the right of selecting a site may be in the Presbytery. Its decision may be reviewed by the Court of Session (D. 457; *Steel* v. *His Parishioners*, 1712, M. 5131). An assistant and successor is not entitled to have a residence provided for him. If, however, the senior minister continues to reside in the manse, and the assistant and successor is unable to find a suitable residence within the parish, the latter is entitled to bring the state of matters before the Presbytery by petition, so that as curators of the benefice they may advise with him, with the parishioners, and if need be with the elder minister as to the best course to be taken in the circumstances. A manse is provided to be the official residence of the parish clergyman, and it should be occupied by the person who discharges the every-day duties of parish clergyman.

A parish minister is not liable to be assessed for poor-rates (*Forbes* v. *Gibson*, Dec. 18, 1850, 13 Mac. 341 (Symington)), but is liable for school-rates in respect of his manse and glebe, under the Education (Scotland) Act, 1872, § 44 (*Hogg* v. *Parochial Board of Auchtermuchty*, June 22, 1880, 7 R. 986).

In giving judgment, Lord Young referred to the exemption from poor's assessment: "It is, I think, undoubtedly a class privilege, which the pursuer enjoys only as an individual member of the class, and does not attach to the parish manse

and glebe, in whose hands soever they may be, but only to his own ownership and occupation of them as parish minister. If he let the manse to a householder, or the glebe to a neighbouring farmer, it is not, I suppose, doubtful that his tenants would be liable to poor's assessment as occupiers of these lands and heritages. The ownership of manses is probably inalienable, though the right of occupation is not; but glebes may be feued or long-leased to the effect of subjecting the feuars and leaseholders to assessment as owners. It is, however, unnecessary to press or dwell on this topic, the conclusion that the privilege of exemption is personal to the minister being otherwise clear. Now this personal, or rather class, privilege stands on ancient usage—*i.e.*, on customary or common, according to a well-known principle of which the usage is the measure of its extent. But according to this measure the extent is clearly limited to poor's assessment."

That the class exemption of ministers from poor-rates is a solitary survival, Lord Young pointed out, observing: "In 1845, when the Poor-Law was amended, it escaped the destruction which has in one way or another overtaken all its kind and species. It did so by what is generally, and probably rightly, regarded as a blunder in the Act of that year—viz., a declaration, not seemingly favourable to parish ministers, although it proved to be so, to the effect that they should be liable to be assessed on their stipends. This being an express partial repeal of their privilege of exemption, was held to imply that it should in other respects continue to subsist, and they have enjoyed the benefit of the implication ever since. Such privileges, which are necessarily enjoyed at the cost of others, are in their nature invidious, and are regarded with disfavour in these days, and the wonder is, not that all but this have disappeared, but that this has been so long-lived. The demand now is for its extension; and although, irrespective altogether of its invidious character, I can find no good grounds for the demand, I think it proper to say that *in dubio* I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation" (p. 996). The point was again raised in the case of *Lochs* (*Gillanders* v. *Campbell*, December 11, 1884,

12 R. 309), and the decision in the *Auchtermuchty* case affirmed, the Lord President (Inglis) remarking: "The Poor-Law and the Education Act appear to me to present a most complete contrast to one another." A minister is liable for road assessments *qua* proprietor and occupier of his manse and glebe (*Cowan* v. *Gordon*, July 9, 1868, 6 Mac. 1018). The writer is of opinion that the minister of a second church, being undoubtedly a parish minister, is entitled to the privilege of exemption from payment of poor-rates; the privilege attaches to his clerical character (*Heritors and Kirk Session of Cargill* v. *Tasker*, February 26, 1816, F.C.; *Forbes* v. *Gibson*, December 18, 1850, 13 Mac. 341 (Symington)), and would therefore seem to be confined not necessarily to manses maintained by heritors, but to any residence occupied by a parish minister within his parish.

The Act of 1844, in reference to the erection of *quoad sacra* parishes, provides that the endowment for the minister shall not be less than £100 per annum, or seven chalders of oatmeal, to be calculated at the highest fiars of the county, exclusive of the sum necessary for communion elements, "with a suitable dwelling-house or manse, and offices and appurtenances," or a stipend of £120, or 8¼ chalders, "where there shall be no such dwelling-house or manse." If there is a dwelling-house or manse, the title is to be taken in such way "that such dwelling-house or manse, and offices and appurtenances, shall be inalienably secured as the dwelling-house or manse, and offices and appurtenances for the minister of the said parish; and that due provision shall be made for the future maintenance of the fabric of such dwelling-house," &c., "all to the satisfaction of the Court" (§ 8). Pew-rents may be applied to upholding the fabric of the church and manse (§ 9).

The Act of 1844 provides for two other cases, where Parliamentary districts, under 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90, are erected into (1) parishes *quoad sacra* under the Act, (2) parishes *quoad omnia*. In the first case, the maintenance of the manses of such parishes is held to be sufficiently provided for under the Georgian statutes. In the second case, the provisions of those statues are declared to cease and determine as to maintenance of "place of worship" and "dwelling-house," "and the burden of upholding the same shall fall on the parties who by the law of Scotland would be

bound to uphold the church and manse of the parish, if such church and manse had been appointed to be built for the newly-erected parish" (§ 15).

The minister is entitled to be entered upon the valuation roll as proprietor *qua* liferenter (*Cowan* v. *Gordon*, July 9, 1868, 6 Mac. 1018). In *Robbie* v. *Meiklejohn*, 1868, *supra*, Lord Ardmillan observed: "Both Established Church ministers and Dissenting ministers are entitled to be enrolled as liferenters in respect of their manses."[1] During a vacancy the heritors are not liable in payment of assessments or rates, as they are not proprietors then more than at any other time. It is quite usual for heritors to place a caretaker within a manse during a vacancy, and to pay his wages and fire, &c., but this does not imply an assumption of ownership; the caretaker is in possession simply to prevent such dilapidation of the subjects as might increase the heritors' burden in the way of repairs.

Glebe.

Glebe, the land belonging to a cure, from Old French *glebe*, "glebe land belonging to a parsonage" (Cotgrove), from Latin *gleba*, soil, a clod of earth, allied to *globe* (Skeat).

Minister's grass: pasture-land for one horse and two cows, designable from church lands to a parish minister.

Soum, measure of land expressing the relative proportion of cattle or sheep to pasture, or *vice versa*. A soum of grass = as much as will pasture one cow or five sheep. Probable derivation Anglo-Saxon *seom*, French *somme*, *onus*, *sarcina*, a burden, or quantity. Cf. Swedish *sum=tal* number, which is represented in Scottish by *soume*.—Jamieson.

The minister of a landward, or of a burghal-landward parish is entitled—irrespective of half an acre of manse ground—to a glebe of four acres of arable ground, or sixteen "soums" of pasture-land, and to "minister's grass," *i.e.*, land sufficient to provide grazing for two milk cows and a horse (Ersk. 6. ii. tit. 10, § 59; Stair, 6. ii. tit. 3, §§ 4, 40). Cook, "Church Styles," 1882, says a soum consists of as much land as will pasture one cow or *ten* sheep (p. 204). "If there is a landward district annexed to this parish, it is clear that the minister is entitled to a glebe"

[1] It has been held in a case recently decided in the Sheriff-Court of Stirlingshire that a parish minister is "owner" of the manse of his parish in the sense of the 212th Section of the Police Act of 1850, and as such is liable for the expense of laying down a footway opposite the manse (*Brown* v. *Lang*, July 6, 1888, Sheriff-Court Reports, iv. p. 273).

(Lord President Inglis, *Magistrates of Arbroath* v. *Presbytery of Arbroath*, Mar. 13, 1883, 10 R. 767). See also D. 489.

In the case of glebe, primarily (and in the case of ministers' grass solely), the lands liable to designation for this purpose are kirk lands—*i.e.*, parsons' or vicars' lands, first, abbots' or priors' lands friars' and bishops' lands, and other kirk lands thereafter (*Nicholson* v. *Earl of Galloway* (Whithorn), June 12, 1823, 2 S. 398).

The principal Statutes applicable to glebes are 1563, c. 72; 1572, c. 48; 1592, c. 118; 1593, c. 156 (in the case of *Ogston* v. *Stewart* (Banchory-Devenick), March 26, 1896, 23 R. (H. of L.) 16, the House of Lords held where a glebe had been designated in 1602, when the Act 1593 was in force, that in the absence of direct evidence as to the lands from which the glebe was taken, that it was to be inferred it was taken from abbots' lands, rather than from bishops' lands); 1606, c. 7; 1644, c. 31; 1649, c. 45; 1663, c. 21; 7 & 8 Vict. c. 44; 29 & 30 Vict. c. 71.

Glebes and manses are allodial subjects with no superior, and each incumbent succeeds the other without service or any other form of an *aditio hæreditatis* (Ersk., ii. 3. 8; Lord Neaves in *Presbytery of Selkirk* v. *Duke of Buccleuch* (Yarrow), Nov. 9, 1869, at 8 Mac. 131).

The right emerges with the minister's admission to the benefice (*M'Callum* v. *Grant* (Leith), March 4, 1826, 4 S. 527).

A minister of a burghal parish is not entitled to a glebe nor to minister's grass. Nor, it is thought, is the second minister of a collegiate charge, although the abstract point may not have been expressly decided (see *Panmure* v. *Presbytery of Brechin* (Brechin), Dec. 12, 1855, 18 D. 203, per Lord Curriehill).

A glebe may be either—

(1) A glebe proper, or

(2) A grass glebe. The latter term is sometimes used also to describe "minister's grass."

A glebe proper consists of four acres—adjacent to the parish church—of arable land—*i.e.*, of land adapted for cultivation, even although not yet tilled (*Macmillan* v. *Presbytery of Kintyre* (Kilcalmonell), Nov. 19, 1867, 6 Mac. 36; *Grierson* v. *Ewart*, 1781, 2 Hailes, 888).

Where there are not four acres of arable land to be obtained, a grass glebe takes its place. It consists of 16 soums—each

soum being equivalent to one-fourth of an acre of arable land. A minister is not entitled to have a grass glebe designed from land once under regular course of cultivation, although for two years laid out in grass on a lawn, and more suited for pasture than agriculture (*Macmillan* v. *Presbytery of Kintyre*, *supra*).

Glebe is sometimes used to describe a portion of land, the use of, or the revenue from, which is enjoyed by a parish minister, although not under the provisions of any statute relative to glebes. In the *Stranraer* case, a minister had secured to the benefice thirty acres of land, and the revenue from those lands and houses thereon was enjoyed by his successors in the cure. One of those in 1826 asked the Court to give him compensation in respect that he had no legal glebe. The Court refused the demand, as he had a sufficient provision of land (*Wilson* v. *Officers of State* (Stranraer), Feb. 8, 1826, Shaw's Teind Cases, 88).

The peculiar favour shown to churchmen in regard to their glebe is well illustrated in the case of *Yarrow* (*Presbytery of Selkirk* v. *Duke of Buccleuch*, Nov. 9, 1869, 8 Mac. 121). The Presbytery of Selkirk raised an action against the heritors of the parish of Yarrow for declarator that a portion of a farm was the parochial glebe. The land had in 1641 been designed as a glebe, but the decree of designation had been lost, and the minister had remained in actual possession of the glebe till 1723. Subsequently the manse was removed to a distance, and the minister received an annual money payment from the proprietor of the farm in question and his tenants for possession of the glebe. In 1764 the proprietor sold and conveyed the whole farm, including the glebe, to the predecessor of the defender, with an exception from a clause of absolute warrandice, that £8, 6s. 8d. was payable to the minister for the glebe. For upwards of forty years prior to the date of the action the whole farm was possessed by the tenants of the proprietor, and during that period the successive ministers on various occasions stipulated for and obtained from the proprietor of the farm and his tenants an increase in the money payment for the glebe. It was held that the constitution and subsistence of the minister's right to the glebe had been proved, and that it was not necessary for him to produce a title, or to bring a proving of the tenor, and that the minister's possession excluded prescriptive possession by the proprietor of the farm.

Where there is no glebe, or one of insufficient (less than legal) size, the minister applies to the Presbytery. The Presbytery give notice to the heritors of their intention to visit the parish on a certain day. When an appropriate piece of ground is selected, the Presbytery obtain a full and adequate description of its boundaries from a man of skill; and again visit the lands to hold a perambulation, and the Presbytery thereafter pronounce a deliverance designating the glebe or the portion attached to it to make it of legal size. No infeftment is required. Any question as to boundaries will thereafter be decided by the Civil Courts: the Presbytery is not a competent court for this (*Marquis of Queensberry* v. *Gibson* (Lochmaben), Feb. 14, 1829, 7 S. 418). In the case of *Lochlee* (*Dalhousie's Tutors* v. *Minister of Lochlee*, June 27, 1890, 17 R. 1060), it was *held* by the First Division of the Court of Session that in construing a Presbytery's decree (of 1803) giving effect to the excambion of a glebe, it was competent to adduce parole evidence, to explain the meaning of the decree, as to the natural configuration of the ground and the boundaries described in the decree, and to ascertain the local situation of natural features set forth in it, but that it was incompetent to adduce evidence of possession inconsistent with its terms.

The choice of the ground to be designated will be guided chiefly by its nearness to the church. But the minister will, of course, be justified in pointing out to the Presbytery which of two or more plots nearly equally adjacent is the more suitable. Assuming that all are more or less similar in character, the choice of the Presbytery will fall to be guided by what are church lands, and what temporal. Preferably the glebe is to be taken from the former as constituting the patrimony of the church prior to the Reformation. Lands formerly held by Knight Templars or Knights of St. John are not church lands, whether incorporated in one or not (*Duncan* v. *Parishioners of Kilpatrick Easter* (Kilpatrick Easter), 1698, M. 5140; *Ross* v. *Vassals*, Feb. 29, 1700, M. 7985).

In the term "church lands" has been held to be included lands, the superiorities of which were in the clergy prior to the Reformation, although the actual property might have passed from them before that time (*Minister of Kingsbarns* v. *Hay* (Kingsbarns), 1799, M., Glebe, App. 2). If the glebe is taken

from church lands, the heritor from whose lands it is taken has a claim of relief against the other heritors of church lands in the parish, but not against the heritors of temporal lands, and *vice versa* where the glebe is taken from temporal lands (Stair, ii. 3. 40). It has been remarked that the doctrine proceeds evidently on the assumption that when the glebe is designed out of temporal lands, this implies the absence of designable church lands, but that as temporal lands may have been selected instead of church lands on account of greater proximity to the church or manse, it seems scarcely consistent with the spirit of the Act, 1644, c. 31, to exempt the heritors of church lands from liability in relief. On the other hand, there can be no doubt that the terms of the Act are quite specific; the Act ordains that the whole heritors of the parish shall "contribute proportionally for making recompense to the heritors out of whose lands the said manse and glebe shall be taken respectively—viz., heritors of kirk lands where kirk lands are designed, and the heritors of all lands of other holding when the designation is of other lands not kirk lands." The right of relief is a personal one; it does not attach to proprietors (*Snow* v. *Hamilton*, 1675, M. 10167); it is good against the representatives of persons from whom it might have been claimed proportionally to their valuations, but not against their singular successors (D. 512, 513).

Where a minister has a crop on the glebe at the time of his death, his representatives will receive, or in the event of his transference to another cure, he himself receives, the fruits, following the brocard *messis sementem sequitor*. In the case of a minister dying, say on 1st February, it is thought that his executor is entitled to a crop of hay, though not sown that year, if it be the fruit of seed sown by the minister at some time. If the glebe is let to a tenant, the crop sown belongs to the tenant, and rent for the portion of the year to which belongs the crop sown at the time when the minister's incumbency ends falls to the minister's representatives (*Taylor* v. *Stewart*, July 12, 1853 (Wilton), 2 Stuart, 538).

The glebe may be excambed; the authority of the Presbytery is requisite, and it is highly proper that the heritors and minister should also approve of the exchange of lands (1649, c. 45; *Stewart* v. *Glenlyon*, May 20, 1835, 13 S. 787; but see

infra, *Bain* v. *Lady Seafield*, second case (1887)). A deed of excambion should be duly executed although an excambion under verbal agreement has been recognised by the Court (*Bremner* v. *Officers of State*, June 29, 1831, 9 S. 838). Great care should be exercised in the preparation of such a deed. In the case of *Duthil* the Presbytery of a parish, with the concurrence of the minister, entered into an excambion, whereby they conveyed to a heritor a part of the glebe, the churchyard, and the site of the church. The deed proceeded on the narrative that the portion of the glebe was conveyed with a view to the heritor planting and improving it, but the dispositive clause contained no such restriction. In a note at the instance of the minister for interdict against the heritor building a mausoleum on the excambed glebe lands, it was held—(1) that the conveyance was absolute, and (2) that the minister was barred by his acquiescence in the granting of the deed from objecting to the heritor's title to the proposed site of the building (*Bain* v. *Lady Seafield* (Duthil), Nov. 6, 1884, 12 R. 62). In a later case under the same name (*Bain* v. *Lady Seafield*, July 15, 1887, 14 R. 399) it was held that the consent of heritors is not essential to a contract of excambion of glebe lands.

A minister may cut down trees on the glebe (*Logan* v. *Reid* (New Cumnock), May 11, 1799, F.C.); dig peats (*Mercer* v. *Minister of Lethendy*, 1789, mentioned in *Minister* v. *Heritors of Newton*, 1807, M., Glebe, App. 6); both for his own benefit. He may work marl, and even coal, but in both cases the proceeds are to be applied for the benefice (*Minister* v. *Heritors of Madderty*, 1794, M. 5153; *Minister* v. *Heritors of Newton*, *supra*). The price of the produce of such workings should be accumulated, and the income of the fund so brought together paid to the minister who serves the cure. Where certain lands had been held for over two centuries by trustees "for the use and benefit of the minister of the gospel serving the cure at the Kirk of Bo'ness," and in 1888 the minerals therein were leased for twenty years at a yearly rent of £25 or royalties, the Court held in a special case between the trustees and the minister of the parish, that the mineral rents or royalties should be accumulated and the income paid to the minister. Those lands were not glebe, but the principle applied was the same as is

applicable to glebe (*Galbraith* v. *Minister of Bo'ness*, October 27, 1893, 21 R. 30). As the minister enjoys the whole benefit of the glebe, it does not appear that he is entitled to ask the heritors to build a wall round it. If a fence be around the glebe when he enters upon the benefice, it is thought it is his duty to maintain it if he requires it, just as he may maintain a road or footpath, which may (like a wall or fence) contribute to his lucrative enjoyment of the glebe. To maintain his fence or wall is incident to the minister's right to the glebe, just as is his payment of road and school assessment *qua* proprietor of manse and glebe.[1]

Until the passing of Act 29 & 30 Vict. c. 71, "The Glebe Lands (Scotland) Act, 1866," no incumbent could sell or feu any glebe lands—except as in Govan and a few other parishes, in virtue of the powers conferred by special private Acts. The word heritor in this Act means a proprietor of lands of the value of £100 of real rent. With the consent of the heritors and Presbytery the minister may grant a lease or leases of his glebe, reserving five imperial acres nearest the manse for himself, which are to be marked out by the heritors and Presbytery. The lease may not exceed eleven years, with no grassum; if the five acres above mentioned are included, the lease must contain a provision that so far as those acres are concerned the lease ends at the first term of Martinmas, six months after the death, deprivation, resignation, or translation of the minister: the heritors' and Presbytery's consent is to be evidenced by a certificate on each lease signed both by the clerk to the heritors and the moderator and clerk of Presbytery: the rent is to be paid and belong to the minister. With the same consents the minister may sell for an annual payment of grain or money any servitude or right of pasturage over any lands possessed by him as minister. If the proprietor of the lands over which such

[1] This also is Mr. Rankine's view: "Where a glebe has once been provided, it is difficult to conceive of any further burden resting on the heritors by way of maintenance, unless it be to keep up the fences and access, and to provide a new glebe if the old one become, in the words of the rescinded Act of 1644, "unprofitable by inundation, sanding, or any other extraordinary accident." In the absence of decisions on these matters, it may be conjectured that there is no obligations of the former sort (*i.e.*, to keep up fences, &c.), and that nothing short of absolute destruction or sterility would bring the latter into play" ("On Landownership," p. 640).

right exists elects to purchase it absolutely, the purchase-money will be invested at the sight of the heritors and Presbytery on such securities and in such manner as the Court of Teinds directs, the interest and proceeds only being paid to the minister (§§ 3, 4).

If a minister desires to feu his glebe, or any portion of it, or to grant building leases (for a term not exceeding ninety-nine years), he must intimate his intention to the Presbytery by a letter to the moderator, transmitting therewith a copy of the proposed application to the Court of Session (as Commissioners for the Plantation of Kirks and Valuation of Teinds) (§ 2). The moderator lays the letter and proposed application before the first meeting of Presbytery. If the Presbytery are of opinion that it will be for the interests of the benefice that the glebe should be feued or let on building leases, they will give their consent to the application, subject to any condition they may think necessary or advisable, by a certificate written on a copy of the proposed application, and signed by the moderator and clerk (§§ 5, 6).

On the certificate being granted, the minister calls a meeting of heritors. The meeting is called by (1) pulpit citation "in the usual manner," and (2) notices sent to each heritor, or his known agent, at least thirty days before the meeting is to be held within the parish, the notices containing the day, hour, and place of meeting, and enclosing a copy of the proposed application.[1] At the meeting of heritors, every heritor may vote by proxy, or by letter under his hand; if two-thirds in value of the heritors of the parish approve of the application (after this called the petition), the clerk to the heritors will grant a certificate to that effect under his hand to the minister (§§ 7, 8).

The petition will state the date of the minister's admission to the benefice, the amount of the stipend, and other sources of emolument attached to the living, the extent of the parish, the population according to the immediately preceding census, the nature and extent of the glebe, the purpose of the proposed feuing or building leases, the expected rate of feu-duty or rent,

[1] It is not said that the copy of the proposed application sent to each heritor should contain a copy of the Presbytery's certificate, but it is advisable that it should do so.

and the grounds on which the petitioner submits that benefit will arise to the minister and his successors in office by authority to feu or lease being granted. With the petition is produced—(1) the certificate of the Presbytery; (2) the certificate of the heritors; (3) the form of feu-charter or building lease proposed to be adopted (§ 9). The Court will order intimation of the petition, and service upon all proprietors of lands and heritages conterminous with the lands proposed to be feued or leased for building, and appoint notice of it to be inserted once in the *Edinburgh Gazette*, and once a week for three successive weeks in such local newspaper or newspapers as the Court may think proper (§ 10). Any conterminous proprietor may appear and object to the application being granted on the ground of injury to the value or amenity of his said conterminous lands; the Court may give effect to such objections by refusing the application in whole or in part (§ 11).

After intimation and advertisement, as above, the Court, on considering the petition, with or without answers from any party interested, may remit to any person or persons to inquire into the facts stated in the petition, to report his or their opinion, and as to any conditions or restrictions subject to which the prayer of the petition should be granted (§ 12).

The Court may, subject to any conditions or restrictions they may deem expedient, grant the required authority, and will, in their order or interlocutor, fix the minimum rate at which the glebe, or any portion of it, shall be feued or leased for buildings, and will authorise and empower the petitioner and his successors in office, at the sight of the heritors and the Presbytery (subject to the provision of the Act), to grant and dispose of the glebe or any part or parts thereof, in feu-farm, fee, and heritage, for the highest feu-duties, or in building leases for the highest rent in grain or in money that can be got for the same, not being less than the minimum above mentioned, and that either by public auction or private contract.[1] The Court may also authorise the minister to construct such streets, roads, passages, sewers, or drains in and through the glebe, or any part thereof, as the Court on inquiry may find reasonable or expedient, with the view of the more advantageous feuing or leasing of the glebe (§ 14), but the cost of forming a new avenue to a manse, rendered

[1] § 13. See *Blair-Athole* case, *infra*.

necessary by the feuing of the glebe, was held in *Robertson* (St. Ninians), Feb. 21, 1896, 23 R. 526, not to be such a charge as could be imposed as a permanent burden on the glebe.

The feu-duties and rents, and in the event of any sales in fee-simple,[1] the interest of the price, are to be taken payable to the minister and his successors in office serving the cure of the parish, and to be recoverable by him or them. On the death of a minister his representatives[2] receive the feu-duties and rents[3] in the same manner, and for the same length of time, as is provided in 3 Chas. II. c. 13 (1672), as to "Ann"; in the event of any circumstance causing a vacancy to be prolonged beyond the term during which a minister's widow, heirs, or executors have a right to the said feu-duties and rents, the heritors and Presbytery are empowered to uplift and apply these feu-duties and rents to the provision of spiritual superintendence and the supply of religious ordinances in the parish during the vacancy (§ 15).

In the few parishes which were feued under private Acts, when a vacancy occurs, the private Act must be carefully studied to enable parties to ascertain their rights. If the Act is silent as to the liability of feu-duties to be computed as stipend, and therefore subject to Ann, the proportion of feu-duties from the death of one minister to the admission of another is payable to the heritors of the parish for pious uses. The minister's widow has no further right to the feu-duties of the glebe than her husband had, and his right ended with his death. The new minister has no right to the feu-duties until his admission to the benefice. Connell, "On Parishes," p. 436, observes: "The disposal of the proceeds of a glebe during a vacancy only seems to have belonged to a patron, but was understood to accresce to the heritors under a similar obligation of bestowing them upon pious uses within the parish, and this right remains at present on the same footing." Ann is not payable out of the rents or produce of the glebe at common law or under statutes, likewise the Ministers' Widows' Fund apart from statute has nothing to do with the glebe. The heritors are the only parochial ecclesiastical authority in temporal matters in a

[1] See §§ 4 and 17.

[2] "Widow, heirs, or executors."

[3] Interest on price of land sold is not mentioned. *Quære*, Is it implied?

parish (apart from the minister), and as protectors of the benefice they are entitled to collect and administer the feu-duties. The Presbytery has no authority or right of interference. Pious uses are difficult to define. In *Donaldson* v. *Brown*, Feb. 20, 1694, M. 9946, a gift to the last minister's widow and children was found to be a pious use, provided they dwelt within the parish at the time. The case of *Lord William Douglas* v. *Heritors of Mannour*, Dec. 6, 1695, M. 9946, was one arising out of a quarrel between the patron and the heritors. It was held that the patron who had destined vacant stipend for building a bridge in the parish was applying the money "to an uncontroverted pious use within the parish," but it does not appear that the heritors' action in proposing to allocate it for repairing the church and manse was wrong in purpose, although wrong in law as not being preferable to the destination proposed by the patron. It appears from *Lord Saltoun* v. *Lady Pitsligo*, June 20, 1700, M. 9948, that a Presbytery explained pious uses within the parish to be "the repairing the church and manse that were ruinous, the building a bridge, and the maintaining the poor," while the patron of the kirk allocated the vacant stipend to repairing the harbour of Fraserborough; the majority of the Lords "preferred the Presbytery and parish to the harbour," and found that pious uses must be ascertained "within the parish." Education was also a pious use. But as in the present day, education, poor relief, the building of bridges and other like parish purposes are provided for by statute, the writer is of opinion that pious uses may now most fitly be found in church extension work within the parish, and in the preservation of the gravestones of the parishioners for which it does not appear there is a power of assessment, but the repair of the church and manse would not be excluded.

The sums paid on account of the glebe disposed of as above are to be enjoyed by the minister in place of the natural possession of the glebe, or of the rents, maills, duties, and profits of the glebe, subject always to the burden of payment of interest on the cost of applying for and obtaining the above order or interlocutor from the Court and incidental thereto, and of making and constructing the streets, roads, passages, sewers, or drains, sanctioned by the Court, which costs may be deemed by the Court on the summary application of the minister on the grant-

ing of the order, or at any time thereafter, or of his heirs, executors, administrators, or assignees, to be a permanent burden upon the glebe; the interest, until extinguished, as provided in § 19, or otherwise, will form a first charge on the whole product and revenue of the said glebe. After the minister has feued out or let on building lease, or sold the glebe or any part of it in virtue of the Act, it is not competent to him or to his successors in office to make any demand upon the heritors to provide him with a glebe, or any portion of land in lieu of the glebe land so feued, leased, or sold. But nothing in the Act is to preclude or prejudice any claim which the minister may have to any additional glebe that might have been competent to him if the Act had not passed (§§ 16 and 18)—*i.e.*, if the minister's glebe was not of the full size, his claim to have a glebe of the legal size (inclusive of the portion disposed of under the powers of the Act) is reserved to him.

When the Court have made the order or interlocutor granting authority to feu or let on building lease, and have fixed the minimum feu-duty or rent, any proprietor whose lands are conterminous with the glebe mentioned in the order may, within thirty days of the date of the order, intimate his willingness to feu or lease, or to purchase so much of the said glebe at such a rate of feu-duty or rent or price as the Court may determine on consideration of the whole circumstances of the case, and after directing such inquiry as they may consider necessary. If he proposes to feu or lease, the conterminous proprietor is to undertake (in his intimation) to grant security over the whole or such part of his estate in addition to the glebe itself, as to the Court shall seem necessary, for the regular and punctual payment of the feu-duty or rent fixed by the Court, and on such intimation, and after the rate of feu-duty and security therefor or price has been so fixed, the Court will, in case of feuing or leasing, interpone its authority to the bond or other writ in security, and decern accordingly, and in case of sale will pronounce a decree of sale thereof in favour of such heritor (*i.e.*, conterminous proprietor), on which he is entitled to obtain a charter from the Crown for payment of a blench duty of a penny Scots, and interpone their authority accordingly. The heritor is not entitled to obtain an extract of the decree of sale until the price is consigned in one of the chartered banks

in Scotland[1] for behoof of the minister; and in every case of such sale the price, after deduction of all expenses connected with the application to the Court, is to be invested at sight of the heritors and Presbytery on such securities and in such manner as the Court of Teinds directs, and the interest or proceeds only paid to the minister (§ 17).[2]

So long as any burden (for expenses of application or of drains, &c., § 18) remains unpaid, the casualities of superiority payable under any contracts, dispositions, or charters of feu, or writs by progress for entering heirs or successors granted under the provisions of the Act, as well as any payments received from grantees in respect of the construction of roads, sewers, or drains, are to be invested, at the sight of the heritors and Presbytery, on such securities and in such manner as the Court of Teinds approve, as a sinking fund to meet the said burden; the interest of the fund being payable to the minister for the time being. As soon as the fund amounts to a sum sufficient, the burden is to be paid off, and the casualities of superiority thereafter due form part of the income of the minister, and are payable to him (§ 19).[3]

All deeds granted by the minister with consent of the heritors and the Presbytery, as certified by the clerk to the heritors, and the moderator and clerk of the Presbytery, are declared to be as legal titles as if granted by a proprietor or superior with a completed feudal title holding immediately of the Crown; subjects feued, conveyed, or leased under the authority of the Act are subject to payment of poor-rates, "any law or custom to the contrary notwithstanding;" contracts and

[1] Bank of Scotland; Royal Bank; British Linen Company.

[2] The section continues: "And it is provided further, that it shall be lawful for any heir of entail in Scotland to burden the lands and estate of which he or she is in possession as heir of entail lying contiguous to such glebe for the amount of such price, or to give security over the same for the annual payment out of the clear yearly rents and profits of the said lands and estate, the interest of such sum calculated at four and one-half per centum, or the amount of such annual payment, not exceeding three pounds per centum of such clear yearly rents and profits after deducting all prior burdens and provisions, as the same shall be ascertained by an average of the five years immediately preceding the date of creation of such burden or security." See *Gloag* v. *Rutherfurd* (Galashiels), Jan. 6, 1876, *infra*; *Campbell* v. *Morison* (Balmerino), Nov. 18, 1872, *infra*; *Fogo* (Pet.) (Row), Nov. 9, 1868, *infra*; *Minister of Rattray*, July 15, 1868, *infra*.

[3] See *Mackie* (Petitioner), May 25, 1874, *infra*.

other deeds are to be recorded in the books of the heritors (§ 20). It is said to be the practice in some parishes to engross all deeds also in a minister's chartulary, but it does not appear that any legal charge can be made against a feuar for such engrossment. The entire deeds should be engrossed in the books of the heritors, not mere extracts. The purpose of the section is to provide a complete legal record.

In all deeds the full value of the ground thereby feued or leased is to be stipulated to be paid in perpetual annual feu-duties, or rents for the endurance of the building leases before mentioned, in grain or in money, payable half-yearly without taking any sum or sums of money or other matter or thing whatsoever by way of fine, foregift, or grassum; all casualities of superiority accruing on the renewal of the title to heirs or singular successors are taxed at a duplicate of the annual feu-duty; all feu-duties, casualities, or rents are to be properly and legally secured upon the ground for which they are payable, and on the buildings thereon (§ 21). The minister is to have the usual powers of a superior, and feuars the usual rights of vassals holding of a superior holding immediately of the Crown (§ 22).

The Court may pass such Acts of Sederunt as they consider necessary to regulate procedure, and the Act is declared not to affect any Act of Parliament "now" (6th August, 1866) in existence affecting the feuing of glebes in Scotland, or anything done, or contracted to be done, thereunder (§§ 23, 24).

The model feu-charter is that approved in the *Penicuick* case (5 Mac. 1145). In a petition for authority to feu a glebe (in 1875), the Court approved of certain alterations, rendered necessary by the Conveyancing and Land Transfer Act, 1874, on this model (*Browne*, Mar. 1, 1875, 2 R. 488).

The construction of the 13th section was considered in the case of *Blair-Athole.*

The minister of the parish of Blair-Athole, which includes the old parish of Kilmaveonaig and Little Lude, presented a petition for authority to feu part of the glebes of Blair-Athole and Kilmaveonaig. Of the non-arable portion of Blair-Athole glebe it was sought to feu 328 acres of rocky grounds incapable of reclamation for tillage, and scarcely improvable for pasture, at four shillings an acre per annum, being double its agri-

cultural value as reported by the land-surveyor to whom the Lord Ordinary made a remit. None of the land was suitable for building purposes. The Lord Ordinary (Gifford), in reporting the case to the Teind Court, referred to the following cases (unreported), in which authority had been given to feu glebe land, although it was not to be built on—viz., the cases of *Wilton*, 1870, where authority was given to feu 10 acres for plantation; of *Kirkden*, 1868, where 5 acres were feued, with a prohibition against building; of *Kilrenny*, where a portion of the glebe was feued to enlarge the burying-ground. On the whole, the Lord Ordinary was of opinion that, where feuing is otherwise advantageous, power to feu may be given, although there is no prospect of the ground being required or taken for building purposes. The Court took this view, Lord Justice-Clerk Moncreiff remarking: "I have no doubt that under the statute in question the power to grant feus of glebes was not intended to be restricted to feus for building, and I am led to that result, not only by the reason of the thing, but by the express words of the statute. . . . The statute draws very clearly in its phraseology the distinction between feus and building leases, and this runs throughout all the clauses relative to this matter" (*Macleod* (Blair-Athole), July 4, 1870, 8 Mac. 955).

Nor is the rule inflexible that where buildings are to be erected they are bound to be of the value of sixty years' purchase of the feu-duty. In the *Row* case the Court bound the heritors to erect buildings of the value of forty-five years' purchase of the feu-duty (*Fogo* (Petitioner), July 1, 1868, 6 Mac. 970).

The following decisions refer to the 17th section. If a conterminous proprietor desires to acquire a portion of the glebe, the application to the Court should be made by him, not by the minister (*Imrie* (Petitioner), Jan. 29, 1868, 6 Mac. 284). As to a feu to a conterminous heritor at a specified feu-duty, see *Minister of Milton*, July 1, 1868, 5 S.L.R. 631.

In an application for authority to feu under this Act, the Court held (1) that in fixing the minimum feu-duty the building value and not the agricultural value fell to be taken; and (2) that the price to be paid by a conterminous heritor for lands taken under § 17 was twenty-five times the amount of the

minimum feu-duty (*Campbell* v. *Morison* (Balmerino), Nov. 18, 1872, 11 Mac. 80).

The lodging of a minute by a conterminous proprietor, under the 17th section, intimating his willingness to purchase the glebe or any part of it, does not conclude a personal contract of sale between him and the minister, it being in the power of the Court, at any time before decree of sale is pronounced, to impose conditions for the protection of the benefice (*Gloag* v. *Rutherfurd, &c.* (Galashiels), Jan. 6, 1876, 11 Mac. 251).

The Teind Court granted authority to feu the glebe of Row; a conterminous proprietor, under § 17 of the Glebe Lands Act, 1866, within thirty days of the interlocutor, lodged a minute in which he intimated his willingness to purchase a certain portion of the glebe at such a price as the Court might determine. Shortly after the commencement of the winter session, before any steps had been taken on the minute, he asked leave of the Court to amend his minute by inserting the maximum price which he was willing to give. The Court held that the minute must be unconditional, in terms of the 17th section. The conterminous proprietor then asked leave to withdraw his minute; the minister of Row opposed this, on the ground that on the analogy of the interpretation put on the Lands Clauses Act, the lodging of the minute was an acceptance of the offer made to the conterminous proprietor by the interlocutor authorising the glebe to be feued, and that nothing now remained to be done but to fix the price. The Court held that the minute might be withdrawn; no procedure had taken place on it (*Fogo* (Petitioner) (Row), Nov. 9, 1868, 7 Mac. 88).

Two persons offered for the same portion of glebe: the Court preferred the higher offerer, though second in point of time (*Minister of Rattray*, July 15, 1868, 5 S.L.R. 659).

Where a glebe had been feued under the Glebe Lands Act, the Court authorised a composition paid by a feuar, instead of being invested as directed by the 19th section of the statute, to be applied in part payment of a bond and disposition in security, which had been granted over the glebe for the expenses connected with the application for authority to feu (*Mackie* (Petitioner), May 25, 1874, 1 R. 934).

The heritors of Galashiels having built a new manse on part of the glebe, and the Presbytery having designed as glebe the

site of the old manse and garden, authority was granted to the minister, the heritors appearing and consenting to the arrangement, to feu the site of the old manse and garden, under reservation of the right of the heritors to the fabric of the old manse (*Gloag* (Petitioner), Nov. 17, 1873 (Galashiels), 1 R. 187).

The case of a united parish containing more than one glebe, from which parish a disjunction and erection has been made of a portion into a parish *quoad sacra*, is dealt with by the Act 39 Vict. c. 11 (the United Parishes (Scotland) Act, 1876). The expression *glebe* is defined to include grass, glebe or minister's grass, and any land settled in perpetuity on the minister for the time being.

The Act provides that if in the course of any proceedings under the Act 7 & 8 Vict. c. 44 for the disjunction of a portion of a united parish and for its erection into a parish *quoad sacra*, it appears that there is more than one glebe forming part of the benefice of the united parish, the Court of Teinds, upon sufficient evidence being produced of the consent of the Presbytery, may, in pronouncing decree of disjunction and erection, declare that one of the glebes, described by its marches and boundaries, and with its parts and pertinents, shall be transferred from the minister of the united parish to the minister of the *quoad sacra* parish, and be thereafter the glebe of such parish, the minister being invested with all those rights in relation to the glebe which were formerly vested in the minister of the united parish: the right of personal occupancy and enjoyment of such (transferred) glebe, however, continues with the minister of the united parish in office at the date of the decree, during his incumbency, unless by deed duly executed and lodged with the clerk of the Presbytery he renounces the right (§ 3). The same provisions apply to the case of a portion of a united parish which has already been erected into a parish *quoad sacra* under the Act before-mentioned, including the reservation to the minister of the united parish of the (transferred) glebe during his incumbency, unless he renounces his right (§ 4). The glebe of the *quoad sacra* parish is not subject to the provision of any trust constituted under the Act 7 & 8 Vict. c. 44, subject to this proviso, that if a manse and offices are erected on such glebe, either before or after decree of disjunction and erection, or decree as aforesaid (*i.e.*, of transference of

glebe), the site of such manse and offices is subject to the provisions of any trusts constituted in terms of that Act (§ 5). Nothing in the Act increases or affects the existing liabilities of heritors in any parish, and the Act is to be deemed as incorporated with the Act of 1844 (§§ 6 and 7). It has been decided that the 4th section of the above Act does not apply to the case of a *quoad sacra* parish, a small portion of which only had been disjoined from a united parish, and the rest from adjoining parishes (*Minister of Brydekirk* v. *Minister and Heritors of Hoddam*, June 4, 1877, 4 R. 798). Lord President Inglis expressed his opinion that the provision applied only in the case of a *quoad sacra* parish, the whole of which had been disjoined from the united parish.

The powers conferred on a landlord by the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), are declared by § 32 not to be exercisable by ministers in respect of their glebes, except with the previous approval in writing of the Presbytery of the bounds.

Contrary to the rule deducible from early cases, the possession of a glebe of legal extent and of unusual value affects the amount of augmentation of stipend to be granted to a parish minister (*Carnegie* v. *Spied*, July 15, 1849, 11 D. 1250; *Minister* v. *Heritors of Old Deer*, Nov. 23, 1808, F.C.; *Stevenson* v. *Duke of Buccleuch* (Milton), Nov. 21, 1827, Shaw, Teind Cases, 137; *Stewart* v. *Glenlyon* (Blair Athole), May 28, 1835, 13 S. 787.

MINISTER'S GRASS.

The statutes relative to the provision of minister's grass are the Acts 1649, c. 45, and 1663, c. 21 (c. 31, Thomson's ed., vol. vii. p. 473). The latter provides "that every minister (except such ministers of royal burrowes who have no right to gleibs) have grass for ane horse and tuo kyne, over and above their gleib, to be designed out of kirklands, and with relieff according to the former Acts of Parliament standing in force; and if there be no kirklands lying neir the minister's manse, out of which the grasse for ane horse and tuo kyne may be designed, or otherwise, if the saids kirklands be arable land; in either of these caces, ordaines the heritors to pay to the minister and his successors yearly the sume of £20 Scots, for the said gras for ane horse and

tuo kyne, the heritors alwayes being releived according to the law standing, of other heritors of kirklands in the said paroche."

A minister who has a glebe, whether pasture or arable, is therefore entitled also to ground sufficient to pasture one horse and two cows, provided (1) that there is church land in the parish, and (2) that the church land is not arable land. In the case of a glebe the *preference* is merely given to church land, other land being available for designation if it is nearer the church or better suited to the case, but here the prohibition is absolute.

If there is no church land, or if it is arable, the minister is entitled to £20 Scots per annum in place of the minister's grass. This provision is obviously insufficient, but the Court have no power to increase it (*Carfrae* v. *Heritors of Dunbar* (Dunbar), May 13, 1814, F.C., Lord Meadowbank dissenting).

As the provision of minister's grass is quite independent of the provision of a glebe (except that without a glebe a minister is not entitled to grass), it is no fatal obstacle to a minister's application for grass that he has already a glebe of larger extent than he is strictly entitled to. The minister of Jedburgh, a cure with six acres of arable glebe since before 1663, was found entitled in 1805 to minister's grass; so, too, the minister of Kilconquhar, with eight acres of glebe in 1811, was also admitted to have right to grass (*Dundas* v. *Somerville* (Jedburgh), 1805, M., Glebe, Appendix 5; *Bethune* v. *Small* (Kilconquhar), Feb. 2, 1811; Connell "On Parishes," 409). In the older case of *Borgue*, where from the union of three parishes, three glebes were enjoyed by the minister, the Court refused to allow him also minister's grass; each glebe was less than the legal size, but taken together the glebes made up not only a full glebe, but in the opinion of the Court provided sufficient grazing for a horse and two cows (*Forbes* v. *Miller* (Borgue), 1755, M. 5127).

The extent of ground to be designated is not specified in the Act of 1663. It has varied from four and a-half acres in the case of *Oldhamstocks* to twenty acres (of moorland) in the case of *Falkirk* (*Belshes* v. *Moore* (Oldhamstocks), Dec. 23, 1825, 4 S. 347, rev. 2 W. & S. 558; *Wilson* v. *Forbes's Trustees* (Falkirk), June 10, 1818, F.C.).

Numerous questions have arisen as to the definition of arable land. In an old case it was observed: "The Presbytery must

not pitch on arable land that has been in use to be tilled, and the heritors must not, *in æmulationem*, till up what was in use to be lee" (*Steel* v. *His Parishioners* (Lochmaben), 1712, M. 5131; *Steel* v. *Dalrymple*, July 27, 1748, M. 5161; *Bruce* v. *Carstairs* (Anstruther Wester), May 30, 1826, 4 S. 626; see *Macmillan* v. *Presbytery of Kintyre*, Nov. 19, 1867, 6 Mac. 36).

No lapse of time bars a minister's claim to grass, provided the Presbytery has not sanctioned formally the substitution of the money payment for land, but this is an absolute bar. See M., Glebe, App., No. 7; *Minister of Dollar* v. *Duke of Argyll*, July 9, 1807, F.C.).

A heritor who has kirk lands from which the minister's grass is selected is entitled to relief from the other heritors of kirk lands in the parish, but not from the heritors of temporal lands also. When a provision in money is made, it is derivable in the first instance from propietors of church lands nearest the manse and kirk, with a right of relief to them against heritors of other church lands in the parish, exigible in proportion to the valuation of their lands (*Duke* v. *Thomson* (Dunfermline, 1755), M. 5161; D. 568, 569). It does not appear that heritors of temporal lands are liable either with church-land heritors or in relief. But the payment is so small that the point is of almost no importance.[1]

[1] See Dr. Cook's "Church Styles" for forms of petitions to Presbytery or to the Sheriff relative to glebes, &c. The subject of the feuing of glebes, under the Glebe Lands (Scotland) Act, 1866, forms the second part of Mr. Elliot's work on the "Erection of Parishes *Quoad Sacra*" (1879).

CHAPTER VIII.

PROCEDURE IN CASES UNDER THE ECCLESIASTICAL BUILDINGS AND GLEBES (SCOTLAND) ACT, 1868.

THE Ecclesiastical Buildings and Glebes (Scotland) Act became law on 31st July, 1868, and since that date the procedure in relation to the building, re-building, repairing, adding to, or other alteration of churches or manses, or to the designing or excambing of sites for such buildings, or of glebes or additions to them, or of sites for or additions to churchyards, and the suitable maintenance of churchyards, including the building or repairing of churchyard walls, when any heritor or the minister of the parish is dissatisfied with any order pronounced by a Presbytery having reference to such matters, falls to be regulated by that Act. The remedy open to a dissatisfied heritor, or the minister of the parish, is by appeal to the Sheriff of the county in which the parish is situated, when a matter falling under § 3 of the Act calls for settlement, or if the parish is situated within more than one county, then by appeal to the Sheriff of either county. In the course of more than thirty years the Sheriffs have decided a very large number of cases under the Act, but each individual Sheriff has decided but a few. It is impossible to be assured of the procedure followed in each case, or to ascertain the circumstances, or all the decisions themselves, but it may be helpful to bring together such information as is available as to the course usually followed in the conduct of cases, and to offer some suggestions as to the construction of the statute. It is, perhaps, unfortunate that the primary jurisdiction was left with the Presbyteries, but as matters stand proceedings must originate in the Presbytery.

When a minister is satisfied that the parish church or manse is in a state of disrepair, or that any other of the matters enumerated in § 3 require, or may require, to be brought under the notice of the Presbytery, unless the heritors deal ade-

quately with the grievance which he believes to exist, he should carefully consider the circumstances and, it may be, obtain a report from an architect as to what requires to be done. If it is the church which is in a state of disrepair, the kirk-session or congregation will be well advised to get such a report. The minister calls a meeting of heritors (see § 22 of the Ecclesiastical Buildings and Glebes Act, 1868) in the following or similar terms:—

PARISH OF .

I hereby call a meeting of the heritors of the Parish of , to be held within the Parish Church (*or as the case may be*) on , the day of at o'clock. Business—to receive and consider a statement by the minister of the Parish relative to the disrepair of the parish church (or the disrepair and inadequate accommodation of the manse) [and if so resolved to impose an assessment to defray the cost of its repair] [(*in the case of a manse*), and of such alterations and additions as may render it an adequate and suitable manse for the accommodation of the present minister and his successors (*or as the case may be*)].

The minister's statement should be clear and brief. He should narrate when the church or manse was built, what repairs, alterations, or additions have been made so far as he knows, and the circumstances which led to his calling the meeting. If he has obtained a report from a man of skill he will read it, and hand it to the clerk to the heritors that it may be engrossed in the heritor's minute-book. He will answer any relevant questions. If requested to retire, he should do so without demur, for he is not a heritor, and is not entitled to be present at a meeting of heritors unless he calls it himself, *ex proprio motu*, and then only to make the statement which he has called the heritors together to receive. While heritors frequently expect the minister's presence at their meetings, and would be disappointed were he not there, the minister's most judicious course is to absent himself when he has no personal business, and when he has a personal statement to make, to leave when he has made it, unless he is requested to remain. No good is done by a minister entering into acrimonious discussion. If he has cause to be dissatisfied with the action of the heritors, he has his remedy by bringing the matter before the Presbytery.

When a minister has called together a meeting of heritors for such a purpose as has just been indicated, the heritors' clerk, who as a rule will be familiar with the circumstances, should prepare himself for the meeting by a perusal of the heritors' minute-book and accounts, so as to be ready with a statement as to past expenditure. The old and new Statistical Accounts of Scotland may generally be consulted with advantage as to the history of the ecclesiastical buildings. He will, of course, have beside him a note of the population of the parish, the stipend, the rental of the parish, and other particulars. If he is a lawyer, should the enlargement of a church be sought he will bear in mind the import of the decided cases, and consider how far they are applicable. The clerk will advise the heritors that they cannot safely determine whether the church is in a state of such disrepair as to warrant rebuilding without the opinion of a man of skill. It is best that the man of skill should not be a heritor.

Should the manse be complained of, the heritors' clerk will be prepared to advise the heritors to put such questions as the following to a man of skill:—Is this building one which any reasonable man would think of repairing? (*Heritors* v. *Minister of Olrig*, July 10, 1851, 13 D. 1335). Is it sufficient for the accommodation of the minister? (*Heritors of Strathblane* v. *Hamilton*, July 10, 1827, 55, 914). Is it suitable for the minister's position and comfortable for his family? (*Heritors of Insch* v. *Storie*, Dec. 18, 1869, 8 D. 369). Has it a stance of half-an-acre, stable, barn, byre, garden, washing-house, and other conveniences for the residence of a gentleman, a garden wall, and suitable accessories? If questions such as the above are clearly put, and as clearly answered by the man of skill consulted by the heritors, the chances of litigation between minister and heritors are greatly diminished. Heritors who refuse to consult a man of skill, or who ask his opinion only upon selected points, while they perhaps think they are avoiding expense, in truth are seeking the surest way to incur it.

The opinion of the man of skill is usually considered at an adjourned meeting. If the heritors agree to do the work he recommends, good and well, whether the decision be arrived at unanimously or by a majority. But such a resolution does not prevent the matter going further, for the minister, if dissatisfied with the extent of the work ordered, can bring the matter

before the Presbytery. The following are forms of petition which can be adapted to circumstances:—

[For repair or rebuilding of Church.]

Unto the Reverend the Presbytery of .

The Petition of the Reverend ,
Minister of the Parish of ;

Humbly sheweth,—

That the church of the Parish of has, through the lapse of time and the progress of natural decay, become so ruinous [*or*, unsafe] and insufficient as to render it unfit for the attendance of the parishioners at Divine service; and the present application is made to have the church rebuilt in a substantial and sufficient manner.

The ground outside is now from to inches above the floor of the church. Much of the woodwork is rotten. There is no appliance for heating the church. The lighting and ventilation are very defective, and the church is inconvenient, insanitary and dangerous.[1]

The present church, as the petitioner is informed, was built about the year , and in consequence of its condition it would be impossible by repairing it to render it substantial and safe. At all events, an expense would be incurred almost equal to what it would cost to rebuild it.

The church has only sitting accommodation for persons, and ought to provide accommodation for at least , and does not afford accommodation for the population of the parish, which has largely increased within recent years. The present population of the parish is estimated at , and sittings for would be greatly less than two-thirds of the examinable population.

[1] "It has been proved that the church is in various respects inconvenient, insanitary, and even dangerous. The seats and passages are too narrow, the floor is too low, there is no vestry, there is no retiring room of any kind, except the session house, the upper gallery is objectionable on many grounds, the egresses have been condemned by the burgh engineer, the ventilation is most defective, and the air-space available for each sitter is quite insufficient, being something like 113 cubic feet per sitter, whereas it ought to be from 150 to 200 feet" (Lord Stormonth Darling (Lord Ordinary), *Steel* v. *Kirk Session of St. Cuthbert's Parish*, 18 R., at p. 913). Air-space: *see* Appendix, pp. 375–6.

The site upon which the church stands is unsuitable and too small for a church with the accommodation required, unless the heritors can arrange with the lair holders in a sufficient portion of the ground which surrounds the church to give up their legal rights to said ground, and failing an arrangement, it is necessary that the church be removed to another and more suitable situation. The petitioner has brought the matter before the heritors of the parish, but they refuse or delay to take any steps.

May it therefore please the Reverend Presbytery to appoint a visit to be made to the Parish of , and to direct this application and the proposed visit to be intimated to the heritors and all concerned, to direct the attendance at the visit of such men of skill as may be considered qualified to assist at the inspection: Thereafter to visit and inspect the church, and to require the said men of skill to report as to its state and condition, and whether it is ruinous and unsafe [*or*, dilapidated, insanitary, and inadequate] for the attendance of the parishioners at Divine worship, and also whether it is capable of being repaired and enlarged so as to be made safe and sufficient and at what expense as compared with that of rebuilding; and also to report whether the site upon which the church at present stands is suitable and proper, or whether it is necessary that the church be built upon an extended site or removed to another and more suitable situation: Thereafter to find that the church has become ruinous and unsafe [*or*, dilapidated, insanitary, and inadequate] and incapable of being repaired and rendered sufficient, and that it must be taken down and rebuilt: And further, that the present site of the church is too limited to permit of the erection of a suitable church of the proper area owing to its proximity to numerous graves, and that, failing an arrangement being made by the heritors with the lair holders for an extension of the present site, the church must necessarily be removed to a more suitable and convenient situation; to design and set apart the present site, with necessary extension, if obtained, as aforesaid, or otherwise to design and set

apart a piece of ground in a convenient situation and of proper dimensions and quality as a site for the church, to ascertain the value of the said piece of ground, and to ordain the persons in possession to remove therefrom; to appoint the necessary plans, specifications, and estimates to be procured for rebuilding the church upon such a scale as will afford comfortable accommodation for at least sitters, and to authorise a contract to be entered into, conform to such plans, specifications, and estimates as may be approved of: Thereafter to remit to the Clerk of Court, or other proper person, to prepare a scheme of division of the expense of the operations among the whole heritors of the parish who are liable in payment thereof, and to proportion and assess the amount of the value of the piece of ground chosen as a site of the new church and of the contract price and other contingent expenses (including the expense of plans and estimates, and a remuneration to the men of skill and others for attendance and reports, as well as the usual allowance to the Presbytery clerk, and the expense of collecting and administering the assessment), among the said heritors, according to their respective properties, or other just proportion; to appoint a proper person to collect and administer the said assessments, and to decern and ordain the heritors to make payment to such collector of the proportions thereof due by them respectively, or otherwise in the premises to do as to the Reverend Presbytery shall seem just.

According to Justice, &c.

[For repair of a Manse.]

Unto the Reverend the Presbytery of .

The Petition of the Reverend ,
Minister of the Parish of .

Humbly sheweth,—

That the petitioner is minister of the parish of ,

which is a landward parish, and he is by law entitled to a competent manse, offices, and garden, and garden wall.

That the manse was built, as the petitioner is informed, about years ago, but the offices were built at the same time as the previous manse, which was erected over one hundred years ago.

That petitioner was admitted to the ministry of the parish in the year , at which time the manse was not internally in a good state of repair, and it has never been put in such a state. The petitioner was advised to enter upon its occupancy in the expectation that the necessary repairs would shortly afterwards be effected. The house has not been painted since the petitioner became parish minister. There is no wash-house. The water supply arrangements of the house generally are defective. The servants' accommodation [cannot be used], and although the petitioner has bestowed much care and attention upon the building, and has frequently incurred personal expense in order to preserve it, the want of timely repair by the heritors has resulted in the manse being now defective in sanitation, comfort, and accommodation, for the use of petitioner as minister of the parish, and the offices, more particularly, have suffered dilapidation, and do not suffice for the accommodation to which the petitioner as parish minister is by law and custom entitled.[1]

That the petitioner has brought the state of matters before the heritors of the parish, but they have declined to do more than make certain inadequate repairs upon the fabric of the manse, and, with the exception of the repair of a roof which fell in, have left the offices untouched.

May it therefore please the Reverend Presbytery to appoint a visit to be made to the parish of and to direct this application and the proposed visitation to be intimated to the heritors [from the pulpit, and also upon the church door, in common form, and by advertisement in a newspaper circulating in the county of , once during each of two successive weeks, or otherwise as the Presbytery may direct]; to

[1] For the purpose of initiating procedure only a general allegation of disrepair is needed in the petition to the Presbytery (who are to inquire for themselves), but it is usual and proper to mention a few points of special complaint.

direct the attendance at the visitation of such men of skill as may be considered qualified to assist at the inspection; thereafter to visit the said parish, and to inspect the present manse, garden, and offices, and to require the said tradesmen or others, to report [upon oath] whether the manse, offices, and garden wall are in a proper state of repair; and, if they are not, what repairs are necessary in order to render the premises safe and comfortable: and, likewise, what additions are required to make the manse and offices a suitable and convenient residence for the petitioner and his successors in office, ministers of the said parish: To appoint the necessary plans and estimates to be procured, and to authorise contracts to be entered into, conform to such plans, specifications, and estimates as may be approved of: Thereafter to remit to the clerk of Presbytery, or other proper person, to prepare a scheme of division of the expense of repairs, additions, &c., among the whole heritors of the parish who are liable in payment therefor, and to proportion and assess the amount of the contract price and other contingent expenses, including the expense of plans and estimates, and a remuneration to the man of skill for attendance and reports, and solicitor's costs, as well as the usual allowance to the Presbytery clerk, and the expense of collecting and administering the assessments among the said heritors, according to the valued rent of their respective proportions, or other just proportion: To appoint a proper person to collect and administer the said assessments; and to decern and ordain the heritors to make payment to such collector of the proportion thereof due by them respectively, or to do otherwise in the premises as to the Reverend Presbytery shall seem just.

According to Justice, &c.

It is usual at the present day to lay stress upon the insanitary state of the church, as evidenced by insufficient air-space for the number of sitters, or the want of a damp-proof course, &c.

When a petition is received by the clerk of Presbytery,

he should immediately mark upon its back the date of receipt, and should communicate to the next meeting of Presbytery the fact that the petition has been received. He will read the petition to the Presbytery, but it is a matter for the Presbytery to decide whether he should also read any report by an architect which may accompany the petition. Such a report may be useful as corroboratory of the minister's petition as being made in good faith, and as evidence that he is not frivolously invoking the authority of the Court; but it is an *ex parte* document, in reliance upon which the Court should certainly make no deliverance. It is the practice in some Presbyteries to allow a petition to lie a month on the table. This does not seem necessary as a rule, but there may be exceptional cases where such delay is justifiable.

It is usual for the agent of the petitioner to intimate to the clerk of the heritors that such a petition has been presented, but this is merely done to save time as, should the heritors not have received intimation, the Presbytery will order intimation to be made. The Presbytery may hear the petitioner or his agent,[1] and the heritors by their agent or clerk, or representative members, but it is quite irregular to allow documents to be received showing what sums have been expended in the past on a church or manse or other subject of inquiry, with a view to impressing the Presbytery with the liberality of the heritors in the past. The true question before the Presbytery is "What is the present state of the building?"

The Presbytery has no duty laid upon it to refer a minister back to his heritors. In a recent case a Presbytery pronounced this deliverance:—"The Presbytery not being satisfied that Mr. A B has exhausted all other means the law provides to induce the heritors to make the necessary repairs, delay further consideration of Mr. A B's petition." The minister appealed to the Sheriff, alleging that the deliverance was erroneous and contrary to law in respect the Presbytery had failed to take means to acquaint themselves with the state of the edifice. There is no doubt about the law. Lord

[1] It is usual to move "that the agent for the petitioner be heard at the bar." The motion is invariably carried, and it is thought the Presbytery, meeting as a Court, would not be justified in refusing to hear a qualified law-agent, since it is competent to appeal the case to the Sheriff-Court. A member of the Court who is a solicitor should not be heard as an agent for parties.

President Inglis observed, in *Presbytery of Deer* v. *Heritors of Pitsligo*, July 8, 1876, 3 R. 975 : "Where a complaint was made that the manse was out of repair, it was the duty of the Presbytery to inform their minds on that subject, and if they required the advice of an expert they were entitled and bound to take it, and according to immemorial usage they were entitled to do so at the expense of the heritors." The circumstances under which a Presbytery can safely investigate defects in a building without professional advice must be very exceptional. A Presbytery on receiving a petition alleging serious structural defects in a manse, appointed a visitation by certain of their number, without a man of skill. The minister appealed to the Sheriff against the deliverance as being erroneous and contrary to law, and proceeded with the case in the Sheriff-Court.

The proper procedure is either for the Presbytery to refer the petition, &c., to a man of skill to report, or to remit the matter to the law (or other ordinary or special) committee with power to take the opinion of such a man of skill. As usually it is alleged in the petition that there are sanitary faults in the building which is to be the subject of inquiry, an architect should be empowered to take expert advice on sanitation if and when necessary, but he will probably do so in any case. The clerk should then transmit to the man of skill the petition, &c., and copy of the Presbytery's deliverance, and should in writing request him to attend at a meeting of Presbytery on a day named, with his report. Verbal instructions should never be given. It is convenient that the man of skill should report at the visitation. The heritors should be duly cited. The following is a form of notice :—

PRESBYTERY OF .

Notice.—Intimation is hereby given to the heritors of the parish of , and all concerned, that a petition has been presented to the Reverend the Presbytery of , by the minister of the parish of , craving them to visit the said parish and to inspect the church *or* manse, garden, and offices, and to find that the same are unsuitable and improper for the said parish (and are incapable of being repaired, *or* deficient in safety, comfort, and accommodation, *or as the case may be*) and to do otherwise in the premises, and that the

Presbytery are to visit and inspect the church *or* manse, garden and offices on the day at o'clock, at which time the heritors, or persons duly authorised to act for them, are hereby cited to attend.

Moderator.

Clerk to the Presbytery of .

It does not appear necessary that at the visitation the man of skill should affirm his report on oath, but this procedure is usual. The report is then read, and the reporter answers any questions which those present desire to put to him. The heritors should be invited to put any question arising out of the report to the man of skill. The questions may be put through the acting moderator or direct, as the moderator may see fit. The meeting is a court, but no discreet moderator would refuse to put questions, even outside of the report, if he was satisfied that by so doing doubts might be cleared up and the position of matters made the clearer. The reporter should express no opinion whatever on a matter of law. He should in no way travel beyond the remit.

Having heard the reporter and any representative of the heritors, the Presbytery will meet in private, and either then or at an adjourned diet pronounce a deliverance which will be intimated to the minister and to the clerk of the heritors. Within twenty days of the date of such deliverance any heritor or the minister of the parish may stay the proceedings by appealing the whole cause under § 3 of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, by "summary petition."

The following is a suggested form of appeal by a heritor who is dissatisfied with an order of Presbytery :—

In the Sheriff-Court of shire at .

The petition of A B, a heritor of the parish of .

Humbly sheweth,—

That on the day of January, 1901, a petition was presented to the Reverend the Presbytery of Z, at the instance of the Reverend C D, minister of the parish of E, praying the Presbytery to order certain repairs (or additions, *or as the case may be*) to be executed on the church

(*or* manse) of E, and that the Presbytery on the day of , 1901, pronounced a deliverance in the following terms:—(*Quote.*) That the petitioner is dissatisfied with the said deliverance, and desires that the Presbytery be stayed from taking any further steps in connection with said proceedings.

May it therefore please your Lordship to stay the said proceedings, and to dispose of the same in terms of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868.

In respect whereof,

A B, (or his Agent).

It is usual to describe the finding of the Presbytery as "a deliverance" as above, but the words of the Act are "order, finding, judgment, interlocutor, or decree," and it may be well to use at least one of those words, though not one of the five is so suitable as "deliverance." It does not appear necessary that the appeal should be framed as if it were a Petition under the Sheriff-Courts Act, 1876. A general Act does not affect a prior special Act by implication; further, what the Sheriff-Courts Act of 1876 provides is, that "every action in the ordinary Sheriff-Court shall be commenced by a petition in one of the forms as nearly as may be contained in Schedule A." (§ 6). Actions as to churches and manses, however, do not "commence" in the Sheriff-Court. They reach the Sheriff-Court by way of Appeal under the Ecclesiastical Buildings Act, and the "summary petition" provided for by that Act is merely a means to bring the cause from the ecclesiastical tribunal to the civil tribunal. There is, however, less risk of a preliminary objection being urged if the ordinary form of the Sheriff-Court petition is adopted.

Sheriff includes Sheriff-Substitute; as a matter of practice an appeal is always heard by a Sheriff-Substitute, and from his judgment the only appeal is to the Lord Ordinary (§ 16). The hearing of a case under this Act by a Sheriff is therefore unlikely, although he may elect to hear such a case personally, instead of allowing it to be heard by his Substitute. The provisions of § 3 must be carefully followed. It was held in the Sheriff-Court of Perthshire (*Nairnes (Heritors of Collace)* v. *Presbytery of Perth*, 1897, 14 Sheriff-Court Reports, 334), that not only must an appeal to be valid be taken within twenty

days of the deliverance appealed against, but that it must be duly intimated to the Presbytery clerk within the same period. The provisions of § 6 as to intimation are not (it is thought) to be read as having reference to § 3, but to § 5. In the *Collace* case, the Sheriff held that an intimation of the appeal posted to the Presbytery clerk on the twentieth day after the Presbytery's finding was a valid intimation, even though it was not received by the Presbytery clerk till the day following.[1]

Section 5 provides that within ten days of the presentation of an appeal, intimation is to be made by circular to (1) each heritor, or his known factor or agent; (2) to the clerk of the heritors, if there be such clerk; (3) to the minister of the parish, if the benefice is full at the time, and to the clerk of the Presbytery of the bounds. This, it will be seen, may mean that there should be a second intimation to the Presbytery clerk.

If the heritor or minister taking any appeal shall "unduly delay to follow forth the same," § 3 of the Act enables any other heritor, or the minister, or the clerk of the Presbytery, to sist himself and to proceed with the appeal. What constitutes "undue delay" is a question of circumstances. In the *Biggar* case, the minister presented a petition to the Presbytery craving the erection of a new manse. The

[1] "The terms of the third section of the Citation Amendment Act, 1882, are I think quite distinct on this point. That section provides that in the case of a 'judicial intimation,' such as is required to be given to the Presbytery clerk under the provisions of the Ecclesiastical Buildings Act, 'a Registered Letter by post containing a copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, such posting shall constitute a legal and valid citation.' In the case of *Lochhead* v. *Graham*, November 28, 1883, 21 S.L.R. 144, it was held that the section above quoted was, as expressed by Lord Young, 'both in language and reason, applicable to "judicial intimations" as well as citations;' and in the more recent case of *Alston* v. *MacDougall*, November 18, 1887, 25 S.L.R. 74, Lord President Inglis, in considering the effect of this section, stated the law to be 'that, under the terms thereof, the date of the posting of the registered letter was to be held to be the date of the citation, the putting of the letter into the post office constituting in itself a legal and valid citation. The case of *Neilson* v. *Robertson*, December 10, 1891, 19 R. 307, was quoted by the respondent as supporting his contention that the mere posting of intimation was not sufficient, but I do not think that this case can be received as authority upon the question now at issue. All that is required in such a case as the present is merely "due intimation," and that, I consider, must be what has been declared by the Court to be due intimation under the Citation Amendment Act, namely, the intimation being posted within the prescribed period.'"

Presbytery, on the advice of their man of skill, ordered extensive repairs on the existing fabric. Both minister and heritors were dissatisfied with this deliverance—the heritors because they had been advised by their man of skill that less extensive repairs were required, the minister because he had been advised by his man of skill that the manse was practically irreparable. Certain heritors appealed to the Sheriff, but upon the case being called in Court they proposed to lodge a minute craving leave to withdraw the appeal. To this the minister objected that an appeal for one was an appeal for all, and that if the appealing heritors withdrew, the minister was entitled to sist himself as a party and to prosecute an appeal against the Presbytery's deliverance on his own account. This contention was upheld. The following interlocutor was issued: "*Lanark*, 16*th September*, 1895.—Having heard parties' procurators, in respect that the Respondent craves to sist himself as a party in the Appeal, refuses the Minute for the Appellants craving to withdraw the Petition of Appeal: Allows the Respondent to sist himself as a party appellant, and appoints him to lodge reasons of appeal within fourteen days: Appoints intimation to be made of this Interlocutor by the sisted Appellant to the clerk of the Presbytery of Biggar, and also to the clerk of the heritors of the said parish, and to the Appellants Mrs. A B or C; G H, and I J: Further, appoints parties to be heard upon Monday the twenty-first day of October next, within the Sheriff-Court House, County Buildings, Lanark, at 12 o'clock noon: And on the motion of the agent for the Appellants grants leave to appeal against this Interlocutor."

In the event of a clerk to a body of heritors taking up an appeal dropped by a heritor, or by the minister, he should be careful to show that he is acting by "the authority of the heritors." He should produce an excerpt from a minute of meeting of heritors, bearing that he was authorised by the heritors unanimously, or by a majority, to sist himself as a party to said appeal *qua* clerk. Heritors who object to the clerk being sisted should have their dissent carefully noted in the minute of meeting. They should also lodge in the Sheriff-Court a minute of disclaimer, which, in the event of the Sheriff finding expenses due by the heritors, will save them from participating therein with the other heritors.

When the Presbytery clerk receives intimation of the appeal (if within the time specified in § 3) he should at once transmit the papers in the case to the Sheriff-Clerk of the sheriffdom in which the appeal is taken. The papers will consist of—(1) The petition by the minister, with any certificates or reports which he presented with the petition; (2) report by the Presbytery's man of skill; (3) certified excerpt from the Presbytery's minutes, showing the Presbytery's procedure. The papers should be accompanied by a duplicate inventory. The Sheriff-Clerk will write a receipt on one copy, and return it to the Presbytery clerk, who will place it among the Presbytery records. It is unnecessary and improper for the Presbytery clerk to delay delivering the papers until he has been authorised to do so by a meeting of Presbytery; the Presbytery have nothing more to do with the case, except in the event of the appellant delaying to follow forth his appeal. Under what circumstances a Presbytery may be a party is not clearly defined. A Presbytery is a court, and it is not usual for a court to appear to support its judgment before a Court of Appeal. A Presbytery, however, is more than a court; as a body they are the conservators of the benefice. Should a minister die or vacate his charge while an appeal initiated by a heritor is in progress, it is right and proper that the Presbytery should take up the position of defender which the minister had taken. The Presbytery do this as conservators of the benefice, and to secure that the ecclesiastical buildings will be in a fit state of repair when the incoming minister enters upon the discharge of his duties.

The first deliverance upon the Petition of Appeal will be in the following terms:—

(*Place and date.*)—The Sheriff-Substitute appoints the foregoing appeal and this deliverance to be intimated in terms of the fifth section of the "Ecclesiastical Buildings and Glebes (Scotland) Act, 1868," and appoints parties to be heard thereon upon the day of , at o'clock forenoon, within the Sheriff-Court house, .

It is judicious for the Sheriff to fix a date four weeks ahead, should the minister be the appellant, as the heritors may wish to meet to consider the position of affairs.

A newspaper "circulating in the county," is understood to mean in the county of the Sheriff who is to hear the appeal. The expense of more than two insertions in a newspaper would not be sanctioned by an auditor.

At the appointed diet the agent of the appellant should produce a copy of each of the newspapers which contained the notice of the presentation of the petition, and a certificate by the parish minister or clerk to the heritors that a copy of the Petition of Appeal had been affixed to the most patent door of the church for two successive Sundays, as required by § 5. If notice has been made by a circular, then a copy of the circular should be produced, with a list of heritors and their addresses appended, and a certificate of postage. The lodging of such papers in process will, it is presumed, satisfy the Sheriff that proper intimation has been made. The Presbytery clerk as above-mentioned should, before the diet, have transmitted to the Sheriff Court the principal petition, report by man of skill, and certified copy deliverance.[1]

Section 6 of the Act provides that the Sheriff "shall inquire into the circumstances and hear the parties by themselves or their agents without any written pleadings, unless the same shall be specially ordered by him;" but the inconvenience of proceeding without written pleadings is manifest, and the usual course is for the appellant, if he has proceeded by summary petition, to ask leave to put in a written statement of his case known as "reasons of appeal" in the form of a condescendence with pleas-in-law, or to ask that he may be allowed to do so within so many days, if the document is not ready at the moment. The more closely the procedure can be assimilated to that of an ordinary Sheriff-Court action the better, and the Sheriff in usual course will allow the statement for the appellant to be received and order answers from the parties

[1] In a recent case where the defenders were heritors on the roll of valued rent, the Sheriff ordered intimation of the petition to be made "to the heritors of A by two advertisements in *Herald* on and curt., and by affixing a copy of the petition of appeal to the most patent door of the church for two successive Sundays next after this date, and appoints as a diet for further procedure," the Sheriff's view being that although if the church were only repaired the liability would fall on the valued-rent heritors, yet the minister's petition asked for the erection of a new church, and were that found necessary the heritors according to the real rent would be liable.

appearing to sustain the Presbytery's deliverance, within so many days, and appoint a further diet. The agent for the appellant will make up the process in the ordinary way, with interlocutor and duplicate interlocutor sheets. As he will probably desire to lodge at this stage a certified excerpt from the heritors' minutes, should they have failed to give proper attention to the minister's complaint, and a certified excerpt of the Presbytery's deliverance, should the Presbytery clerk not have lodged it, the agent will also put in an inventory of productions.

The answers for the heritors will be in the usual form of defences. Statements as to negotiations which have come to naught are irrelevant. An extravagant time should not be allowed to prepare and lodge defences, although in practice it is frequently asked. The parties should know their own mind by the time the case comes into Court, and it is not desirable that delay (which is the bane of all procedure relative to ecclesiastical buildings and persons) should be encouraged. When the Sheriff has the case next before him he will close the record unless any good reason to the contrary appears, and he will then settle whether the parties are to be allowed proof, or whether a remit should be made to a man of skill.

The provisions of the Act as to the inquiry to be made by the Sheriff are not well expressed—(1), It is possible to construe § 6 to mean that the Sheriff cannot refuse to allow a proof, he is to take a note "of any evidence which may be led before him;" (2), but as regards the rebuilding of a church or manse, it appears from § 7 that he "may" take (and therefore may not take) evidence and make a remit to architects "or other professional persons." If the Sheriff under this action allows a proof, he is not excluded from making a remit afterwards, but it is clear he is not bound, after having allowed a proof, to make a remit as well, unless he so elects; (3), under § 8, in proceedings for the building or repairing of a church or manse, a proof may seem to be excluded because nothing is said about the Sheriff taking evidence; he is to inquire "with such assistance of architects or other professional persons as he shall think proper" "into the truth of the allegations contained in the petition"—a duty which, after all, is what is expected of him under the two preceding sections. Proof in any case will largely consist of evidence of

professional persons, and it is thought that a Sheriff is at liberty to construe this clause to mean that he can have such "assistance" by way of a proof, if he thinks he will sooner get at the facts of the case. In any proceedings for building or repairing churchyard walls (§ 10), the Sheriff is to "inquire as to the truth of the petitioner's allegations," but how he is to "inquire" is left to himself. It is thought such an inquiry might be by way of proof. In any proceedings for designing a glebe or churchyard, or the site of a church or manse, or additions to any of them, or for excambing a glebe, churchyard, site of a church or manse, or any portions thereof (§ 11), the Sheriff is to "inquire into the truth of the petitioner's allegations, and for that purpose may take such evidence, and make such remits to land valuators, surveyors, or other persons of skill as shall seem necessary." There are advantages alike in allowing a proof and in making a remit: in a proof the parties have it in their power to make quite sure nothing is omitted; a remit is much less costly.[1] It does not appear that because he has allowed a proof the Sheriff is not to be allowed to inform himself further by a remit.[2]

[1] Sheriff Strachan observed in the *Shettleston* case (note to interlocutor of August 12, 1897), "I was of opinion when the case first came before me (involving as it did a matter of some public interest and importance) that the facts bearing on the condition of the church, and on the expediency of repairing or rebuilding it, could be ascertained better by a proof than by a remit to a practical person, seeing that his opinion could not be tested by any cross-examination, and that by accepting it I would be compelled to base my judgment on somewhat narrow and restricted *data*. I cannot, of course, say what the result would have been had I followed the latter course; but I have no hesitation in stating that nothing could be more unsatisfactory than the voluminous evidence that has now been piled up in this case. I have never known a more striking instance of the unreliability of expert evidence. It would be very surprising, if it were not so common, to see the extent to which men of high character and ability can, when acting as experts, entertain and express the most conflicting and irreconcilable opinions regarding matters with which they must be familiar in their own every-day experience." (Not reported. See Appendix.)

[2] When a petitioner avers that a church must be rebuilt, he often mentions the inadequacy of the existing building for the parishioners of the present day; the Sheriff, however, in making a remit is usually careful to limit his remit to the question whether the church is dilapidated, unsafe, and insanitary (or like phrase), "and if so whether it is repairable so as to remove those defects, and if so at what expense compared with the expense of rebuilding." The heritors are not bound when the church is in good repair or repairable to enlarge or renew it for an augmented population. If the man of skill reports that a new church must be built, the question of accommodation will be considered in due course.

Section 13 makes it competent for any of the parties in the cause "to require the Sheriff to make a personal inspection of the premises or locality as the case may be, and the Sheriff shall comply with such requisition." This precaution should never be neglected. It is usual when the record is closed to ask the Sheriff to appoint his inspection; he consults as a rule the convenience of the agents of parties, and they and he and the Sheriff-Clerk are the only persons present at the inspection except (in the event of a remit) the man of skill.

An intimation that the Sheriff intends to make a remit does not make it any the less desirable that the Sheriff should visit the church or manse. He will usually do so (but not necessarily) with the man of skill to whom he remits, but it is as well the man of skill should have made himself familiar with the matter of the remit before he accompanies the Sheriff. In practice it is usually desirable that a remit should not be made to a local architect.

Under what circumstances and at what stage the Sheriff may dismiss a petition is difficult to say. If it appears that a manse, regarding which a petition has been presented, is really a free manse (see § 12), he will of course dismiss the petition at once. This would be in the case of a minister appellant. In the event of a heritor appealing against a finding by a Presbytery, in which all the rest of the heritors, or all but a very few, concurred, a question of more difficulty arises. In a recent case where the rental of a parish was over £16,000, the heritors by a majority in public meeting agreed to acquiesce in the Presbytery's findings, and to do certain work required upon a manse. Twelve heritors, the aggregate value of whose rental was less than £200, appealed. The agent for the minister lodged a motion asking that the heritors' appeal should be dismissed in respect the great majority of the heritors had acquiesced in the Presbytery's decision, or alternatively, that the appellants should be ordered to find caution. The Sheriff refused the motion.[1]

[1] "I have no hesitation in refusing the first part of the motion of the minister as too strong in the circumstances. The second may admit of some argument, but must, I think, also be refused. The authorities quoted to me in support of it, where the real raisers of an *actio popularis* put forward a man of straw, who was ordered to find caution, do not in my opinion apply to the present case, which is not an *actio popularis*, but a personal and patrimonial action by some individuals of a certain class whose substantiality up to the amount at least of their rental is apparent" (*Slamannan Heritors* v. *Parish Minister*, February 17, 1898, Falkirk Sheriff-Court (not reported)).

When the Sheriff, after a proof or remit, finds that a church or manse is to be built, or rebuilt or repaired, or churchyard walls built or repaired, or a glebe or churchyard designed, &c., it is the duty of the heritors to give effect to his decision, or to appeal to the Lord Ordinary in Teinds Causes within twenty days of the interlocutor. If the heritors do not appeal, and delay or refuse to carry out the Sheriff's finding, the Sheriff (§ 9), when a manse or glebe is in question, "shall remit to an architect or other professional person to prepare plans and specifications." He is to hear any objections that may be offered, and therefore must of course allow sufficient time for the examination of the plans and for objections to be lodged, and he may modify the plans. He is next to ordain them to be executed. The first finding of the Sheriff is one of law only—viz., that "in accordance with the law as at present existing a church or manse must be built, rebuilt, or repaired." The second finding, after approval of the plans, ordains the work to be executed, and, if need be, the Sheriff remits "to an architect or other professional person" to receive tenders for the execution of said plans and specifications, to accept of such tenders as shall seem best, and to superintend their execution. When the heritors refuse or delay to give effect to the Sheriff's finding that churchyard walls should be built or repaired, he is to remit (§ 10) "to some person" "to prepare the necessary specifications (on which, if required, he shall hear parties), and he shall approve of or modify the same, and, if need be, remit to some person to take and accept tenders and superintend the execution thereof," when the Sheriff designs a glebe or churchyard, or the site of a church or manse, or additions to any of them, or excambs a glebe, churchyard, &c., he is to assess and allocate the expense of acquiring land, "and decern therefor as in the case of building, rebuilding, or repairing a church or manse." The Sheriff, it is needless to remark, does not deal with expenses of rebuilding or repairing a church or manse until the heritors have disregarded his finding in law that rebuilding or repairs are required, and it may therefore be inferred that in case of designing or excambing there is to be an interval of time between the interlocutor finding that such designing or excambing is in accordance with law, and the assessing and allocating the expense of acquiring the land. This is the more

to be inferred since it is provided that no decree of excambion is to be pronounced by the Sheriff unless it appears that the Presbytery have given their consent to the excambion (§ 11).

Should the Sheriff find it necessary to remit to an architect or other professional person to superintend the execution of works connected with the building, rebuilding, or repair of a church or manse, he "shall find the heritors who are *now* liable in the expense of such building, rebuilding or repairs, and shall assess and allocate the same, together with a sufficient sum to cover the expenses of collection upon them, according to their respective real rents, as they shall appear on the valuation roll or rolls in force at the date of such assessment and allocation, or according to their valued rents as the case may be, and shall grant decree for payment thereof in such instalments and under such conditions as he shall direct" (§ 9). The meaning of the word "now" is not clear. The act did not increase existing burdens (§ 24). The Sheriff may assess, allocate, and decern for the expenses of building or repairing churchyard walls (§ 11), and of acquiring lands for a glebe or churchyard (§ 12) as in the case of building, rebuilding or repairing a church or manse.

It is possible that under the Ecclesiastical Assessments (Scotland) Act, 1900 (63 & 64 Vict. c. 20), some difficulty may be felt as to the proper persons to be assessed for such expenses. In a parish where assessments have, according to use and wont, been imposed on the valued rent, but where it would be competent to impose assessments on the real rent, the heritors are themselves to determine by a majority whether an assessment imposed after 1st January, 1901, shall be upon the valued rent (§ 1). The Sheriff would presumably assess on the valued rent, as being the use and wont. In a parish where assessments are in use to be imposed on the real rent, a Sheriff would assess upon it, notwithstanding the provision (§ 3) that heritors having a rental of under £50 may be relieved of assessment where the kirk-session has paid to the collector of the assessment the amount of the deficiency created in the total amount of the assessment by allowing the deduction of rental of £50, or of other rentals by that amount; this provision only applies to cases "where it has been resolved to levy an assessment," not where the Sheriff has found it necessary to himself impose, allocate, and decern for expenses of building, rebuilding, &c.

When works ordered in the course of any proceedings for the building, rebuilding, or repairing of any manse are completed it is competent for any heritor of the parish "to move the Sheriff to declare it a 'free manse'" (§ 12). It is not unusual to proceed by petition, but a motion is sufficient; it should be intimated to the minister or his agent, or the Sheriff will order such intimation. "If the Sheriff shall be satisfied that the manse is in a state of thorough repair, he shall find and declare accordingly;" how the Sheriff is to be satisfied is left to himself; he may of new make a remit to ascertain the thorough repair of the works, but it is not unusual to accept a certificate by the architect employed to carry out the works ordered by the Court; whether this is desirable is open to question. Pardovan observes that before a Presbytery declare a manse to be free, "a committee of their number must visit it, after it is built or repaired, and find upon the depositions of four discreet workmen, who understand that work, *but have not been employed therein*, two whereof to be chosen by the heritors, and other two by the minister, that the building or reparation is sufficiently finished." The decree of free manse is an important matter alike for heritors and minister, and no Sheriff grants decree without careful inquiry. The decree has effect for fifteen years from its date, or until the appointment of a new minister to the parish, whichever event shall first happen.

As regards the expenses of a cause, the Sheriff, by § 15, is entitled to dispose of all questions of expenses, and to grant decree therefor. A motion for certification of skilled witnesses must be made within eight days from the date of judgment, see *Scott* v. *Lanarkshire Railway Company*, *Scots Law Times*, November 13, 1897; and Interlocutor of November, 17, 1897, by Sheriff Strachan in *Shettleston* case, see Appendix (where also see observations as to the number of witnesses to be certified). See article on "Skilled Witnesses' Fees," *Scottish Law Review*, vol. xiii. p. 89. It was held by Sheriff-Substitute Fyfe of Lanarkshire, in the *Biggar Manse* case (*Duncan* v. *Presbytery and Heritors of Biggar*, 1896, 12 Sheriff-Court Reports, 169), that the fees of counsel employed by one of the parties could not be allowed as costs.[1]

[1] "It is, of course, always open to a party in a suit to have counsel at his own expense, but in my view it is only in most exceptional circumstances that

An appeal to the Lord Ordinary is taken by note of appeal written at the end or on the margin of the interlocutor appealed from, or by a separate note of appeal lodged with the Sheriff-Clerk on the following or similar terms:—"The petitioner [or respondent] appeals to the Lord Ordinary in Teinds Causes." The note is signed by the appellant or his agent, and is dated (§ 16). An appeal cannot be withdrawn without leave of the Lord Ordinary, "and an appeal may be insisted on by any party to the cause other than the appellant, in the same manner and to the like effect as if it had been taken by himself" (§ 18). The Sheriff, within two days after date of appeal, sends written notice of it to the respondent or his agent (§ 19), and within the same period transmits the process to the Court of Session (§ 20). When the appeal is called in the roll it is competent for the Lord Ordinary to dispense with printing the note of appeal and other papers or productions, or if he orders them to be printed and they are not printed by the appellant, or in case the appellant does not move in the appeal, the Lord Ordinary on a motion by any other party in the cause may grant an order authorising the party so moving to print the papers and to insist in the appeal as if it had been taken by himself (§ 20). All orders, &c., of the Sheriff are submitted to the review of the Lord Ordinary by the appeal (§ 18), and the Lord Ordinary has "the whole powers which are hereinbefore

counsel's fees can, in the Sheriff-Court, be allowed as costs against the opposite party. The language employed in the Act of Sederunt of 1878 most aptly expresses what ought to be the practice. The expenses to be allowed as costs in the cause are limited to 'proper expenses of process,' and in taxing accounts only such expenses are to be allowed as are 'absolutely necessary' for conducting the litigation 'in a proper manner, with due regard to economy,' and the expressed reason for this is, 'in order that the expenses of litigation may be kept within proper and reasonable limits.' Now, this is a statutory appeal. The legislature has selected the Sheriff-Court as the tribunal to which an appeal may be taken from the finding of the Presbytery, and presumably it was intended that an appellant should, as regards expenses, take only the risk of the ordinary Sheriff-Court expenses. In this case, also, the appellant had no counsel, although the burden of proof lay upon him. On the whole, I think the services of counsel must be regarded here, as in the ordinary case, as a luxury which the respondents were quite entitled to indulge themselves in, but that the appellant is entitled to object to the attendant cost being expenses in the cause, beyond the fees which an agent would have got." See also *Leny* v. *Milne*, Jan. 19, 1890, Sheriff-Court of Fifeshire, 15 Sheriff Court Reports, 76, for observations by Sheriff Mackay on the cases in which the sanction of the Sheriff as a general rule will be given or refused to the employment of counsel in the Sheriff-Court.

conferred on the Sheriff" (§ 20). All orders, findings, interlocutors, judgments or decrees, pronounced by the Lord Ordinary are final and not subject to review.

A parish minister having raised an action in the Sheriff-Court against the heritors of the parish for payment of £1000 as manse maill, the Sheriff-Substitute allowed proof and the interlocutor was confirmed by the Sheriff. The heritors appealed, under the 40th section of the Judicature Act, 1825 (6 Geo. IV. c. 120), to the Court of Session and asked that the case should be remitted to Lord Stormonth Darling, who, as Lord Ordinary on Teinds, had already pending before him an appeal taken by the minister under the Ecclesiastical Buildings, &c., Act, which was concerned with practically the same matters as those which formed the subject of this action. The First Division of the Court of Session dismissed the appeal and remitted the case back to the Sheriff as being one peculiarly appropriate to a local tribunal (*Bain* v. *Heritors of Duthil*, Feb. 13, 1894, 21 R. 536). Lord President Robertson said he was to some extent influenced by the consideration that if the case were tried in the Court of Session before a judge, an appeal to the House of Lords on the facts would be obtained. Lord Adam observed, that the object of the 40th section of the Judicature Act is to enable the party appealing to obtain a trial by jury, but that was not what the heritors sought in their appeal, but that the case should be tried by a judge. Both parties were agreed there should be a proof. "To my mind the case ought never to have come from the Sheriff; it is entirely a question for a local enquiry before the Sheriff—viz., What has been the state of these subjects during a considerable period?" Lord M'Laren said, "I agree that the circumstances of this case are such as to render it more suitable for investigation before the local tribunal rather than before the Court of Session, because of the entirely exceptional character of the case and because of its affinity to cases arising under the Act 31 & 32 Vict. c. 96, in which the judge is final on the facts."[1]

[1] The case of *Oliphant* v. *Presbytery of St. Andrews*, in which, upon an appeal from the Sheriff to the Lord Ordinary in Teind Cases, the appeal was dismissed and case remitted by him to the Sheriff, has been decided while these pages were passing through the Press (see 8 *Scottish Law Times*, p. 314, January 5, 1901).

PART III.

CHAPTER IX.

THE MINISTER—NOTARIAL POWERS—STIPEND—ANN—COMMUNION ELEMENTS—PATRONAGE.

A PARISH minister is a public officer appointed by the Church of Scotland, with the authority of the State, to the spiritual charge of a particular district of land, and to the service of God in the church of his district, and the administration of the ordinances directed by the Church of Scotland. His office is recognised by the State as a *munus publicum*. The office of principal in a missionary institution is not a *munus publicum* (*Hastie* v. *M'Murtrie*, June 4, 1889, 16 R. 715).

The endowment of a parish minister consists of the *temporality* of benefices—*i.e.*, the manse, glebe, and minister's grass—and the *spirituality* of the benefice—*i.e.*, the stipend (Craig, "*Jus Feudale*," 1 dieg. 14, §§ 1, 2; Ersk. ii. 10, 4; Bank. ii. 8, 127; D. 373).

His right to the temporality emerges with his admission to the benefice; his right to the spirituality is subject to the claims of a deceasing minister's next-of-kin. The term "induction" is frequently used to describe the entrance of a minister upon his cure, but in *Hastie* v. *M'Murtrie*, Lord President Inglis observed: "Induction is not a *nomen juris*, neither is it a *vox signata*, in the existing ecclesiastical law of Scotland. By the canon law, which was the ecclesiastical law of Scotland prior to the Reformation, induction was the legal name of a ceremony by which, after collation by the bishop of the diocese, some inferior ecclesiastical person gave the presentee actual and corporal possession of the church and benefice, under mandate from the bishop, by the use of certain symbols, which

it is needless to enumerate. The ceremony was formal and imposing, and necessary to complete the presentee's title to the benefice. During the two comparatively short periods in the 17th century when the National Protestant Church of Scotland was governed by bishops, induction had again a fixed and technical meaning, and was the name for a somewhat similar ceremonial conducted under the authority of the bishop, which consisted in the inferior clergy of the diocese, after collation by the bishop, carrying the collated presentee into the church and placing him in the pulpit, or in some other conspicuous part of the church, and there delivering to him the keys of the church. But with the ceremony the name of induction as a *nomen juris* has perished. There is no use of the name in any of the numerous statutes relating to the settlement of ministers under Presbyterian Church government. In the earliest of these statutes (1567, c. 7) it is provided 'that the examination and admission of ministers be only in the power of the Kirk.' By the Act of 1592, c. 116, Presbyteries are 'bound and astricted to receive and admitt quhatsumever qualified minister presented,' &c. The Act of 1690 simply revived the Act of 1592. By the Act 10 Anne, c. 12, restoring patronage, the Presbytery is 'bound to receive and admit such qualified person or persons, minister or ministers, as shall be presented.' The Aberdeen Act, 1843 (6 & 7 Vict. c. 61), bears in its title to be an Act respecting the admission of ministers, and by § 3 Presbyteries are directed to 'admit and receive into the benefice.' Lastly, in the Act 37 & 38 Vict. c. 82, abolishing patronage, and giving the appointment of ministers to congregations, it is enacted (§ 3), that "the courts of the Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof.' As to the form of admission to the benefice, the Church courts are left at perfect liberty to exercise their own discretion. But it is clear they could not use, and never have used, the old ceremonial of induction." "It may be true," the Lord President continued, "that the old name of the ceremony of induction still lingers in the common speech of the country, and may be used popularly even in the proceedings of Church courts as an equivalent of 'admission to a benefice.'

It is remarkable, however, that in the earlier authoritative or *quasi*-authoritative Church documents, as distinguished from Acts of Parliament, the term 'induction' entirely disappeared. In the First and Second Books of Discipline, in Pardovan's 'Collections,' in Principal Hill's 'View of the Constitution of the Church of Scotland,' 'admission of ministers' and not 'induction' is the phrase used. But what is the act of admitting a minister to a benefice, and what is its effect? There is no *actus solemnis* apart from ordination. By the imposition of the hands of the Presbytery, the candidate is admitted and set apart to the office of the holy ministry. If he has been already ordained, the fact is minuted. What follows is not a ceremony at all, but merely a recognition of the new minister as a member of Presbytery in his capacity of minister of the benefice to which he has been presented or elected."[1]

His enjoyment of the benefices of both classes is in its nature absolute, qualified only by the condition of dutifully serving the cure to which the benefices are attached, or in other words of ministering to the needs of his parish, and of the members of his congregation whether they reside in his parish or not. "There was a time," said Lord President Inglis, "when parishioners were compelled to attend their Parish Church, but these were the days of intolerance and persecution, and have long ago disappeared. Congregations now consist partly of parishioners and partly of persons resident beyond the bounds of the parish; these persons are all equally entitled to the services of the minister" (*Charlton* v. *Corke*, May 22, 1890, 17 R. at p. 788). He should, whether minister of a country or town parish, reside in it. To this rule there can be no justifiable exception. Though he lets his manse, he must continue to reside in the parish. In *The Inland Revenue* v. *Fry*, March 9, 1895,

[1] "Institution was formerly given by the presiding Presbyter delivering to the newly-ordained Pastor the pulpit Bible, and by putting into his hands the key of the church and the bell-strings. This was done at the close of the service, as appears, for example, from the following extract from the Records of the Presbytery of Perth in 1700: 'The moderator having closed the action with prayer and praise, gave the said Mr. C. institution by delivering him the kirk Bible, key of the kirk doors, and bell-strings; whereupon Mr. C. for his part, and J B, elder, in name of the rest of the elders and parishioners, asked and took instruments in the clerk's hands'" (Sprott, "Worship and Offices of the Church of Scotland" (1882), p. 215).

22 R. 422, Lord President Robertson observed that one of the checks upon the minister's right to let the manse was "his duty to be present to serve the cure, a duty enforceable by the ecclesiastical superiors. But then this duty may be performed without living in the manse, for a minister might have, or might choose, another residence *within the parish*." Lord Adam said: "So long as the minister *resides in the parish*, and gives no cause of complaint as to the way in which he performs his ministerial functions, the Presbytery have no right to say to him, 'You shall not let the manse.'" A minister of a city parish has no manse, but his parishioners' right to immediate and convenient access to their minister is not less than that of country parishioners. Resignation, deposition, or transportation may terminate his tenure of office, as well as death; he is not, then, even strictly a liferenter (but he may be enrolled on the valuation roll as such in respect of his manse and glebe).

It is the duty of the minister to preserve his benefices for his successors in the cure, but even his cession of any of his rights enjoyed as minister will not affect those who come after him. The minister of Falkland gave up, with concurrence of the Presbytery, his manse and glebe (in 1650) for an annual payment, but in 1793 the Court found one of the ministers of Falkland entitled to a manse and glebe (*Minister of Falkland* v. *Johnston*, 1793, M. 5155; see also *Pannure* v. *Presbytery of Brechin* (Brechin), Dec. 12, 1855, 18 D. 197). To this rule there is one exception: where the minister has accepted £20 Scots, in place of "minister's grass," the bargain cannot afterwards be recalled (*Minister of Dollar* v. *Duke of Argyll*, 1807, M., Glebe, App. 7).

A minister is entitled, under § 52 of the Property and Income-Tax, 1853, in computing his income to deduct from his emoluments—(1) expenses incurred by him in visiting members of his congregation beyond the limits of his parish; and (2) travelling expenses incurred in discharging duties imposed upon him by his ecclesiastical superiors—*e.g.*, the General Assembly or the Presbytery (*Charlton* v. *Corke* (Stranraer), May 22, 1890, 17 R. 785). The Customs and Inland Revenue Act, 1876, § 8, allows an abatement from income-tax to every person whose "total income from all sources" is under £400, but a parish minister must compute the annual value of his manse as income,

seeing he is entitled to make it a source of income if he likes, by letting it (*Inland Revenue* v. *Fry* (Girvan), Mar. 9, 1895, 22 R. 422).

No minister can hold a plurality of benefices (Act 1584, c. 132); a cure consisting of parishes united in one parish does not constitute plurality.

Thirteen years' uninterrupted peaceable possession by an incumbent of a subject as his benefice, or a part of it, supports a presumptive right in his favour to continuance of possession without a written title. This is the rule of *Decennalis et Triennalis Possessio*, as recognised by the law of Scotland. (The definition in the text is that of Duncan, p. 737. See Stair, ii. 1, 25; Bank. ii. 8, 106 *et seq.*; Ersk. Inst. iii. 7, 33, 34.) For a full historical exposition of the rule, see D. ch. xviii., on the possessory rights of churchmen. The case-law is chiefly old, but see *Cochrane* v. *Smith* (Cupar), Dec. 16, 1859, 22 D. 252, in which the modified canon rule is recognised as adopted into Scots law.

Seven years' possession by a minister also enables him without a title to retain, *qua* ecclesiastic, possession of a subject. A judgment following on such possession is regarded (D. 749 and *Cochrane* v. *Smith*, *supra*) as in nature and effect merely possessory, while in the case of thirteen years' possession, the judgment amounts to a decerniture that the subject so possessed belongs to and forms part of the benefice, and to this effect operates as a written title of property in the subject.

As to prescriptive title by *thirty* years' possession *in ecclesiasticis*, see Act of Sederunt, Dec. 16, 1612; *Marshall* v. *Drumkilbo*, 1629, 1 Br. Supp. 62, 378; and by *forty* years' possession, see Act 1617, c. 12; Ersk. iii. 7, 3–5; *Craufurd* v. *Maxwell* (Stoniekirk), 1724, M. 10,819, D. 750–753.

Notarial Powers.

The power to act *as a notary public* is inherent in the office of parish minister, and is the last vestige of the ancient connection between the church and the law in Scotland. Historically there were three classes of notaries—imperial notaries acting under the authority of the Emperor, head of the Holy Roman Empire, who were laymen; apostolic notaries appointed by the Pope, generally, if not invariably, ecclesiastics, authorised to exer-

cise notarial functions in temporal as well as spiritual affairs; the growing power of the apostolic notaries led King James III. to create a third class of royal notaries, with the intention of curbing ecclesiastical pretensions to a monopoly of legal business. The attempt was only partially successful as the Popes continued to make apostolic notaries, and the Church gave them a preference over imperial and royal notaries. The Act 1563, c. 79, however, vested the power of admitting notaries in the Court of Session alone. Where the apostolic notaries end, the parish ministers begin. There seems little doubt that, in all his actings as a notary public in virtue of his office as parish minister, the clergyman is a survival of the apostolic notary. The Scots Parliament in its zeal thought to extinguish utterly the authority of anyone to act as notary who did not derive his title from the Court of Session, and yet no sooner was this done than the parish minister stepped forward, Presbyterian though he was, to fulfil the useful functions of the old clergy. Thus the Act c. 133, of James VI., 1584, provides that none who are ministers, either at the date of the passing of the Act or thereafter, "sall in ony waies accept, use, or administrat ony place of judicature, in quhatsumever civil or criminal causes, nocht to be of the Colledge of Justice, commissioners, advocates, court clerkes, or notaris in ony matters (the making of testamentes onely excepted), under the paine of deprivation fra their benefices, livinges, and function."

It is curious that from the time when John Knox ceased to attend classes in the University of Glasgow, then a city of only 2000 inhabitants, to 1545, he passes completely out of sight, were it not for the fact that he exercised notarial functions as a cleric. In the Protocol book of Alexander Symson, Elder, "'Sir Jhohn Knox' is represented as appearing at the market-cross of Haddington, 13th December, 1540, on behalf of James Ker of Samuelston. He appears as 'Sir Jo. Knox' in a case before the Burgh Court of Haddington, 21st November, 1542. A third document is a notarial Instrument, drafted by Knox himself, dated 27th March, 1543, and bearing the signature 'Joannes Knox sacri altaris minister Sanctiandreae dioceseos auctoritate appostolica notarius.'" In the fourth document Knox is named as a witness.[1]

[1] Hume Brown, "Life of Knox," 1895, i. p. 58—"Either James Beaton, who held the see of St. Andrews from 1522 till 1539, or David Beaton who suc-

The requisites to the proper making of testaments by a parish minister in his notarial capacity are simple. A clergyman is in no better position than anyone else to make a will. The mere putting on paper the testamentary wishes of a sick man can be done by anyone. The first necessity of a will is the use of clear and unambiguous words; the danger in a clergyman's will-making arises from his too-wide vocabulary, and his acquaintance with legal terms of a kind. In his zeal to be exact, and formal, and business-like, a minister sometimes produces a document which is inexact, informal, and unbusiness-like, even when he is dealing with less serious things than the apportionment of a dying parishioner's worldly means and estate. The first duty of one who makes a will for another is to endeavour to set forth the testator's wishes in English of as direct and unconditional terms as he can command. Some general observations were made by Lord President Inglis in *Colvin* v. *Hutchison*, May 20, 1885, 12 R. 947, which should be borne in mind. The "will" which in that case formed the subject of judicial consideration was a very informal document. The Lord President observed: "The Lord Ordinary (Lord M'Laren) says that a testator 'must declare his will in writing, and it is implied in this statement of the law that he must use significant words disposing of the estate.' In another part of his note his Lordship says, 'I think that the testator's intention, if such exists, must take the form of a proposition of some kind.' In the first statement which I have quoted that words of gift must contain a verb expressing conveyance or transference or bequest, I am not prepared to agree with him; and if by the second statement the Lord Ordinary intends to lay down that a gift or legacy must take the form of a proposition, or, in other words, of a completed sentence, I am also not prepared to agree with that statement. I do not think it matters how inelegant or how imperfect grammatically a testator's language may be if it can fairly be construed to mean that he bequeaths certain sums of money to certain individuals, sufficiently designed in the writing itself" (p. 955). In the circumstances the "document

ceeded him must have been the bishop under whom he held his office of notary. The important inference to be drawn from Knox's tenure of this office," says Mr. Brown, "is that Knox was presumably of good repute in the Church till the day when he left it."

propounded was held to be a jotting and no will," but the Lord President said, "I do not mean to say that a paper of this kind, consisting of a mere schedule, as the Lord Ordinary calls it, may not be effectual if you can extract from it a testamentary intention and act of the will. Supposing the paper had been headed, 'This is the will of A to B, £100; to C D, £200,' &c., and that it had been regularly subscribed, I am not disposed to say that I should not have given effect to it, if the persons to whom the legacies were left were sufficiently ascertained and identified (dummodo constat de persona), and if the subjects or sums bequeathed were intelligibly described." It is always desirable that an executor should be appointed, but the Executors (Scotland) Act, 1900 (63 & 64 Vict. c. 55), by § 3 provides: "where a testator has not appointed any person to act as his executor, or failing any person so appointed, the testamentary trustees of such testator, original or assumed, or appointed by the Supreme Court (if any), failing whom any general disponee, or universal legatory or residuary legatee appointed by such testator, shall be held to be his executor nominate, and entitled to confirmation in that character."

It is the privilege of a parish minister to assist the feeble, for he can sign a will in a thoroughly valid and competent manner. But he is no more privileged than other notaries, and he must be careful to see that all the solemnities are observed. He must either personally know the granter of the deed, or be well assured of his identity. He must see that two witnesses are present, male or female, above the age of fourteen. He must take care that the will is read over to the granter in presence of the witnesses, who are to hear him asked to sign. It has been asked, What is to be done in the case of a person who is deaf and dumb? and it is thought that, to such a person, the document should be read off according to the deaf and dumb alphabet, the precaution being first taken to make sure that the witnesses understand the signs. When the truster is blind and almost totally deaf, and has heritable and moveable estate, many agents take the precaution to have two notaries and four witnesses, and perhaps this is discreet; but a parish minister cannot fetch in another parish minister. The authority to sign may be given by word or sign, but must at all events be clear. The 41st section of the Conveyancing Act,

1874, abolished the necessity for the granter touching the notary's pen, but to the present day it is very often touched. The parish minister writes his docquet as follows—the form being prescribed in schedule I. of the Act :—

By authority of the above named and designed A B, who declares that he cannot write, on account of sickness and bodily weakness (*or* never having been taught, *or otherwise as the case may be*), I, C D, minister of the parish of (name it), subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before-named and designed, who subscribe this docquet in testimony of their having heard (*or* seen) authority given to me as aforesaid, and heard these presents read over to the said A B.

C D, Parish Minister.

E F, Witness.

G H, Witness.

It seems clear that a minister's notarial power is limited to his own parish. In 1606 Hepburn, brother to Mr. Patrick Hepburn, Gilmerton, pursued the laird of Wauchton, as heir to his father, "for spoilation and wrongous intromission of certain goods and corn pertaining to the pursuer's umquhile mother, to whom he was executor-nominative. It was alleged that the testament produced could give no action, because it was neither subscribed by the party nor by a notary at her command. It was answered : it was subscribed by a minister. It was duplied that the answer was not relevant, because the subscriber of the testament was not minister of the parish where the defunct dwelled and died, and albeit the Act of Parliament gave power to ministers to be notaries on testaments, yet that was not universal, but in their own parishes only, which the Lords found to be so by interlocutor, and found not the said testament a sufficient title" (*Hepburn* v. *the Laird of Wauchton*, Jan. 31, 1606, M. 16827). From the Kerse MS. it appears that not only in this case was the minister who acted as notary the minister of another parish, but the proper minister was in the parish at the time, so that his services had been slighted.

Bell (Principles, 2232) says, "The clergyman of the parish is not required," but Erskine, Menzies, Dickson, and Craigie, and all other writers, affirm that the parish clergyman is the proper notary in his own parish, and certainly, as Mr. Murray says ("Notary Publics," p. 49), the schedule to the 1874 Conveyancing Act implies that the parish minister's power is limited to his own parish. From Mr. Hamilton Grierson's "Cases Commented Upon," there has been, at least from 1862 to 1893, no observation made by the Court of Session upon the soundness of *Hepburn's* case. (In the 1899 edition of Bell's "Principles," the opinion is expressed that in the absence of the parish minister, the minister of another parish can perhaps act as notary in his neighbour's room.)

It does not appear that the minister of a *quoad sacra* parish is entitled to act as notary.[1] The minister of a dissenting church is not entitled to act as a notary.[2]

The minister must be careful himself to write the docquet. It is not sufficient that he should sign a docquet written by some one afterwards. Nor can his error be corrected after the testator's death. It is true that in *Traill* v. *Traill*, February 27, 1805, M. 15, 955, the Court allowed a minister to annex an attestation as a notary, of his having subscribed the testament, and that having been done they sustained the deed, but the case of *Campbell* v. *Purdie*, March 12, 1895, 22 R. 443, puts

[1] The editor of Bell's "Principles" thinks he is "probably competent." Although *Bell* v. *Bell*, December 10, 1840, 3 D. 204, decided that a minister of a parish *quoad sacra* could not grant a certificate of a person's fitness for admission to the benefits of the poor-roll, this was practically reversed in *Murrie* v. *M'Donald*, December 24, 1853, 16 D. 325, where the Court held that, as it was in the *quoad sacra* parish that the applicant resided, the minister of that parish "must be best acquainted with the circumstances of the applicant." On this analogy it may be thought that a minister of a parish *quoad sacra* is quite as proper a notary *qua minister* as the minister of the parish *quoad omnia*, for, so far as his ecclesiastical status is concerned, the minister of a *quoad sacra* parish is every whit as fully vested in clerical functions as is the parish minister.

[2] Although the function of a minister as a notary is properly restricted to the execution of testaments, yet, in a case where a minister had acted as notary in the execution of a contract of marriage, the Court of Session on 12th July, 1631, refused to find a contract null on that account, for "albeit the Act (1584) prohibits ministers to be notaries, yet such acts are not declared null, done by them contrary, but ordains another pain—viz., deprivation of them; so that the prohibition, having a pain specially thereto, is not a simple prohibition, which ought to derogate to the fact itself." Parish ministers should confine themselves to wills, for the execution of which they have statutory authority.

the present state of the law in a clear light. A testatrix who was unable to write, was, in March, 1893, attended by two law-clerks and a Justice of the Peace. One of the law-clerks wrote the docquet, and it was signed by the Justice of the Peace in presence of the testatrix. The lady died in September, 1893, and the next-of-kin raised an action in March, 1894, for reduction of the testament on the ground that as the docquet was not holograph of the Justice of the Peace, the settlement was invalid and of no effect in law, and that the defect in the notarial execution founded upon being an omission of an essential solemnity, and not a mere formality of execution, cannot now be cured. The defender stated: "Both the deceased and the said Justice of the Peace were under the belief that the whole legal solemnities necessary for the legal execution of the said deed had been complied with. There is ample space between the body of the said deed and the notarial docquet and subscription of the Justice of the Peace and witnesses for the insertion of a docquet holograph of the said Justice of the Peace. The said Justice is prepared to insert in said space a holograph docquet." The First Division held that the will was not validly executed, and that the defect could not be cured. The rectification was urged on the authority of *Traill's* case; Lord Kinnear said, "I agree that this (*i.e.*, rectification) is quite inadmissible, both because it is against the express terms of the Act of 1874, which says that the granter of the deed must be present, and also on the more general ground that a will cannot be executed after the death of the testator."

Stipend.

Definition.—Teind; the proportion of the produce of the earth devoted to the maintenance of the clergy. Derivation: Icel. *tíund*, a tenth, and hence a tithe, from *tíu*, ten; Swedish, *tiende;* Gothic, *taihunda*.

Surplus, or free teind, is the amount of teind within a parish unallocated for the payment of minister's stipend.

Free teind may also mean teind payable to the lay titular by heritors having no heritable right to their teinds, or by tacksmen to the extent of the teind-duty paid by them to the titular.

Teinds, historically, may be *personal* or *predial*. The former are practically unknown in Scotland, the latter are *natural* or *industrial*, and may be either parsonage or vicarage teinds. The history of teinds in Scotland is noticed in Part V.

Stipend, minister's salary, from *stipendium*, a tax, tribute; put for *stipi-pendium*, a payment in money, derived from Lat. *stipi*,—crude form of stips, small

coin; *pendere*, to weigh out, pay. "Stips is supposed to mean 'pile of money,' from *stipare*, to heap together; cf. *stipes*, a post (perhaps a pile)."—SKEATS.

The present system of payment to clergy of the Church of Scotland dates from the reign of Queen Mary. By the Acts 1567, c. 10; 1581, c. 100; and 1592, c. 123, it was provided that of the ecclesiastical benefices, one-third of their revenues should be devoted to the support of the clergy. The stipends to be paid were modified by commissioners out of the thirds. On the restoration of bishops in 1606 many of the benefices were exempted from payments towards this fund. By diminishing the number of contributories, the fund at the disposal of the commissioners, and known as "thirds," was reduced, and the small stipends of the parochial clergy were made still smaller. The reform most desired by them was a system of *localising* the stipend. This was brought about by the Act 1617, c. 3, which gave power to the commissioners under the Act, "out of the said teinds of every parochin, to appoint and assigne at their discretions, one perpetual *local* stipend to the ministers present and to come," of all parishes without stipends, or with stipends of less than 500 merks annually, or five chalders of victual, or such proportion of money and victual as amounted to 500 merks, or five chalders of victual annually, with a manse and glebe. The maximum to be given by the commissioners as stipend was ten chalders victual, or 1000 merks (£55, 11s. $1\frac{1}{3}$d.), or proportionally money and victual, with a manse and glebe. Another commission was appointed in 1621 with more liberal powers, in so much as the commissioners were not limited by any maximum or minimum of existing stipend, but it is believed the commissioners never acted. A commission was appointed in 1627, who were "to make sufficient provision for those churches wheirof the teynds sall be reserved, and disposed as afoirsaid, if the saids churches be not already sufficientlie provydit, and for providing their ministers with sufficient local stipends and fees." This was ratified in 1633, and the minimum of ministers' stipends fixed, generally, at eight chalders of victual or 8000 merks. Of numerous subsequent Acts, it may be sufficient to say, that their object was distinctly to ensure the augmentation of ministers' stipends to eight chalders of victual, or three chalders

victual, and money for the other five. No maximum being fixed by the Act 1633, the statutory maximum of 1617 has been held to be revoked; and, in 1720, the Lords of Council and Session, who had become in 1707 the permanent commissioners on teinds, augmented the stipend of a clergyman to 1200 merks, although in 1650 it had been fixed at 800 merks. Augmentations still continue to be granted from time to time, provided—(1) that there is surplus or free teind in the parish: and (2) that twenty years have elapsed from the date of the final interlocutor authorising the last modification. The mode of calculating a minister's stipend at augmentations by victual, is archaic and clumsy, and causes frequent misunderstanding.

When teinds were liable to be taken or drawn in kind, the annoyance caused by the delay of a titular to come promptly to the field and remove his share of the harvest must have been a prolific cause of heart-burning, for the crop could not be stacked till it was teinded. By Act 1606 a heritor was entitled, when fifteen days had elapsed after cutting his corn, to call upon the titular to teind the corn within eight days; if he failed to do so, the heritors might "teynd and stack the same themselves." By Act 1612, c. 5, the fifteen days of waiting were reduced to eight. Five years later the titular's days of grace were limited to four days after the expiry of the eight days, but the heritor was obliged to protect from cattle the corn he teinded for the backward titular for eight days on the field.[1] The custom of compounding for teinding in kind was not unusual. The heritor and the titular agreed that so many bolls, hence called rental bolls, should represent the teinds, and this much simplified tithe-paying wherever an agreement was come to. After the valuations introduced in Charles I.'s reign, teinding in kind fell into desuetude; but Mr. Elliot mentions that, strangely enough, one small piece of land he knows of has been teinded in recent years.[2] This is an unexpected survival of what, even three hundred years ago, was felt to be an anachronism.

The value of the victual in which a parish minister's stipend is usually, or in great measure, calculated, is ascertained by the fiars prices, which are struck every year by the Sheriff of each

[1] Connell, i. pp. 204-5.

[2] Elliot, p. 10.

county. Take it that the minister's stipend is fixed at "such a quantity of victual, half meal, half barley, in imperial weight and measure, as shall be equal to twenty chalders of the late standard weight and measure of Scotland, payable in money according to the highest fiars[1] prices of the county annually, and that for stipend," with perhaps £10 "for furnishing Communion elements." This involves annually a fresh calculation of the stipend, as fiars prices vary; the calculated sum has to be collected from the parties liable in payment of teinds in such proportions as their teinds have been allocated upon in the minister's action of augmentation, modification, and locality when his stipend is fixed. In the view of the clerk of the Court of Teinds, augmentations of stipend should be awarded in sterling money and not in victual, and some means should be arrived at for converting permanently the present victual stipends into sterling money, perhaps on an estimate based on the average stipend, as fixed or deduced from fiars prices for seven years previous to such conversion, and in the clerk's opinion the writer may take leave to express his concurrence. Nothing can be said in defence of the present system.

The income of the clergy has, in many cases, been greatly increased by the feuing of glebes under the provisions of the Glebe Lands (Scotland) Act, 1866, but such feuing is not overlooked when an augmentation is applied for.

Every minister of the Church of Scotland is entitled with his benefice to receive a stipend. His right to stipend emerges with his induction (as does his right to manse and glebe) (*Earl of Kinnoul* v. *Presbytery of Auchterarder*, Feb. 27, Mar. 5, 1838, 16 S. 769), meaning by "induction" admission to the office of parish minister, for stipend is "a permanent fund" (per Lord

[1] "Fiars are the prices of grain in the different counties, fixed by the Sheriffs respectively in the month of February, with the assistance of juries. The form of striking the fiars is prescribed by Acts of Sederunt of 21st December, 1723, and 29th February, 1728. A jury must be called, and evidence laid before them of the prices of the different grains raised in the county; and the prices fixed by the jury, and sanctioned by the judge, are termed the fiars of that year in which they are struck, and regulate the prices of all grain stipulated to be sold at the fiars prices" (Bell's "Dictionary of the Law of Scotland," edited by George Watson, p. 458). The fiars prices, however, for the Archbishopric of Glasgow are not fixed by the Sheriff but by a Justice of Peace, who receives depositions by witnesses, and modifies, assesses, and taxes the price of each boll of meal, quarter of barley, &c.

Shand, *Hastie* v. *M'Murtrie*, June 4, 1889, 16 R., at p. 734). His right is subject to the claims of the executors of the former incumbent to ann, if the benefice has been vacated by death. For circumstances relating to an obligation to provide "a competent and legal stipend not under" a certain sum, see *Magistrates of Greenock* v. *Peters*, May 18, 1893, 20 R. (H. of L.) 42, affirming the judgment of the Second Division, Mar. 16, 1892, 19 R. 643, and *Rainie* v. *Newton-on-Ayr Magistrates*, June 6, 1895, 22 R. 633. See also *Peters* v. *Greenock Magistrates*, June 9, 1894, 21 R. 886, where the Court fixed the amount of stipend to be paid, with interest at 2 per cent. from 1880 (when the minister first made his claim to an increase of stipend) to 1891 (when he raised his action), and with interest at 4 per cent. on arrears accruing thereafter. Another Greenock minister raised an action (*Thomson* v. *Magistrates of Greenock*, Jan. 17, 1896, 23 R. 405) for payment of a stipend of £400. The Court assoilzied the Magistrates of Greenock, and distinguished the case from that of *Peters*. In the subsequent case, two years later, of *Rainie* v. *Newton-on-Ayr Magistrates*, Feb. 26, 1897, 24 R. 606, in circumstances where a burgh was bound to provide a legal and competent stipend in addition to a manse, cow's grass, and allowance for Communion expenses, the Court fixed £300 as the stipend so to be provided. The Court was influenced in its decision by the circumstances of the benefice and the average stipend in the surrounding and neighbouring parishes.

Stipend is subject, by the Act 1669, c. 9, to a quinquennial prescription, unless proved by writ or oath. A right to stipend is acquired by uninterrupted payment of stipend for forty years to the occupant of a cure (*Boswell* v. *Town of Kirkcaldy*, 1668, M. 10,890; *Minister of Eyemouth* v. *Officers of State*, 1756, M. 15,677; *Baird* v. *Minister of Polmont*, July 3, 1832, 10 S. 752).

By 50 Geo. III. c. 84, a parish minister whose stipend did not exceed £150 sterling annually, and whose income could not be augmented to that amount from the parish teinds, either because they were exhausted or the free amount was too small to warrant an augmentation, was entitled to have the requisite sum paid out of a sum of £10,000 of public funds; the Teind Court could award the unexhausted teind, such as it was, to him before

granting assistance from the public funds. By 5 Geo. IV. c. 72, a parish minister having no right to a manse and glebe, and whose income is under £200 sterling per annum, became entitled to an allowance making up his stipend to a sum not exceeding that amount; if there was a manse but no glebe, or a glebe and no manse, the minister's income might be supplemented so as to ensure him £180 per annum. An allowance of £23 for manse and glebe rent was not held equivalent to a manse and glebe (*Procurator for Church* v. *Officers of State* (Ayr), Jan. 23, 1828, S.T. 148). Ministers under these Acts are also entitled to an allowance of £8, 6s. 8d. for Communion elements.

By 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, ministers under these Acts (who had also manses provided) were entitled to a stipend not exceeding £120, inclusive of cost of Communion elements.

By 7 & 8 Vict. c. 44, the stipend of ministers of *quoad sacra* parishes is fixed—where there is a manse—at not less than £100 per annum, or seven chalders of oatmeal calculated at the highest fiars prices of the county, exclusive of a sum for Communion elements, and where there is no manse, at not less than £120 per annum or eight chalders of oatmeal similarly calculated. These stipends are voluntary, and provided through the endowment schemes of the Church; the provisions of 50 Geo. III. c. 84, and 5 Geo. IV. c. 72, are not applicable to parishes created under 7 & 8 Vict. c. 44, although the minister's stipend is less than £150 per annum.

Before a second minister can obtain a modification or augmentation of stipend there must be either a special agreement on the part of the heritors that his stipend be payable out of the teinds, or his appointment *quâ* parish minister must be one made by the Parliamentary Commissioners, or the Teind Court (*Falkirk* case, Dec. 31, 1707, Connell, "Parishes," p. 121; *Elgin*, 1714, *ibid.*, 129; *Old Machar*, *ibid.*, 131; *Culross*, *ibid.*, 133; *Marshall* v. *Town of Kirkcaldy*, 1738, M. 14,795; *Fairnie* v. *Heritors of Dunfermline*, M. 14,796; *Inveraray* case, Connell, 146; *Buist* v. *Cheape* (St. Andrews), June 5, 1822, S.T. 23; *Magistrates of Haddington* v. *Kennedy*, Mar. 15, 1859, 21 D. 734).

The minister of a second charge is not entitled to an augmentation (*Buist* v. *Cheape* (St. Andrews), June 5, 1822, S.T.

23) (except as above mentioned); nor is a minister deriving stipend from voluntary contributions; nor a minister of a *quoad sacra* parish (under 7 & 8 Vict. c. 44); nor a minister deriving income under 50 Geo. III. c. 84, or 5 Geo. IV. c. 72; nor an assistant and successor (D. 336; *Macruer* v. *Macnicol*, 1803, M. 15,711; *Shaw* v. *Heritors of Roberton*, 1806, M., Stipend, App. 5). A minister cannot alienate his own or his successors' right to claim an augmentation (*Stewart* v. *Earl of Fife* (Turriff), 1800, M., Stipend, App. 4). But a special stipulation in the decree erecting a benefice may exclude a demand (*Magistrates of Kilmarnock* v. *Aitken*, May 31, 1849, 11 D. 1089). By 48 Geo. III. c. 138, an augmentation cannot be applied for within twenty years of the last augmentation.

The procedure by which a parish minister seeks an augmentation of stipend is regulated by 48 Geo. III. c. 138, and relative Act of Sederunt of 5th July, 1809. The action is raised in the Teind Court by summons of augmentation, modification, and locality. The pursuer is the parish minister. Having ascertained that twenty years have elapsed from the year when the last augmentation was granted, he then has a summons prepared against the heritors of the parish, the titulars or tacksmen of the teinds, and all others having, or pretending to have, an interest in the teinds of the parish, and the moderator and clerk of the Presbytery in which the parish is included; and in this summons is set forth all the circumstances which the minister thinks are likely to induce the Court to grant a suitable augmentation. He lodges a note of the stipend he draws, mentioning how much is paid in money and how much in victual, what species of victual and the mode of measurement, and the amount received by him for Communion elements, and also a rental of the parish, showing each heritor's rental. The accuracy of this rental may be admitted or it may not. If it is not questioned, or when it has been adjusted and the Court allow an augmentation, the amount of the stipend, including the augmentation, is next fixed—this is the modification—and the process is remitted to the Lord Ordinary to fix the locality or scheme under which the stipend so modified or appointed shall be paid. The heritors then elect a Common Agent, whose business it is to ascertain the amount of the free or surplus teind in the parish upon which the augmentation falls to be

apportioned or localled. If a heritor has had his teinds valued, then in no case can he be called upon to pay more than the amount of that value; if he has purchased his teinds, he is liable up to the amount of the annual value as fixed at the valuation which preceded that sale, and for no more; but a heritor may purchase from the titular without a valuation, in which case the teinds will have as yet no fixed value; a titular, however, cannot be compelled to sell except at a price arrived at after a valuation. The amount of the teind so long as unvalued is taken at one-fifth of the land rent or arable value. A heritor who has purchased his valued teinds may surrender them in favour of the parish minister; by so doing, he frees himself and his lands from liability for any augmentation of stipend in future; the minister by this surrender becomes titular of these teinds. In preparing a scheme of locality, the teinds to be first stated are (1) those which the minister holds in virtue of such surrender; there fall next (2) to be exhausted the teinds in the hands of the titular of the teinds, which includes the patron *qua* titular, teinds under tack being postponed to teinds to which the heritor has not even a temporary right; if those two are exhausted, the teinds (3) held by heritable title, acquired by purchase from the Crown or other titular, are liable; upon their exhaustion the bishops' teinds (4) held by the Crown are liable, but if such teinds have been sold, the purchaser falls into the third rank, that of heritable proprietors, and his teinds will be allocated upon for stipend before those which still belong to the Crown. Assuming that all the other classes are exhausted, then (5) the teinds belonging to Colleges; and lastly (6) teinds appropriated to pious uses, including teinds granted to the Deans of the Chapel-Royal, are localled upon. Out of 880 teind-producing parishes, the teinds of 476 have been exhausted by augmentations; this means that in those 476 parishes the minister's stipend can never be increased from the landowners, and, on the other hand, that under no circumstances (except by valuation of such part of the teinds as might have been exhausted when unvalued) can the landowners' burdens be reduced, because there is no surplus teind to be wiped out.[1]

[1] See as to augmentation of stipend, Elliot, "Teind Court Procedure," p. 2 (footnote), pp. 67 *et seq.*; Buchanan, "On Teinds," p. 257; "Juridical Styles," iii. p. 241.

A minister's stipend is attachable for debt. No portion of it is alimentary, but a minister will be allowed, even against creditors, to keep enough to ensure an alimentary provision sufficient to enable him to discharge the duties of the cure (*Minister of Linton* v. *Creditors*, 1736, cited in *Smith* v. *Earl of Moray* (Petty), Dec. 13, 1815, F.C.; *A.B.*, Petitioner, Nov. 26, 1823, 2 S. 526; *A.B.* v. *Sloan*, June 30, 1824, 3 S. 195; *Learmonth* v. *Paterson*, Jan. 21, 1858, 20 D. 418). A minister who was assistant and successor to a parish minister had emoluments of £106 a-year, and debts amounting to £1100. He applied for *cessio*, and it was held by the First Division of the Court of Session that he was entitled to the benefit of *cessio* on his assigning £20 a-year to his creditors,—Lord Shand, however, observing that if the minister applied for his discharge, it might be fairly argued that in view of his income being certainly increased in the event of his surviving the parish minister, on his death a larger sum should be provided (*Simpson* v. *Jack*, Nov. 23, 1888, 16 R. 131). In the recent case of *Leslie* v. *Cumming and Spence*, Feb. 26, 1900, 2 F. 643, it was held that a minister with an income of £273 should assign £80 per annum for the benefit of his creditors as a condition of his discharge. The minister's sequestration had continued for nearly six years, and from May 1894 to January 1895 the creditors had awarded him an allowance at the rate of £130 a-year, and subsequently £106 a-year. "This seems to me," said the Lord President (Balfour), "to be too small an allowance to enable a gentleman of the petitioner's position to live and perform the duties of his office." The minister was a man of seventy, and his sequestration was not due to extravagance on his part, but to the fact that he was the heir to a small estate on which he and his father expended considerable sums, and which fell so greatly in value that when sold it fetched less than the amount so expended.

A parish minister, prior to 1845, was not liable for poor-rates for manse, glebe, or stipend, but § 49 of the Act 8 & 9 Vict. c. 83, provided that "clergymen" should be liable to be assessed for the poor in respect of their stipends. "Clergymen" means "parochial ministers" (*Adams* v. *M'Leroy*, Dec. 18, 1851, 14 D. 248).

Income tax is payable upon all stipend, even if a portion of it is

applied to the salary of an assistant, although the 52nd section of the Income-Tax Act of 1853 provides that, in assessing the tax on any minister, it shall be lawful to deduct from his profits any sums of money paid or expenses incurred by him "necessarily in the performance of his duty." It was held that this provision applied only to expenses incurred by a minister in the personal performance of his duty, and did not apply to a sum of money contributed by a minister, who from his age required the services of an assistant, to make up that assistant's salary to a certain fixed sum, the rest of which was raised by the congregation (*Lothian* v. *M'Rae* (Hawick), Dec. 12, 1884, 12 R. 336). In *Inland Revenue* v. *Fry* (Girvan), Mar. 9, 1895, 22 R. 422, it was held that the annual value of a manse fell to be counted as income of the minister, since he was entitled to make it a source of revenue by letting it.

A minister's right to stipend terminates with his death, deposition, resignation, or transportation to another. If the interest in the benefice ceases before 15th May (Whitsunday), he receives no part of the stipend of the year's crop; if between 15th May and 29th September (Michaelmas), he receives one-half; if after 29th September, he receives the whole stipend (Stair, ii. 8, 33; Erskine, ii. 10, 54). "While the right of ministers to stipend is regulated by these terms, as the stipend periodically accruing (except when modified in money) is derived from the year's crop when reaped, so the year's stipend does not become exigible, because theoretically, the stipend has no existence until the arrival of the latter term" (D. 320).

In cases where an assistant and successor has been appointed to a parish minister, he succeeds on the removal of the incumbent to the enjoyment of the benefice without fresh admission. In the other cases above-mentioned *vacant* stipend may be found due. This is stipend accruing during a vacancy, and so far as it is not ann it vests in the Widows' Fund. (As to the history and application of vacant stipend, see D. 324 *et seq.*) In a case where the Teind Court granted an augmentation in a process raised by a parish minister who had by agreement with the parishioners ceased to reside in the parish, and whose duties were discharged by an ordained assistant who received from the minister the greater portion of his salary, the Court directed that the augmentation should be paid to the assistant

(*Minister of Carsphairn* v. *Heritors*, Mar. 13, 1893, 20 R. 521).

A proprietor who has a bare superiority over lands, or one who has a security right over lands, on which no possession has followed, and who has not intromitted with the fruits, is not liable for minister's stipend (*Jackson* v. *Cochrane* (Cupar-Fife), Feb. 27, 1873, 11 Mac. 475), for it is intromission with crop that renders a proprietor liable for stipend (per Lord Cowan in *University of Glasgow* v. *Pollok*, May 27, 1868, 6 Mac. 884).

A Presbytery may legally admit and ordain a minister of the Church of Scotland, and thereby entitle him to stipend, without his taking any oath of allegiance, abjuration, or making any declaration in lieu thereof, or subscribing "the assurance" (*Bell* v. *Presbytery of Meigle* (Persie, *q.s.*), July 20, 1869, 7 Mac. 1083).

Ann.

Ann, a payment to the executors of a minister dying while he serves a cure, probably derived through Low Latin *annata*, from *annus*, a year.

Ann has many peculiarities: it is neither heritable nor moveable; it is a gift of the state; it is never in *bonis defuncti*, and does not require any title on the part of the recipients.

The Act 1571, c. 41, provided that ecclesiastics who died fighting against the king's enemies, and their nearest of kin, should have among other privileges not only the ann, but also the next presentation to the benefice.

The following is the text of the Act:—

> Anent Kirkmen, that happinis to be slane in our Soverane Lordis service in defence of his hienes authoritie.

Our Soveraine Lord, with advise of his Regents Grace, the three Estates, and haill body of this present Parliament, hes statute and ordained, that in case ony our Soveraine Lordes trew lieges, beneficed men, happinis to be hurt, slane or woundis to the deid, and thereaftir of the saidis hurtis or woundis to de [die] in our Soveraine Lordes service and in defence of his authoritie, at ony time, against the foirfaltit and declared Traytouris, presently being within the castell and burgh of Edinburgh, and uthers his Majesties oppin and manifest

enemies, resistaris [resisters] and conspiratours against his hienes authoritie, during all the tyme of the oppin and manifest resistance thereto, that the narrest [nearest] of the said beneficed mannes kin, able and qualifiit, sall haif the presentation, provisioun and callatioun of his benefice, for that tyme alanerlie, and the samin to be disponit to the nearest of his kin, that happinis to be slane or decease, in maner foirsaid, being alwais abil and qualifit therefoir, as said is. And the profitts of thair benefices, with the fructes specialie on the grund with the annet theirafter to pertaine to thame, and their executors, als weil Abbottes, Priores, as all uther Kirkmen. (Thomson's "Acts of the Parliament of Scotland," Vol. III. (1814), p. 63).

It will be seen that the whole Act had reference to temporary circumstances and to particular persons. Lord President Inglis in *Latta (Fraser's Trustee)* v. *Edinburgh Ecclesiastical Commissioners,* Nov. 30, 1877, 5 R. 266), observed: "It would be of no profit, however, in this inquiry to go back beyond the Reformation.[1] The whole regulation of the ann before the Reformation is so entirely different from what it has become in Protestant times that such an investigation is needless. All our institutional writers—Stair, Mackenzie, and Erskine for example—are agreed that the law of ann was borrowed by us from Germany after the Reformation. But was the rule of law so adopted by us that settled rule which was set up by the Act of 1672 [see *infra*], or was there any settled rule at all? I hardly think there can be said to have been any settled rule. I have referred to some authorities on this point, and I find the

[1] As to pre-Reformation practice, however, the following entry is instructive:—"Govane, 31st July, 1560, 11 A.M.—Mr. Alexander Betone, Archdeacon of Lothian, and one of the executors of q. Mr. James Betoun, rector of Govan, his brother, for himself and Uchtirlony of that Ilk, and Margaret Ogilwy lady Melgum, the other executors, came to the parish church of Govane, and there intimated and served a public instrument, under the sign and subscription manual of Mr. Hugh Lyndsay, notary public, dated at Melgum, 4 May, 1560, by virtue of which the said executors chose the surplus of the parsonage of Govan (elegerunt superplus rectorie), certain parishioners of Govane being there present; inhibiting them and the other parishioners from compounding with any other than with the said executors as regards the *annat* of the deceased rector; protesting that if they should do otherwise they should be answerable. Done in the church of Govane, &c." (Renwick's "Protocols of the Town Clerks of Glasgow," vol. v. p. 27).

rule thus stated by Carpzovius, one of the most learned ecclesiastical writers of Saxony (lib. i. tit. 12, definition 183): 'Ultra salarium, quod defunctus ecclesiæ minister promeruit, ex singulari beneficio viduæ ac liberis ejus etiam dimidius gratiæ annus hisce in provinciis assignatur.' The custom in Saxony then is, that the widow and children receive half-a-year's salary of grace in addition to what the minister has earned for himself. A little lower down he states the motive for this: 'Humanitatis nempe causa et pietas huic sanctioni causam dedit, quo etiam post mortem ministrorum verbi dei gratitudo et liberalitas erga ministerium demonstraretur, et hæredes defunctorum solatio quodam reficerentur.' We gather, therefore, that in the State of Saxony the grace allowed to the widow and children of a minister of God's Word was half-a-year's salary, and the motive for this was gratitude to the deceased minister. But this rule was not generally recognised in other parts of Germany. In Bœhmer's '*Jus Eccles. Protestant.*' lib. iii. tit. 5, § 289, we find this stated: 'In ecclesiis Protestantium annus gratiæ in favorem viduæ et liberorum potissimum introductus, cum ministrorum ecclesiæ reditus non adeo solent esse pingues, ut viduæ et liberis suis sufficienter post mortem prospicere possint, inde humanitatis intuitu hoc lucrum adhuc iis indulgetur. Atque hæc lucra proprie gratiam continent, cum neutiquam intuitu anni carentiæ, his, quibus debentur, assignentur. Inde, in plurimis locis receptum est, ut tamdiu vacet ecclesia, quamdiu annus gratiæ durat, et interim ecclesia vacans vicinorum fiduciæ committatur.' Now, here the general rule is declared to be to allow a year's grace for the widow and children, and in many places he says that to secure this the church is kept vacant for the year and the cure is served by a neighbour. The result is that in the country from which our rule was borrowed, there was no uniform practice, although there was a general rule adopted that after the incumbent's death some allowance should be made for his wife and family."

Sir George Mackenzie says, the German way of providing for widow and children was soon adopted here, and it seems almost certain that King James VI. wrote a letter on the subject to the General Assembly that met in Montrose in 1595. As at that time the question of how ministers' stipends were to be paid had not been settled, it may

be observed that the king was giving advice to the General Assembly as to how the widows of the clergy should be provided for before he took any practical steps for ensuring that the husbands got any regular stipend when they were alive. The king's letter is lost, and we know not what it contained. The Assembly he addressed, however, passed this Act on 28th June, 1595: "Anent the Act made in favour of the executors of ministers, the Assembly and brethren foresaid for cleiring thereof declares, if the minister die after Michaelmas, *quia fruges separatæ sunt a solo*, that his executors sall fall that yeir's rent and the half of the nixt." To what Act does this Protestant Assembly refer? The late Lord President Inglis in *Latta* case, *supra*, at p. 271, pointed out that obviously it must be the Act 1571, intended for quite a different church and a clergy who would have no widows. Such things are, however, not strange to those who have made any study of the Reformation period. The sense of continuity was very strong in the Reformers, and the effect of the Reformation upon church law was much less than is frequently supposed. What happened next is not clear. We have seen that King James wrote one letter on ann which has disappeared. When he had long been king in England and had revisited Scotland to admire the reformed Episcopal Church which he thought he had permanently set up, the king wrote another letter about ann, apparently to his bishops, and the bishops made "an ordinance and act" in which was engrossed the king's letter, and which provided that, when a prelate died "before the Michaelmas and after the Whitsunday, that his relict and heirs shall have that year's profits and rents of the benefice, both the Whitsunday and Martinmas terms thereof that year, and nothing of the year subsequent; and if the prelate die after the Michaelmas, that his relict and heirs shall have right to the half of the profits and rents of the subsequent year beside and attour the whole rents of that year wherein he dies." Both the king's letter and the bishop's Act are lost. We only know of their existence from the case of *The Earl Marischal* v. *The Relict and Bairns of the Minister of Peterhead*, July 19, 1626, 1 Brown's Supplement, p. 36, where the Court of Session gave judgment "having seen and considered" the bishop's Act and the king's letter. "In a double poinding

at the instance of the Earl Marischal, who was charged by the relict and bairns of the deceased minister of Peterhead, who was incumbent and served the cure, and who died before the feast of Michaelmas, anno 1623, and who was on the other part charged by the new entrant minister for the stipend of the year 1624; to the which stipend for the whole year the said entrant minister craved the only right, and alleged that he ought to be answered thereof for both the terms of Whitsunday and Martinmas that year, in respect he served the cure that whole year; and the relict and bairns of the deceased minister claiming right to the half of that year's stipend, by reason of an Act and Statute of the Kirk, introduced in favour of the relicts and bairns of deceased prelates and ministers, which appoints the duties of the half of the profits of the prelacy and siclike of the stipend for the year subsequent next after the decease of the incumbent, to pertain to the relict and bairns of the said deceased incumbent, and the other half to pertain only to the entrant: The Lords having seen and considered an ordinance and Act made by the bishops which had relation to a letter of the deceased King James tending and written for that same effect, and which was engrossed in the said Act, and which Act was produced by the said entrant minister; by the which Act it was found that when the prelate dies before the Michaelmas, and after the Whitsunday, that his relict and heirs shall have that year's profits and rents of the benefice, both the Whitsunday and Martinmas terms thereof that year, and nothing of the year subsequent; and if the prelate die after the Michaelmas, that his relict and heirs shall have right to the half of the profits and rents of the subsequent year beside, and attain the whole rents of that year when he dies," the Court gave effect to the Act.

The position of the matter is remarkable, for, in the first place, one does not see what authority the bishops had to make the Act; in the second place, it apparently had reference only to a prelate's wife. As, however, the Court's judgment mentions that the bishops' Act made reference to "the like ordinance made before that Act in favour of ministers," it is possible that all the bishops did was to extend to themselves the provisions of the Act of Assembly of 1595.

The Act which is now the guiding statute was passed on

23rd August, 1672. It provides that, for the good of the Church, "a stated and equal course be taken for clearing and securing the ann due to the executors of deceased bishops, beneficed persons, and stipendiary ministers"—viz., that "in all cases hereafter, the ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency, which is now settled to be thus,—viz., If the incumbent survive Whitsunday there shall belong to them, for their incumbency, the half of that year's stipend or benefice, and for the ann the other half: and if the incumbent survive Michaelmas, he shall have right to that whole year's rent for his incumbency, and for his ann shall have the half-year's rent of the following year; and that the executors shall have right hereto, without necessity or expenses of a confirmation."

The case of *M'Dermet's Children*, July 14, 1747, M. 464, decides that as between widow and children ann is divided, one-half going to the widow, and the children receiving among them the other half. *Colvill* v. *The Lord Balmerino*, July 6, 1665, M. 466, decides that where there is neither wife nor children the annat belongs to the nearest of kin. In another case a minister who died had neither wife nor child, and being apparently not on good terms with his sister, his next-of-kin, he bequeathed his ann to his brother's son. The sister contended that the ann "was not the defunct's, but being given in the time of Popery, when churchmen were neither allowed wives nor children, it belonged to the nearest of kin." The Court gave the sister the ann as next-of-kin, but scarcely, it may be thought, because of her argument (*Alexander* v. *Cunningham*, Mar. 18, 1686, M. 470). One case refers to the ann of Mr. Alexander Shiels, "minister of St. Andrews, who died in our colony of Darien in 1700." Shiels was not serving his cure at the time of his death (*Shiels' Representatives* v. *Town of St. Andrews*, Feb. 8, 1709, M. 466). The most important decision of late years as to ann is that given in *Latta's* case above referred to, where the First Division held that the payments of stipend and of ann under the Act 1672, c. 13, were not affected by the Apportionment Act of 1870 (33 & 34 Vict. c. 35).

It was provided in an agreement between the parish minister of Penicuik and his assistant and successor that the former should "surrender" to the latter £165 of the annual income

derivable from the benefice of said parish, payable half-yearly at Martinmas and Whitsunday. The minister died on 29th April, 1887, unmarried; the First Division of the Court of Session held that under the agreement the minister's executor was not bound to pay the assistant for his services between the previous Martinmas and that day, the stipend for the period being payable to the minister's next-of-kin as annat, and there having been no personal obligation upon him and his representatives to make any payment (*Dow* v. *Imrie* (Penicuik), July 15, 1887, 14 R. 928).

By 50 Geo. III. c. 54, executors or personal representatives of ministers whose stipends are augmented to £150 under the Act became entitled, § 16, to one half-yearly moiety of the augmentation to be so granted in name of ann, over and above the stipend due to the deceased minister in the same manner as in ordinary stipends, and the Barons of Exchequer were empowered to grant precepts for payment of this ann to those having right thereto, on their receipt without confirmation or making up any other titles. The Act 5 Geo. IV. c. 90 (June 21, 1824), as to churches in the Highlands, provides, § 24, that the widow or nearest of kin of a minister of a church under the Act shall be entitled to the same payments as those of the parochial clergy.

Feu-duties and rents under the Glebe Lands (Scotland) Act are subject to ann (29 & 30 Vict. c. 71, § 15):—"In the event of any circumstance causing a vacancy to be prolonged beyond the term during which such widow, heirs, or executors have a right to the said feu-duties and rents, it shall be lawful for the heritors of the parish and Presbytery of the bounds to uplift and to apply the said feu-duties and rents to the provision of spiritual superintendence and the supply of religious ordinances in the parish during the vacancy."

Ann is not included in the inventory of a deceased minister's estate for confirmation (Act 1672). Ann is given the minister "on such conditions that it can never form part of his executry estate, for it is never *in bonis* of the defunct; but that only enhances the value of the gift, for his widow and children will always have a claim to it preferable to the claims of his creditors" (Lord President (Inglis), *Latta's* case, *supra*). In the event of a minister being survived by a son, and the children of a predeceasing son, it is thought that such children would have

no right to share in the ann. The Intestate Moveable Succession Act, 1855, only affected moveable succession, and ann is neither heritable nor moveable, but a donation of the State at the expense of the incoming minister. In the opinion of the writer, therefore, there is no representation in ann, any more than there is in regard to the legitim fund. Both are arbitrarily constituted by statute, and are subject to no latitude of application.

The history of ann is a remarkable illustration of the conservatism of lawyers and churchmen, for the law which for two centuries has been administered for the benefit of Presbyterian ministers' widows originated in a provision for the next-of-kin of militant bishops of the pre-Reformation Church, and rests to some extent on supposed provisions for the widows of King James's post-Reformation prelates.

Allowance for Communion Elements.

In modifying stipends the Teind Court distinguishes between the amount allocated as stipend and the sum due by heritors of a parish for providing communion elements. The minimum for the latter purpose is £8, 6s. 8d. (£100 Scots). This sum is usually awarded if the population of the parish is under or about 2000: from 2000 to 3000, £10; from 3000 to 5000, £12; beyond 5000, £15; when the population approximates to 10,000, £20 would probably be granted (D. 707, citing various unreported cases, and *Minister of Logie*, Dec. 4, 1867, 6 Mac. 82). The allowance is payable in money; if the minister fails to administer the Sacrament at least once annually, or does not expend the whole sum, the balance ought to be applied to pious purposes—*e.g.*, the relief of the poor; and the heritors may compel the minister to apply it (*Heritors of Abdie* v. *Corsan*, 1713, M. 2490; *Heritors of Strathmiglo* v. *Gillespie*, 1742, M. 2491). When there are no surplus teinds the Court will not award a sum against the heritors. If a party voluntarily undertakes to supply communion elements, his liability is only for so much as may be required, although by a custom for a term of years a greater quantity may have been provided (*Buchanan* v. *Magistrates of Dunbar* (Dunbar), Feb. 26, 1869, 6 S.L.R. 381).

Patronage.

Patronage, or the right to present a duly qualified person to an ecclesiastical benefice, was abolished in Scotland by the Church Patronage (Scotland) Act, 1874 (37 & 38 Vict c. 82). It repeals the Acts 10 Anne, c. 12, and 6 & 7 Vict. c. 61, and provides that from and after 1st January, 1875, the right of electing and appointing ministers to vacant churches and parishes in Scotland is to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregation, and of conducting the election and of making the appointment by the congregation as may from time to time be framed by the General Assembly of the Church of Scotland, or which, after the passing of the Act (7th August, 1874), but before the next meeting of the General Assembly, might be framed by the commission of the last General Assembly duly convened for the purpose of making interim regulations: Provided that with respect to the admission and settlement of ministers appointed in terms of the Act, nothing contained in it shall affect or prejudice the right of the Church, in the exercise of its undoubted powers, to try the qualifications of persons appointed to vacant parishes; and the courts of the Church are declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister. Ministers appointed, admitted and settled in terms of the Act have in all respects the same rights, privileges, and duties which belonged or were incumbent on the ministers of the Church at the date of the Act passing (§ 3).

Where the patronage of a parish was held either solely or jointly by a private patron, or any guardian or trustee on his behalf, provision was made for a petition being presented within six months of the passing of the Act to the Sheriff of the county, praying him to determine the compensation to be paid to the patron in respect of the operation of the Act; but a holder of patronage upon a fee-simple title, or under a deed of entail or other limited title, was not bound (any more than any other patron) to present such a petition. An heir succeeding

to entailed estates does not take any share of patronage compensation, payable to his predecessor, such compensation being personal to the heir in possession who claimed, and therefore payable to his executor (*Paterson* v. *Paterson* (Tarbolton), July 20, 1888, 15 R. 1060). If no petition was presented within the time specified, the claim for compensation was held as renounced, and no claim for it is afterwards competent in any manner of way. No compensation was payable to the Sovereign or any patron other than a private patron (§ 4).

The amount of compensation was fixed at one year's stipend when the petitioner was sole patron, or such proportion as the Sheriff might think just when there were joint patrons, said compensation to be payable in four equal yearly instalments. It is not necessary to go into the provisions of §§ 5 and 6, as the time within which any questions as to compensation can be raised has expired. This was settled by the case of the *Earl of Strathmore* v. *Heritors of Rescobie*, Feb. 1, 1888, 15 R, 364. In 1875 Lord Strathmore obtained, in terms of the Church Patronage Act, an interlocutor by the Sheriff determining the amount of compensation to which he was entitled for the loss of the patronage of the parish of Rescobie, Forfarshire, and finding and declaring that on the occurrence of a vacancy he should be entitled to receive from the heritors payment of the amount by four equal yearly instalments out of the first four years' stipend. A vacancy occurred in Rescobie in 1880, and a new minister was appointed, but Lord Strathmore did not intimate the Sheriff's interlocutor to the heritors or apply for payment of his compensation till 1887. In the meantime the whole stipend had been paid each year to the minister. It was *held* by the First Division of the Court of Session that as the heritors were *in bona fide* in paying away the whole stipends for the four years over which the deduction in respect of the compensation would have spread, Lord Strathmore had lost his claim as patron against them by neglecting to apply for his compensation within that period. If no appointment of a minister is made by a congregation within six months after the vacancy has occurred, the right of appointment accrues and belongs for that time to the Presbytery of the bounds where such parish is, who may proceed to appoint a minister *tanquam jure devoluto* (§ 7, sub-sec. (1)). The sub-section following

provides for the case of a vacant church prior to 1st July, 1875, where the communicants were less than twenty-five in number.

All laws, statutes, and usages inconsistent with the Act are repealed, but nothing in the Act affects or interferes with the appointment of the minister first appointed as the minister of any new parish *quoad sacra*, or the right to teind possessed by or competent to any patron or titular, or the right to ann, or the laws in force in regard to the disposal of vacant stipend, or proceedings connected with a presentation issued before the commencement of the Act (except sub-sec. (2) of § 7) (§ 8).

The word "minister" includes assistant and successor; the word "parish" includes united parishes, and also parishes *quoad sacra*, as well as parishes *quoad omnia*, and where in any church and parish there is more than one benefice, each benefice is to be dealt with and regarded as if it were a separate parish; the words "vacancy" and "vacant" include and refer to the occasion of the appointment of an assistant and successor, as well as the occasion of an ordinary vacancy; the word "congregation" means and includes communicants and such other adherents of the church as the kirk-session, under regulations to be framed by the General Assembly or Commission thereof (see § 3), may determine to be members of the congregation for the purposes of the Act.

Whether the right of appointment under §§ 3, 4, has accrued to the Presbytery *tanquam jure devoluto* falls to be determined by the Court of Session (*Stewart, &c.*, v. *Presbytery of Paisley*, Nov. 15, 1878, 6 R. 178). A vacancy occurred in the parish of Old Deer, on 23rd May, 1892. A clergyman was elected minister on 25th July. On objections lodged by certain parties, the Presbytery of Deer allowed a proof. After certain evidence a joint-minute was lodged, stating that the parties before the Presbytery were agreed that the elected minister was willing that the election of 25th July "be not sustained." The Presbytery pronounced the following deliverance: "The Presbytery interpones its authority to the joint-minute, and in terms thereof, and with consent of parties, declines to sustain the call, remits the case to the kirk-session and the congregation to proceed in the vacancy in terms of the regulations of the General

Assembly." The minister was again elected at a meeting on 30th November, a date seven days after the lapse of six months from the date of vacancy (23rd May). Members of the congregation raised an action against—(*a*) the minister; (*b*) the remaining members of the congregation; (*c*) the Presbytery, for reduction of the second election and for declarator that the right of election had fallen to the Presbytery *tanquam jure devoluto*. The minister alone defended. The First Division held that the Presbytery had determined on 2nd September that the election of 25th July was invalid; that that finding was not open to review by the Civil Courts, and that consequently there had been no interruption of the period of six months, and therefore that the election of 30th November fell to be reduced (*Craig* v. *Anderson*, Old Deer, July 13, 1893, 20 R. 941). The right of election therefore passed to the Presbytery.

Whether any addition to the church electoral roll by the enrolment of new communicants should be allowed pending a vacancy, was held (*Cassie, &c.*, v. *The General Assembly of the Church of Scotland*, Nov. 25, 1878, 9 R. 221) to be a question eminently within the regulating powers of the Church, and which had been finally decided by the judgments of the Church courts. Opinions were expressed by Lord Gifford and Lord Young, in the case cited, that the *jus devolutum* accrued to the Presbytery when the person appointed by the congregation withdrew his acceptance, and that it was *ultra vires* of the General Assembly to give—as they did—the congregation an additional period to make an appointment; and observations were made on the nature of the right of election and appointment of ministers vested in congregations by the Church Patronage Act, 1874; on the scope and meaning of the declaration in § 3, declaring the Church courts "to have the right to decide finally and conclusively upon the appointment, admission and settlement, in any church and parish, of any person as minister thereof," and on the jurisdiction of the Court of Session, as the Supreme Civil Court, to ascertain and define the nature and limits conferred by that statute on congregations, and the Church courts respectively.

CHAPTER X.

KIRK-SESSION AND CHURCH OFFICERS.

The Kirk-Session.—The kirk-session is composed of the minister and elders of the parish. It is the ecclesiastical equivalent of the heritors. As the heritors are charged with the temporal support of the church and manse, so the kirk-session regulate its spiritual affairs. "A kirk-session," it has been said by Lord Young, "has no concern with pews or seat-rents, or indeed with the administration of parish churches in any way. It is a court of the Church, having ecclesiastical duties within the Church, but having no concern with the fabric" (*Edinburgh Ecclesiastical Commissioners* v. *Kirk-Session of High Kirk*, July 18, 1888, 15 R. 961).[1] The restricted nature of its duties has become all the more apparent, since the kirk-session has been relieved of the management of the affairs of the parish poor.

The minister is moderator; in collegiate charges the ministers alternately fill the office by arrangement between themselves. The minister and two elders form a quorum. The communion roll is made up by the kirk-session and revised at least once annually.

The authority of the kirk-session as a legal court dates from the Act of 1592—"Anent particulare kirkis. Gif they be lauchfully rewlit be sufficiente ministeris and sessioun, they haif power and jurisdiction in their awin congregation in materis ecclesiasticall." The Act of 1690 declares the government of the Church as established by the Act of 1592 to be "by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies."

[1] The kirk-sessions of the parochial churches of Edinburgh are in an exceptional position however.

Kirk-sessions should be very careful as to the information on which they act in cases of discipline. Anonymous communications should be disregarded.[1] In an action of damages for slander, it was held by the presiding Judge (Lord Ormidale) "that a letter written by a member of a congregation to the minister (as moderator of Bathgate kirk-session) informing him that another member had been charged with drunkenness, sent with a view to inquiry, was privileged" (*Rankine* v. *Roberts* (Bathgate), Nov. 26, 1873, 1 R. 225). In another case a session-clerk brought an action of damages against two members of the kirk-session "jointly and severally, or severally, according to their respective liabilities," on the ground that he had been dismissed from his office by the votes of these members, the pursuer alleging that he had been elected to the office *ad vitam aut culpam*, and that no *culpa* had been proved against him. The pursuer did not claim the office or seek to be restored to it. The action was dismissed as irrelevant (*Goldie* v. *Christie and Petrie* (Arbirlot), March 3, 1868, 6 Mac. 541). Lord President Inglis observed that, assuming the pursuer held office *ad vitam aut culpam*, if there was no *culpa* to justify his dismissal, his remedy was not by action for reparation, but by declarator and reduction of the sentence dismissing him. For circumstances in which it was held by Lord Stormonth Darling, Lord Ordinary, that in issues relating to alleged slanderous statements made to a kirk-session, want of probable cause must be put in as well as malice, see *Jack* v. *Fleming* (Houston), Oct. 15, 1891, 19 R. 1.

A letter written by a minister to one of his elders concerning two occasions on which he was intoxicated has been held to be privileged (*Doig* v. *Thomson*, June 13, 1898, Sheriff-Court of

[1] When Pliny was engaged in endeavouring to suppress the Christian communities of the early Church, he wrote to Trajan, 'Mox ipso tractatu, ut fieri solet, diffundente se crimine plures spiceas inciderunt. Propositus est libellus sine auctore multorum nomina continens'. (Before long, as is often the case, the mere fact that the charge was taken notice of made it commoner, and several distinct cases arose. An unsigned paper was presented, which gave the name of many.) Trajan in his reply approved of Pliny's mode of investigating, but added the caution, 'Sine auctore vero propositi libelli in nullo crimine locum habere debent. Nam et pessimi exempli nec nostri saeculi est.' (Papers, however, which are presented unsigned ought not to be admitted in any charge, for they are a very bad example and unworthy of our time.)—Pliny, Epp. x. 96, 97 ("Selections from Early Christian Writers," by Gwatkin, 1893, pp. 26, 27, 28, 29).

Lanarkshire, Sh. Court Rep. xv. 1899, p. 59). Sheriff Strachan in his note said, "The minister of a parish is a recognised public official, who has charge of the interests of the parish, and whose duty it is to care for and look after the morals of the parishioners, and, along with the kirk-session, of which he is moderator, he is entitled to deal with offending members of his church, 'exhorting them, reclaiming them if possible, and rebuking them if necessary.'" See *Croucher* v. *Inglis*, June 14, 1889, 16 R. 774.

In 1868 there were ninety-seven parishes in which the *management of the poor* was retained in the hands of the authorities acting under statutes prior to the Poor-Law Act (8 & 9 Vict. c. 83), and raising funds by voluntary contribution. In 1887 there were fifty-six such parishes. In May, 1891, there were fifty-one, and the writer is informed by the Secretary to the Local Government Board, there are still, January, 1901, five parishes where the poor are supported by church collections or by a voluntary assessment. The number is so small that the matter has now little but antiquarian interest,[1] the rating authority for the parishes of Scotland for poor-law purposes as well as others being the Parish Council.

[1] By the Act 1672, c. 18, the heritors were conjoined with the kirk-session of each landward parish in administering the legal provision for the poor provided by the Act 1579, c. 74, by which Act the authority and obligation had been conferred on the Justices. In burghs the obligation remained as fixed by the Act of 1579, with the magistrates. Relative to Act 1672, c. 18, are three proclamations of the Privy Council of (1) 11th August, 1692; (2) 29th August, 1693; (3) 31st July, 1694. Three later Acts, and one proclamation, confirm their authority—viz., Act 1695, c. 43; Act 1696, c. 29; Proclamation, 3rd March, 1698; Act 1698, c. 21.

Church-door collections are among the funds available for poor purposes. These were originally under the control of the kirk-session; by the proclamation of 1693, one-half of these collections were to be paid to the heritors, but they practically continued under the special charge of the kirk-session; they still continue under § 54 of 8 & 9 Vict. c. 83 to be so, subject to the provisions therein. The kirk-session also administered, in many cases, *pious bequests* (*Liddle* v. *Kirk-Session of Bathgate*, July 14, 1854, 16 D. 1075; *Hardie* v. *Kirk-Session of Linlithgow*, Nov. 15, 1855, 18 D. 37). Sums derived from *letting mortcloths, dues for proclamations of marriage*, and *baptism dues* (when these were not emoluments of the Session-clerk), *stakes* under Act 1621, c. 14 (see *Paterson* v. *Macqueen*, March 17, 1866, 4 Mac. 602), and *fines* paid under 1661, c. 38, are available for such pious uses.

When the proceeds of church-door collections, and other voluntary offerings for the relief of the poor, were not adequate, the heritors were required to impose an assessment upon themselves (see Act 1579, c. 74, and other Acts there cited), but heritors are only liable for the support of aged and impotent paupers (*Abbey*

The Poor's Roll.

The purpose of the poor's roll is to protect the poor litigant's interest, and to enable him to have his case fully brought before the proper tribunal. A statute of 1424 (c. 45) provides—"And gif there bee onie pure creature, for faulte of cunning, or dispenses, that cannot nor may not follow his cause, the King for love of God, sall ordaine the judge before quhom the cause suld be determined, to purwey and get a leill and a wise advocate to follow sik pure creatures' causes."

The remedy seems to have been appreciated more by the poor than by the advocates, for a century later King James V. complains to the Court of Session that "we are daly infestit be the complant of divers our pure leiges, persewand for justice, quhilkis are posponit therfra in defalt of advocatis to procure for thane, and thai have na expenssis to do the samin." The Court of Session to amend this passed an Act of Sederunt, appointing two advocates as counsel for the poor, with a salary for one of them of £10 per annum. In the following year Friday was set apart as the day for hearing poor folk's causes. In 1686 an Act of Sederunt, required persons who desired to take advantage of the Act of 1424 to state what process they were engaged in, and the assistance of the Bar was restricted to such processes. This Act was probably passed to limit a tendency to litigate at large, very natural when a poor man with a grievance of many branches, or susceptible of alleviation by process against one person if it failed against another, found himself in the position of having an attentive advocate, who was bound to give him his best aid without charge. Possibly members of the Bar got tired of the poor man's grievances before they should have done so; at all events, an Act of Sederunt, dated 9th June, 1710, directed that Counsel

Parish of Paisley v. *Richmond*, Nov. 29, 1821, 1 S. 177; *Thomson* v. *Lindsay*, Feb. 27, 1849, 11 D. 719, affd. 1 Macq. 120 and 155). The kirk-session and heritors (here, all proprietors of lands and houses liable for payment of cess under a *cumulo* valuation) (*Robertson* v. *Murdoch*, Feb. 23, 1830, 8 S. 587; see also *Collector of Poor's Rates for Inveresk* v. *Magistrates of Musselburgh*, 1794, M. 10,585) form a Poor-Law Board. Each heritor has a vote, and both heritors and members of kirk-session are entitled to vote by proxy. The Sheriff has jurisdiction over the Board's proceedings, to see that the members attend to their duties of parochial relief.

who began a case should continue in it to the end. By another Act of Sederunt, passed thirty years later (16th June, 1742), the duty was devolved upon the Dean of Faculty of Advocates, and the Writers to the Signet, of giving in annually to the Clerk of Court a list of the lawyers chosen for the year to defend poor's causes. Various other Acts of Sederunt have since been passed regulating the admission of parties to the poor's roll, but it is unnecessary to do more here than refer the reader to the Act of Sederunt of 21st December, 1842, and Mackay on "Court of Session Practice," ch. xxiii. The conditions upon which both counsel and agents give their services free to poor persons are, that no person shall have the benefit of the poor's roll unless it is ascertained (1) that he is in poor circumstances, and (2) that he has a probable cause of litigation. "This is for their protection," said Lord Young, in *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826; "I have always thought for nothing else, because, where anyone sues another for an alleged wrong, it is infinitely better for the defender, there being a probable cause of action ascertained, that his adversary should be in the hands of the agent and counsel for the poor, than in the hands of others who take up his case only upon speculation. Therefore the report upon *probabilis causa* and poverty is really to protect the professional bodies against that gratuitous assistance being given to persons who are well able to afford the cost of litigation, or who have no *probabilis causa*."

The first requisite for a poor man who seeks admission to the poor's roll is that he should obtain a certificate from the minister and two of the elders of the parish where he resides of his indigent circumstances. The applicant should, if possible, appear personally before the minister and elders, and that ten days' previous notice of the diet should be given to the party with whom the poor man wished to go to law; evidence of such notice having been given is to be produced to the minister. The minister and elders, when duly met, are to inquire into the would-be litigant's circumstances, and in the certificate with which they furnish him, if satisfied of his necessitous circumstances, they are to state, in the words of the Act of Sederunt of 21st December, 1842, "what occupation or business the said party follows, what are his or her reputed circumstances and char-

acter, how long resident in that parish or place, whether with or without a family, and whether known to be engaged in any process or processes at the time;" also, "how far the statement given by the party consists with their own proper knowledge, or that of any one of them, or whether its credit rests on the information of others, or solely on the statement of the applicant, in which latter case they shall certify whether he or she be of good character and worthy of credit." The certificate as to character need not be specific; it is enough if it bear that "the applicant, so far as known to us, has hitherto maintained a good character" (Mackay, i. 336). If the poor person, through illness, is unable to attend before the kirk-session, the minister and elders should go to his house (*Clapperton*, October 24, 1884, 12 R. 9). In this case the applicant, who was upwards of sixty years of age, had been knocked down by a tramway car, and had been confined to bed ever since his accident.

The minister and elders do not sit as judges; they have no business to express opinions as to the applicant's case; what they have to do is simply to see that the privileges of the roll are not abused. In a sense they are ecclesiastical officers acting in the discharge of a civil duty, just as is a minister when calling a meeting of heritors, with the business of which meeting he has legally no concern. For this reason the inquiry is limited to the parish minister, as his office alone is a *munus publicum*. This doctrine, if carried to an extreme, might require every application to be made to the minister of a parish *quoad omnia*, or civil, to the exclusion of the minister of a parish *quoad sacra*. This was indeed decided in *Bell* v. *Bell*, December 10, 1840, 3 D. 204, but subsequently the Court held that the certificate of the minister of a parish *quoad sacra* was sufficient, on the ground that as it was in the *quoad sacra* parish the applicant resided, the minister of that parish "must be best acquainted with the circumstances of the applicant" (*Murrie* v. *M'Donald*, December 24, 1853, 16 D. 325). Where the minister and one elder constituted the entire kirk-session of a parish, it was held (*Mitchell*, December 18, 1851, 14 D. 248), that their certificates satisfied the conditions of the law. The ministers and elders of a dissenting church are not entitled to give a certificate (*Elphinston*, February 11, 1836, 14 S. 463). In the case of *Carrigan*, November 17, 1881, 9 R. 149, the

applicant belonged to the Old Kirk Parish of Edinburgh, and its kirk-session was in abeyance when she made her application for admittance to the poor's roll. In lieu of a certificate from the minister and elders of that parish, therefore, she produced a certificate by the minister and two of the elders of the High Kirk of Edinburgh—the church in which the banns of marriage of parishioners of her own parish were published. To this certificate was appended a note, that the statement made in it had been furnished by the minister of the Cowgate Free Church, of whose congregation the poor person was a member. In the circumstances the First Division of the Court of Session dispensed with strict adherence to the provisions of the Act of Sederunt of 1842, and admitted the applicant to the roll. In the case of *Flynne*, June 8, 1882, 9 R. 909, the Court allowed an Irishman, who had resided in the parish of Lasswade, and had, while working there, received an injury which resulted in the loss of his leg, to appear before a magistrate in county Mayo, to which he had removed, and emit the declaration required by the Act of Sederunt, and held the declaration before the magistrate as being a sufficient compliance with the requirements of that Act.

The form of certificate is as follows:—

"We, the undersigned, minister and elders of the parish of A, hereby certify that on (*date*), B (*designation*), residing at (*place*), applying for the benefit of the poor's roll to enable him to carry on a lawsuit about to be brought (*or* presently depending) before the Court of Session, appeared personally before us, and did in our presence (*if the adverse party or his agent be present*, and in presence of C D, *designing him*) emit the following statement regarding his circumstances and situation:—That he (1) is (so many) years of age; (2) is married or unmarried; (3) has (so many) children under such an age, or in such and such circumstances; (4) has resided (*length of residence*) in the parish; (5) possesses such and such property (*specifying it of every description*); (6) is of such and such a trade or occupation, in which he earns so much; (7) that he has (*or* has not) any other lawsuit depending in any Court (*if he has, mention it particularly*)."

A statement follows on the grounds of knowledge of the minister and elders, whether personal or derived from competent witnesses, or from statements of the poor man himself.

The following is a form for certification by messenger-at-arms or law agent, of intimation having been made to the adverse party :—

"I (*name and designation*), certify that of the date hereof, I put into the Post Office of A, between the hours of and , in the presence of T Z, residing in , and hereto subscribing, a letter or notice addressed to C D, merchant in , intimating that B (*name and designation and address*) is to appear before the minister and elders of the parish of , within the manse (*or where the minister and elders may fix*), on , at o'clock, for the purpose of emitting a declaration, in terms of the Act of Sederunt, with a view to admission to the poor's roll, to enable him to carry on a lawsuit in the Court of Session against the said C D (*or* in which the said C D is pursuer).

"Witness my hand at (*place and date*).

"Y Z, witness." Agent or Messenger."

If the clergyman and elders refuse to take the applicant's declaration, and occasion him delay and expense, the Court holds them liable in expenses to him (*Morris*, July 10, 1835, 13 S. 1092. But the Court has occasionally, on such cases coming before them, remitted to the Sheriff of the county, instead of the minister and elders, to make inquiries into the applicant's circumstances (*Rattray*, July 8, 1824, 3 S. 232 ; *Mackellar*, July 15, 1863, 1 Mac. 1114).

By the Act of Sederunt, Dec. 21, 1842, it was provided that the Faculty of Advocates, the Writers to the Signet, and the Solicitors before the Supreme Courts, besides electing counsel and agents for the poor, should also name, respectively, two Advocates, one Writer to the Signet, and one Solicitor each year, to act exclusively as the reporters on the *probabilis causa* of poor men's cases. When, therefore, the declaration and certificates by the minister and elders are transmitted to one of the agents for the poor, and have been lodged (within three months of the date of declaration) with one of the principal clerks of Session, it is competent for the agent, on the lapse of eight days after the principal clerk has entered the case in the Minute-book, or of four days next after the publication of the printed Minute-book containing such intimation if the papers

have been lodged during vacation or recess, to box a note to the Lord President of the Division (Bell's Dict. p. 823), simply stating the names and designations of the parties, and craving a remit to the reporters on the *probabilis causa:* the Court may, on hearing any objections, either refuse the application *de plano*, or remit to the reporters. The reporters consider the case, and hear objections, and report not sooner (except with consent of the adverse party) than six days after the remit.

What degree of poverty entitles a man to be admitted to the poor's roll? This must always be a matter of circumstances.

A person who is in receipt of parochial relief must sue *in forma pauperis*, or find caution for expenses (*Hunter* v. *Clark*, July 10, 1874, 1 R. 1154; *Robertson* v. *Suburban District Committee of Mid-Lothian County Council*, Feb. 18, 1898, 25 R. 569).

An undischarged bankrupt, who was sued for damages for reduction, and whose trustee refused to sist himself as a party to the action, was admitted to the poor's roll by the First Division (*Whyte*, July 19, 1884, 11 R. 1145). In *Milne* v. *Milne*, Dec. 8, 1885, 13 R. 304, where a husband, pursuer in an action for divorce, was suffering from bad health and partial blindness, and had no funds from which he could pay the expenses of his wife's defence, the First Division of the Court of Session sisted process to enable him to have both parties admitted to the poor's roll, Lord Adams observing: "It is very desirable that actions of divorce should be defended, and that the Court should get all the information possible." See, too, *Robertson*, *infra*.

The practice of the First and Second Divisions has been scarcely uniform as to the degree of poverty, as indicated by wage-earnings, which entitles a man to be admitted to the poor's roll. In *Robertson's* case, July 8, 1880, 7 R. 1092, the First Division admitted a man who had been a warder in Jedburgh jail at a wage of 23s. a-week (but who had recently been dismissed), in respect his wife had deserted him, and was living in adultery, that he was burdened with two young children, and was about to raise an action for divorce. Lord President Inglis observed: "Under ordinary circumstances, a man earning 23s. a-week is not entitled to be admitted, nor does it make any difference that, for the time, he is out of employment; the fact that accidentally he may be out of employment does not alter

the case." Robertson's wife was at the same time admitted to the roll.

The Second Division have more readily admitted persons of fair means. In *Stevens* v. *Stevens*, Jan. 23, 1885, 12 R. 548, the applicant was in the employment of the Parochial Board of West Calder, on a salary of £138 per annum, out of which he had, for his daily work, to provide for a man, horse, and cart, which cost him about £85 per annum, and was burdened with the support of an invalid son. His wife had obtained decree against him in an action of separation and aliment, and he wished to take proceedings in the Court of Session to obtain a reduction of the amount of aliment awarded against him. His wife opposed his admission to the roll. The reporters were of opinion that the applicant had a *probabilis causa litigandi*. The Court decided to admit him to the roll. Lord Craighill dissented, remarking: "The applicant is the owner of a cart and the owner of a horse, and that seems to me to be inconsistent with the notion of his being a person entitled to the benefit of the poor's roll. It is quite true that, rightly or wrongly, we have of late been opening the door more widely than we used to do in cases of this sort, but I do not remember any case in which we have gone so far as we are asked to do here; and if this man is to be considered a fit person for admission to the poor's roll, many people will find themselves entitled to litigate *in forma pauperis* who have no idea that they possess such a right."

The same Division, four months later, decided in *Wright* v. *Brown's Trustees*, May 21, 1885, 12 R. 959, that a marine engineer employed on foreign voyages at 18s. a-week, but who was out of employment owing to his remaining in this country in order to superintend personally intended litigation for damages for failure to implement an agreement in reference to certain letters-patent, was entitled to the benefit of the poor's roll, though not because he was unable both to carry on his ordinary work and superintend the proposed litigation. Lord Rutherfurd Clark dissented from the Court's judgment, distinguishing this case from that of *Stevens*, *supra*, because the applicant here might have brought his action in the Sheriff Court if he had chosen, but in *Stevens'* case the action proposed was competent only in the Court of Session. In the same year, the Second Division decided *Anderson* v. *Blackwood* (July 11,

1885, 12 R. 1262), when a miner, whose wages were 15s. a week, was admitted to the poor's roll to prosecute an appeal in an action for damages for personal injury, in which both the Sheriff-Substitute and the Sheriff had decided against him; Lord Young observed: "I should wish to put this plain question as the test of admission or non-admission. Are the man's circumstances such that he cannot pay his way in the Court of Session? For if he cannot, and he is reported to have a *probabilis causa litigandi*, and there is nothing to suggest that the case is an exceptional one, then I should always be prepared to admit him." Lord Justice-Clerk Moncreiff did not dissent, but observed that he wished to reserve his opinion entirely as to the principle Lord Young had suggested.

In *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826, the Second Division admitted to the poor's roll a blacksmith earning 27s. a-week, but who had a wife and family dependent on him. Lord Rutherfurd Clark dissented, and observed, evidently with reference to Robertson's case (*supra*), decided by the First Division, and Lord President Inglis' observations—"I do not think that we ought to establish a practice inconsistent with that of the other Division. There may be cases of exceptional circumstances which may prompt the relaxation of the ordinary rule, but this is not such a case."

The decision of the reporters as to *probabilis causa* is regarded by the Court as final, unless there has been gross miscarriage of justice or failure in duty (*M'Intosh* v. *Roy*, May 25, 1898, 25 R. 899). If the reporters are equally divided in opinion, the Court generally decides in favour of the admissibility of the applicant. Mackay, "Court of Session Practice," vol. i. p. 337, par. 5, gives an unreported case, where there was division of opinion, and in respect thereof the Court admitted the applicant. This precedent was followed in *Marshall* v. *North British Railway Co.*, July 13, 1881, 8 R. 939, though Lord Shand dissented, observing: "The onus upon the appellant is to show that he has probable cause of success, and I do not think that he has done so when the reporters are equally divided. It is not enough to show that he has a fair chance of success; I think he must have a preponderating chance." In *Shanks* v. *Moderator, &c., of the Reformed Presbyterian Church*, Mar. 11, 1886, 13 R. 749, however, where a probationer of a

dissenting church applied to be admitted to the poor's roll, in order to bring an action of damages against the synod of the church for not giving him a fair share of certain lucrative employment open to probationers, and the reporters were equally divided, the Court declined to follow *Marshall's* case as a ruling one in the special circumstances, and refused the application.

In appeals from the Sheriff-Court, where the Sheriff-Substitute and Sheriff had both decided against the poor person, and the reporters were divided in opinion, the First Division of the Court of Session, in *Carr, &c.*, v. *North British Railway Co.*, Nov. 1, 1885, 13 R. 113, refused to admit the applicant to the poor's roll. Lord President Inglis observed: "Persons in the position of the applicant here, raising actions of this kind [*i.e.*, for damage for personal injury] in the Sheriff-Court, ought to be satisfied with the judgment obtained there, and I am not for encouraging them to carry their litigations any further." This decision was followed by the Second Division in *Watson* v. *Callender Coal Co.*, Nov. 17, 1888, 16 R. 111.

A pupil or minor may apply for admission to the poor's roll by consent of his guardian. If he has no guardian, a curator *ad litem* must be appointed. It was observed by Lord Low (Lord Ordinary) in *M'Terman* v. *Bennett*, Dec. 21, 1898, 1 F. 333, that proceedings by a person to get himself put upon the poor's roll in order that he might raise an action against two police-constables for damages could not be regarded as the commencement of an action within the meaning of the Public Authorities' Protection Act, 1893, which limits the raising of such actions to a period of six months after the act complained of.

A poor person may also have the benefit of the poor's roll in the Sheriff-Court.[1] A form for admission to sue *in forma pauperis* is given in Lees's "Sheriff-Court Styles," p. 539. The certificate of applicant's poverty, in terms of Act of Sederunt of 11th July, 1839, § 135, may be signed by the minister of the civil or *quoad sacra* parish in which he resides, or by any two elders of such church, or by the heritor on whose lands he resides. Form of certificate of poverty is given on p. 481 of above "Styles"; and a form of motion to have a person removed from the poor's roll, in respect he is not a proper object for the benefit of that roll,

[1] See Act of Sederunt, 16th January, 1877, and art., The Poor's Roll, in Sc. L. R., January, 1894, vol. 10, p. 11.

will be found on p. 530. A master flesher was struck off the roll in *Ward* v. *Glasgow Magistrates and Town Council*, Nov. 17, 1887, 3 Sc. L.R. 19. The Sheriff-Court of Lanarkshire held, in *Mark* v. *Galloway*, Feb. 5, 1886, 2 Sh. Ct. Reports 150, that a working-man earning 21s. a-week has no right to the privileges of the poor's roll; and in *Martin* v. *Ward*, July 20, 1886, *ibid.*, 346, that in the case of a man usually earning 30s. a-week, the mere fact of his being temporarily out of employment did not justify his being put on the poor's roll. As regards Poor's Roll generally, see Green's Dictionary, art. "Poor's Roll; Probabilis causa litigandi," vol. ix. pp. 344 *et seq.*

Meetings of kirk-session are held in the session-house, or failing that, the church. There is no obligation upon heritors to provide a session-house.

It is the province of the kirk-session to fix the occasions and the hours when the *church-bells* are to be rung. "I think it is reasonably plain," said Lord Selborne, "that by assuming to regulate the hours of ringing these bells on Sundays for purposes of public worship, the magistrates have, in two respects, trespassed upon the proper province of the kirk-session, and have violated the substance of the contract as to the employment of the bells 'for the parish,' first, by fixing the particular hours at which the bells shall be rung for such purposes, whereas the right to fix those hours belongs properly to the kirk-session; and, secondly, by doing this with a view to other worship than that of the parish church, for which it would be wrong and unlawful, both on principle and according to the decision in the *Paisley* case (*M'Naughton* v. *Magistrates of Paisley*, Feb. 7, 1835, 13 S. 432), to ring any bell or bells which had been lawfully provided by the heritors in discharge of their legal obligation for the purposes of the parish" (*Magistrates of Peebles* v. *Kirk-Session of Peebles*, June 7, 1875, 2 R., House of Lords, 124, 125).[1]

Kirk-sessions were long accustomed to fix the amount of fees to be paid by parties for *proclamation of banns*. By the Marriage Notice (Scotland) Act, 1878 (41 & 42 Vict. c. 43),

[1] A minister and kirk-session have been held, in a Sheriff-Court, entitled to interdict a seat-holder from distributing pamphlets and leaflets on controversial subjects within the precincts of the church, and causing annoyance during Divine service (*Gardiner, &c.*, v. *Munro*, 1887, 3 Sheriff-Court Reports, 205).

the fee of the registrar for publishing notice of an intended marriage is fixed at 2s. 6d. The General Assembly in 1879 passed an interim Act fixing the fee for proclamation of banns and certificate at the same sum. The action of the General Assembly in interfering in this matter has been criticised, it being urged that the proclamation of banns is a matter *inter sacra*, and that the Assembly for the first time in 1879, and erroneously, included in its enactments the *inter civilia* of fees. It is thought, however, that until the interim Act is declared by a competent court to be *ultra vires*, it must be regarded as obligatory upon kirk-sessions. Apart from this it is on the ground that proclamation of banns is a matter properly *inter sacra*, that proclamation takes place in the churches of parishes *quoad sacra*. If proclamation of banns, and the charge for it, were *inter civilia*, proclamation logically should remain the pertinent alone of the parish church *quoad omnia*; but see *Hutton, &c.*, v. *Harper, &c.* (Wishaw), March 9, 1876, H. of L., 3 R. 9. There was no obligation upon the General Assembly to deal with the question of the amount of the charges for proclamation, but its power to do so cannot be lightly questioned—the more so, as to permit kirk-sessions to charge higher fees than the registrar, would obviously have the effect of encouraging persons to adopt the cheaper course, and thus decidedly put the ancient procedure of proclamation in church at a disadvantage.

By the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, § 30), it is provided that where Trustees hold any property wholly or mainly for the benefit of the inhabitants of a single parish, or any of them as such inhabitants, or for any public purpose connected with a single parish other than (*a*) for an ecclesiastical charity; (*b*) for an educational endowment; or (*c*) for the benefit of the poor of the parish, within the meaning of the Poor Law Act, 1845: they may transfer the property to the Parish Council of the parish or to persons appointed by that Council, and the Council if they accept the transfer or the persons whom they appoint shall hold the property on the trusts and subject to the conditions on which the Trustees hold it. Should the property not be transferred to the Parish Council, it may appoint such number of additional persons to act along with the original trustees as the Trustees

and Parish Council may agree upon, or, in default of such agreement, as may be approved by the Local Government Board. The Act proceeds, § 30, sub-sec. 33:—

"Where the Trustees of any such property are the kirk-session, or the heritors and kirk-session of any parish, or the kirk-session or deacons' court, or managers or vestry of a congregation belonging to any religious denomination, to the number, whether alone or conjoined with others, of not less than six persons, the said Trustees shall from time to time appoint certain of their own number, not exceeding three, and the Parish Council of the parish shall from time to time appoint such number of additional persons as the Board may in each case approve, to act together as a committee of management of said property, and such management shall be transferred to the committee accordingly."

The kirk-session of Bo'ness in 1807 purchased certain lands with money taken from a box called the Poor's Box or Kirk Box. The lands were purchased "To improve the poor's money to the best of advantage." But the funds were not entirely, though they were mainly, derived from church collections, as sums received as proclamation dues, funeral dues, mort-cloth dues and payments for ringing the church bell had been paid in the same box. The rents of the lands were applied mainly for the benefit of the poor, but to some extent to other purposes connected with the church, such as the salaries of the beadle, session-clerk and bell-ringer, and the heating, lighting and repairing of the church, and a tent for field-preaching. The annual payment from the boxes for behoof of the poor exceeded the rent derived from the lands. The Parish Council of Bo'ness and Carriden raised an action against the Kirk-Session of Bo'ness, concluding for declarator that in terms of § 30 of the Local Government (Scotland) Act, above quoted, the defenders were bound to appoint certain of their number, not exceeding three, to act with certain persons to be appointed by the Parish Council as a Committee of Management of the lands held as above-mentioned for the benefit of the poor of Bo'ness.

The kirk-session contended that the lands were held by them partly for the benefit of the poor and partly for ecclesiastical purposes, and that therefore the properties fell under the class of ecclesiastical charities, the administration of which

they were not bound to share with the Parish Council. The expression, "ecclesiastical charity," is defined by the Act to include "a charity the endowment whereof is held for some one or more of the following purposes:—(*a*) for theological instruction or for the benefit of any theological institution; or (*b*) for the benefit of any ecclesiastical person or officer as such; or (*c*) for use, if a building, as a church, chapel, mission-hall or room, or Sunday-school, or otherwise by any particular church or denomination; or (*d*) for the maintenance, repair, or improvement of any such building as aforesaid, or for the maintenance of Divine service therein; or (*e*) otherwise for the benefit of any particular church or denomination, or of any members thereof as such: Provided that where any endowment of a charity, other than a building held for any of the purposes aforesaid, is held in part only for some of the purposes aforesaid, the charity, so far as that endowment is concerned, shall be an ecclesiastical charity within the meaning of this Act." The Second Division of the Court of Session held that, looking to the source from which the money came with which the lands were bought, the history of the administration and application of the revenues of the lands and other matters, that the lands were held for no interest other than that of the poor, and that they were not held for an ecclesiastical charge within the meaning of the Local Government Act, consequently that their management fell to be transferred to a committee as sought by the Parish Council (*Parish Council of Bo'ness and Carriden* v. *Kirk-Session of Bo'ness*, Feb. 22, 1900, 2 F. 661). In the earlier case of *Prestonpans Kirk-Session* v. *Prestonpans School Board*, Nov. 28, 1891, 19 R. 193, the Court was required to decide as to the application of certain funds held by a kirk-session, which had originated in a sum raised to provide an infant school, and preferred the object suggested by the kirk—viz., its application towards the erection of a hall to be used as a Sunday-school and for congregational purposes in connection with the parish church, rather than the alternative scheme of the School Board that the annual revenue should be paid to the Board to be applied to increase the efficiency of the teaching staff.

Until the Ecclesiastical Assessments (Scotland) Act, 1900 (63 & 64 Vict. c 20), came into operation on 1st January, 1901,

kirk-sessions had nothing to do with heritors' assessments, but by § 2 of that Act it is provided that when heritors have resolved to impose an assessment on the real rent, intimation of such resolution is to be made to the kirk-session of the parish, and it has been suggested (*supra*, p. 51) that the intimation should be accompanied by a draft of the proposed scheme of assessment. Section 3 provides that the rental on which each heritor is to be assessed shall be his total rental as appearing in the valuation roll, "subject to deduction of the sum of fifty pounds when the amount of the deficiency which would be created in the total amount of the assessment by allowing such deduction to every heritor has been paid to the collector of the assessment by the kirk-session." It appears to be optional to the kirk-session to pay the deficiency. If they do not do so the assessment will proceed in the usual way. Should the kirk-session resolve to make up the deficiency, it would seem they are to pay over the necessary amount to the collector before intimation to each heritor of his liability under the assessment. The kirk-session obtains no representation at meetings of heritors by such a payment, nor will it have any legal control of the works in respect of which the assessment has been necessary.

PAROCHIAL ECCLESIASTICAL OFFICERS.

The officials appointed by the heritors are their *Clerk* (*supra*, p. 58) and the *Beadle* (*infra*). The kirk-session officials are the minister as *Moderator*, the *Session-Clerk*, *Precentor*, and *Session-Officer* (who may also be beadle and door-keeper, and is frequently called the "Minister's man").

Beadle.—Heritors or burgh magistrates in a burghal parish are entitled to appoint the door-keeper or the beadle as the *ostiarius* of the canon law (*Kirk-Session of St. Andrews* v. *Town Council of Edinburgh*, Jan. 31, 1835, 13 S. 395). His duties are thus well summarised: "The door-keeper is intrusted with the keys of the church, and it is his duty to open the building for the celebration of public worship on Sundays, and to afford to the parishioners, when duly required to do so, access to the building for such purposes as are not inconsistent with the design of and uses to which it may legally be applied. He

ought, likewise, to be in attendance at the church during the diets of worship, and, at the termination of the service, open the doors to allow the congregation to disperse in a quiet and orderly manner; and thereafter shut up the building against all access thereto until the next occasion of its legitimate use." It is probable that in the event of the beadle not performing the duties of door-keeper (another person doing so), that this appointment lies with the kirk-session (D. 690, 691). The beadle is the officer of the kirk-session, and the personal attendant of the minister. To him pertain all the arrangements for the decent and orderly celebration of the ordinary services and special rites of the church, such as communion and baptismal services, under the direction of the kirk-session. If he hold the keys as door-keeper, the beadle represents the heritors in whom is the charge and property of the church. He is paid by the kirk-session, however, not by the heritors. He may be dismissed at any time on proper notice.[1] The grave digger or churchyard officer is appointed by the heritors, and is paid by them.[2]

The *Session-Clerk* is appointed by the kirk-session, and holds office during their pleasure, even although his salary be paid by burgh magistrates, as in the exceptional cases of *Elgin* and *Dundee* (*Magistrates* v. *Minister of Elgin*, 1740, M. 7916 and 13,124; *Kirk-Session* v. *Magistrates of Dundee*, 1761, 5 Br. Supp. 599). His salary is usually paid by the kirk-session, the heritors having no liability therefor. He attends the meetings of the kirk-session, takes the sederunt and notes, prepares the minutes, engrosses them when approved in the minute-book, which he must preserve faithfully and without alteration, and from which he may as required give certified extracts. When the office is vacant by the suspension, resignation, or death of the clerk, the records will be deposited with the minister or an elder; even although no actual suspension or deposition has taken place, the kirk-session, on reasonable suspicion, may take the records out of the clerk's hands (*Porter* v. *Auld* (Moneydie), Dec. 6, 1850, 13 D. 268).

[1] Pardovan observes that the beadle should hold the keys of any seats that are locked, that when the proprietors are absent such as want seats may be accommodated (bk. ii. xiii. 8). The beadle was included among those who had twice yearly to pass the "privy censure with the kirk-session" (bk. i. xi. 6).

[2] See *Stodart, &c.*, v. *Lyell* (Tweedsmuir), Nov. 15, 1895, Sheriff-Court of Mid-Lothian, Sh. Court Reports, xii. (1896), p. 40.

When the office is temporarily or absolutely vacant the parish minister is usually appointed clerk *ad interim*.

In the case of *Rankine* v. *Roberts* (Bathgate), Nov. 26, 1873, 1 R. 225, the status of a session-clerk was considered with some fulness, though incidentally. A member of a congregation stated to one of the elders openly in his shop, and in the presence of another person, that another member of the congregation, who was also session-clerk, had been drunk and incapable on a certain night. The Court held that the statement was not privileged. Lord Deas observed: "The session-clerk is not necessarily a member of the session, or even of the congregation, nor is an exemplary moral character an indispensable qualification for the office, though it may be a desirable one" (p. 231); Lord Ardmillan however observing: "If a member of a Presbyterian congregation does *in bona fide* bring under the notice of the minister and kirk-session the conduct of a member of the congregation, and does so in the regular and becoming manner prescribed by the law and custom of the Church, I think he has some degree of privilege. He is considered as exercising a right, and, it may be, fulfilling a duty. Therefore, even though the charge which he makes turns out on inquiry to be unfounded, he is not necessarily liable in damages. His privilege protects him unless malice is proved" (p. 238). He added: "This remark is especially applicable and important when the person whose conduct is called in question is not only a member of the congregation and of the church but is also session-clerk and parochial schoolmaster, a position in which his conduct and character is of unusual importance" (p. 234, *ibid.*).[1]

The *precentor* (or "reader," as he was sometimes called), unless by special agreement it is otherwise provided, is appointed by and holds his office at the pleasure of the kirk-session. He is paid by the kirk-session.[2] His duty is to lead the psalmody of the congregation, and in many parish churches the proclamation

[1] This precedent was followed in the Sheriff-Court case of *Doig* v. *Thomson*, June 13, 1898, 15 Sh. C. Rep. 59, where it was held by Sheriff-Substitute Strachan (Lanarkshire) that a minister who wrote a moderate letter to one of his elders concerning two occasions on which that elder was intoxicated was privileged in writing the letter.

[2] *Hislop* v. *Figgins*, 1863, 1 Macph. 321; *Stodart, &c.*, v. *Lyell*, Nov. 15, 1895, Sheriff-Court of Mid-Lothian, Sh. Court Reports, xii. (1896), p. 40.

of banns is intrusted to him. In 1697 the session of Whitekirk appointed the precentor "to read every Lord's Day the Belief, Lord's Prayer, and Ten Commandments." A precentor was held not entitled, not being an ecclesiastic, to plead the *decennalis et triennalis possessio* in support of a claim against the proprietor of an estate in the parish, for the continuance of a payment in use to be made to him and his predecessors for more than one hundred years (*Traill* v. *Dangerfield* (Lady Parish), Feb. 21, 1870, 8 Mac. 579).[1]

[1] As to the office and functions of the "reader," see Edgar's "Old Church Life in Scotland" (1885), pp. 64, 65; Sprott's "Worship and Offices of the Church of Scotland" (1882), p. 14.

CHAPTER XI.

JURISDICTION OF PRESBYTERY.

Presbytery, a legal court composed of ministers and elders from each parish within a defined district known as the bounds, and professors of divinity, being ministers, of any University within that area. *Presbyter* is derived from Gk. πρεσβύτερος, an elder ; *orig.* elder, comparative of πρέσβυς, old.—SKEAT.

THE functions of the Presbytery are considered here mainly in so far as they affect parochial ecclesiastical affairs ; their powers, except so far as recently modified or added to by statute, are practically those of the bishops, who were finally abolished in 1689 and superseded in 1690 by the re-establishment of the Presbyterian Church as in 1592 (Ersk. ii. 10, 56. See also as to records, *Presbytery of Edinburgh* v. *University of Edinburgh*, July 16, 1890, *per* Lord Wellwood (Lord Ordinary), 28 S.L.R. 567).

When a church or manse is in need of repair, and the heritors refuse to do the necessary work voluntarily, the Presbytery within whose bounds the parish is situated are entitled to require them to do so (*Cunninghame* v. *Deans* (Stewarton), Dec. 12, 1811, F.C. ; *Campbell* (Dunoon), May 19, 1815, F.C. ; *Porterfield* v. *Gardner* (Kilmalcolm), Dec. 19, 1829, 8 S. 277 ; *M'Neel* v. *Robertson* (Strauraer), May 27, 1836, 14 S. 849).

"The relations of the heritors and the Presbytery in a matter of this kind are peculiar," observed Lord President Inglis in the *Pitsligo* case. "The heritors are bound to maintain the ecclesiastical buildings. The Presbytery are the guardians and conservators of the benefice, and it is their office to see that all parties connected with the parish do their duty, and they may give orders to any one who is not doing his duty. They have control over the minister, over the church officers, and also over the heritors in regard to their obligation to uphold the ecclesiastical buildings" (*Presbytery of Deer* v. *Heritors of Pitsligo*, July 5, 1876, 3 R. 975 ; see also remarks of Lord

Justice-Clerk Moncreiff in *Duke of Abercorn* v. *Presbytery of Edinburgh* (Duddingston), Mar. 17, 1870, 8 Mac. 738).

The matter may be brought before the Presbytery by any interested party—by the minister (*Hamilton* v. *Presbytery of Hamilton* (Bothwell), Nov. 15, 1827, 6 S. 47; *M'Neill* v. *Nicolson* (Barra), Jan. 24, 1828, 6 S. 422), by a heritor (*Maxwell* v. *Gordon* (Anwoth), H. of L., June 19, 1816, 4 Dow, 279), a parishioner, or a member of Presbytery. The procedure is described in Chapter VIII. Lord Jerviswoode (Lord Ordinary), in the *Kingoldrum* case (*Heritors of Kingoldrum* v. *Haldane*, Jan. 24, 1863, 1 Mac. 325), examined with minuteness the various decisions relative to the powers of the Presbytery in relation to additions to a manse, and held that although insufficiency of accommodation, where a manse is in good condition, affords no ground of claim for a new manse or for additions, yet, where the manse is in such a condition as to require extensive repairs to make it habitable, it is not incompetent for the Presbytery to consider generally what may be necessary to be done, whether by repairs or alterations and additions, to render it sufficient and suitable to the circumstances of the benefice; and on reports by men of skill that the condition of Kingoldrum manse was such that certain repairs, alterations, and additions were necessary, held that the heritors were bound to make them, but that they were not bound to make repairs, alterations, and additions to the extent which the Presbytery had ordained. The case was not appealed. In *Heritors of Insch* v. *Storie*, Dec. 18, 1869 (8 Mac. 363), a similar point was raised. The Presbytery of Garioch, acting under the advice of their man of skill, directed the heritors of Insch to make repairs on and additions to the manse at a cost of £702, 3s. The heritors offered repairs to the extent of £216, 19s., but refused additions. The Lord Ordinary, on report of a man of skill appointed by the Court that the probable expense of putting the manse, offices, and other buildings in a good state of repair was £180, refused, to that extent, to suspend the Presbytery's deliverance. The First Division went further, finding that if there are structural alterations required to keep up a manse, this entitles the Presbytery to order additions. "It appears to me," said Lord President Inglis, "that the cases in which a Presbytery may order

additions to a manse which is clearly unsuitable in capacity and accommodation for the minister, are those in which it has either become impossible to keep it up at all without structural alteration, or in which the extent or expense of the repairs, even assuming that they do not involve structural alteration, are very large, and approach to the cost of what is necessary to convert it, by additions and alterations, into a suitable residence."

The conditions which will respectively entitle the Presbytery to ordain heritors to repair, enlarge, or rebuild a church or manse are the same necessarily on which the heritors might voluntarily undertake these operations, and have been referred to in the preceding pages; but as the Presbytery cannot have the same familiarity with, or knowledge of, the requirements of the parish as the heritors have, they should on no account intervene without taking the fullest and most adequate precautions, by obtaining the report of a man of skill, and by acquiring from all available sources what information is obtainable relative to the history of the parochial ecclesiastical buildings.

Lord President Inglis observed in the case of *Pitsligo:* "Where a complaint was made that the manse was out of repair, it was the duty of the Presbytery to inform their minds on that subject, and if they required the advice of an expert, they were entitled and bound to take it, and according to immemorial usage they were entitled to do so at the expense of the heritors (*Presbytery of Deer* v. *Heritors of Pitsligo*, July 8, 1876, 3 R. 975). On receiving notice from the Presbytery of repairs which they consider necessary, or copy of a deliverance thereanent, the heritors by custom submit plans for their perusal, not as to mode or style, but as to sufficiency (*Campbell* (Dunoon), May 19, 1815, F.C.).

The Presbytery have no power to compel exhibition of plans for repairs undertaken without an order from that Court (*Minister* v. *Heritors of Tingwall*, 1787, M. 7929).

If the heritors neglect to carry out the operations directed by deliverance of the Presbytery, the Presbytery may enter into contracts to do the work themselves (*Dunbar* (Wick), 1804, M., Jurisdiction, App. 11; *Sanderson* v. *Macfarlane* (Duddingston), Mar. 30, 1868, 6 Mac. 701). The heritors have a right to supervise the work; the Presbytery have no right to assess them for the cost; but when the work is done the Presbytery call them to

assess themselves, and on the heritors' failure to do this, decern against them for the cost on their valued or real rent according to the rule of assessment in use of the parish, and may appoint a collector. The collector has a right of relief against the Presbytery for his costs and disbursements if he is unsuccessful in enforcing their decree as against the heritors (*Earl of Glasgow* v. *Miller* (Neilston), Feb. 1, 1831, 9 S. 370; affd. 7 W. & S. 185).

It is competent for the Sheriff, as Judge Ordinary, on the application of a Presbytery or other recognised judicature of the Established Church of Scotland, to issue letters of first and second diligence against witnesses neglecting or refusing to attend on the citation of the Church Court to give evidence in any competent proceeding before it (*Presbytery of Lews* v. *Fraser* (Uig), May 16, 1874, 1 R. 888). In this case Lord President Inglis observed: "I confess I am surprised to see this question raised, for I never, during the whole course of my practice, entertained a doubt that the Judge Ordinary had the power of issuing such a warrant as is here craved, and was bound to exercise that power on good cause shown. . . . We are dealing with a Presbytery, an established judicature of the country, as much recognised by law as the Court of Session itself. Its jurisdiction, indeed, differs widely from that of the Civil Courts, but it is just as much the creation of law as that of any other court in the kingdom. The time at which the judicatures of the Church as they now exist were finally settled was the period of the Revolution, and some of the statutes then passed, particularly the statute of William and Mary, 1693. c. 38, 'An Act for settling the quiet and peace of the Church,' throw much light on the question. The last section of the Act 1693, c. 38, enacts 'that the Lords of their Majesties' Privy Council, and all other magistrates, judges, and officers of justice, give all due assistance for making the sentences and censures of the Church and judicatures thereof to be obeyed, or otherwise effectual as accords.' I want nothing stronger or more comprehensive than that. Whenever the Church Courts are unable of themselves to carry out their own orders made to explicate their own jurisdiction, the Civil Courts are bound to step in and give 'all due assistance.' Now, there is no duty more clear than that which obliges the individual citizen to

obey the citation of a properly constituted court to appear and give evidence. It was quite conceivable that the Church Courts might find some difficulty in compelling the attendance of a recusant witness. But the removal of that difficulty is just one of the things contemplated by the clause of the statute I have read."

The Presbytery have primary jurisdiction as to the *designation of a manse* to a parish minister who is entitled to one, but has it not. The procedure is by application from the minister to the Presbytery, who fix a day for "visitation," of which notice is given in the same way as is above referred to in the case of the Presbytery being asked to intervene when heritors fail to repair a manse. They act with the assistance of a man of skill, select a suitable site (see *Campbell* v. *Morgan* (Lerwick), June 17, 1850, 12 D. 1262), and ordain the heritors to build the manse conform to plans approved by the Presbytery, and decern against them for the cost. They make another formal visitation when the building is reported to be finished, and if satisfied that it is a "competent" or "sufficient" manse, may on the application of the heritors pronounce a decree to the effect of finding it to be a "free manse"—the heritors being thereafter, while the cure is filled by the then incumbent, relieved of the burden of maintenance except as regards dilapidation from time and inevitable accident.

The Presbytery have also jurisdiction in designing a glebe to a parish minister entitled thereto, or designing an addition to an insufficient glebe. The procedure is by visitation in the manner before mentioned. The points to be specially considered by the Presbytery have been summarised as follows: (1) The agricultural character of the ground to be allocated; (2) the order of liability to allocation of different portions of ground, according as these are church lands or temporal lands; (3) the situation of the lands to be selected; (4) the quantity of ground to be designated (D. 623). The ground having been designated, the Presbytery fix a day for "perambulation;" notice is given to the minister and heritors, and a measurer is present to mete out and mark the ground. The Presbytery then by deliverance designate the glebe or the addition to it.

The Presbytery may designate an addition to a churchyard, but although they have no exceptional power to enforce a

decree of removing, it is usual and competent for them, in designating a piece of ground for an addition to a churchyard, to ordain the tenant to remove (*Walker* v. *Presbytery of Arbroath*, March 1, 1876, 3 R. 498). The Lord President observed, in his opinion: "One part of the first minute is an order upon the tenant to remove. Well, that seems to me to be quite right. It was said that this was an assumption of jurisdiction which was beyond the powers of the Presbytery, because they had no jurisdiction to remove a tenant, but that all they have done is to appoint this man to remove. They cannot put that decree into execution, and in that sense it is not a decree at all. It can only be enforced by application to a court of jurisdiction; and if any plea occurs to enable the tenant to resist the enforcement of the decree, he can still maintain it, though I do not perceive that any such plea would be open to him."

This case on general points came under the review of the House of Lords, and Presbyterial procedure is incidentally illustrated in the facts of the case.

On 18th April, 1875, a notice was read from the pulpit of the parish church of Barry, intimating that a petition had been presented to the Presbytery "craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday the 6th day of May next, at one o'clock afternoon, at which time the heritors and all others concerned, or persons duly authorised to act for them, are requested to attend." For several months prior to the giving of this notice the heritors of the parish had been in treaty with Mr. Walker, a heritor, the proprietor of part of "the piece of ground immediately adjoining the churchyard on the north," but had been unable to conclude an agreement with him. At the time specified the Presbytery, after inspecting the churchyard, proceeded to designate the piece of ground to the north referred to. Mr. Walker was not present, though he had heard the intimation made in church. On 11th May, notice was sent to Mr. Walker, as a heritor, that a second meeting of Presbytery would be held on 17th May, "to take further steps towards making an addition to the churchyard," and requested him to

attend. At this meeting the Presbytery, upon the report of men of skill, fixed the value of Mr. Walker's ground designated. No notice of either judgment of the Presbytery was sent to Mr. Walker or his tenant till 22nd July, 1875. In a suspension and interdict brought by Mr. Walker on the grounds—(1) that the only notice he had got of the meeting of 6th May was a notice that the Presbytery would merely visit and inspect the churchyard, and that therefore the decree of designation then pronounced was illegal; and (2) that he had been deprived of his statutory right of appeal to the Sheriff (under 31 & 32 Vict. c. 96, § 3) by not receiving notice of the judgment until after the time for appeal had expired, the Court of Session held (March 1, 1876, 3 R. 498)—(1) that the designation of an addition to a churchyard, and the regulation of the procedure thereanent, being matters within the exclusive jurisdiction of the Presbytery, were not subject to review in the Court of Session; and (2) that, considering the fact that Mr. Walker had been engaged in negotiations with the heritors as to the sale of his ground before the application to the Presbytery, the notice from the pulpit was not insufficient so as to justify the Court in quashing the whole proceedings as illegal. The House of Lords affirmed this judgment (*Walker* v. *Presbytery of Arbroath* (Barry), Nov. 24, 1876, 4 R. (H. of L.) 1).

In designing *minister's grass*, the Presbytery have the like jurisdiction (subject to the conditions referred to *sub voce* Glebe, *supra*), and proceed in the same manner (*Steel* v. *Dalrymple*, 1751, M. 7439).

When an *excambion of a glebe* is under the Presbytery's consideration, a visitation is fixed in the usual form, with the proper intimation to minister and heritors, and on formal report by men of skill, a decree of excambion is pronounced, declaring the old glebe to be no longer, and the new glebe to have become, the glebe of the benefice.

If any heritor, or the minister of a parish, is dissatisfied with any order, judgment, interlocutor, or decree of a Presbytery, relating to the building, rebuilding, repairing, adding to, or other alteration of a church or manse, or to the designing or excambing (*a*) for a site therefor, or (*b*) of glebes or additions to glebes, or (*c*) of sites for, or additions to, churchyards, and the suitable maintenance thereof (including the building or re-

pairing of churchyard walls), he may, within twenty days of the date of such order, stay such proceedings by appeal by himself or his agent, by summary petition to the Sheriff of the county in which the parish is situated, or if it is in more than one county, to the Sheriff of either county—the Sheriff to whom the first application is made having the same authority as if the whole of the parish were situated within his county; and the appeal, on being duly intimated to the clerk of the Presbytery, has the effect of staying the Presbytery from taking any further steps in connection with the proceedings; if no appeal be taken and intimated within the twenty days, the order becomes final, and not subject to review. For the procedure in such appeals, see Chapter VIII.

A minister petitioned the Presbytery to visit his *manse* with a view to repairs. The Presbytery employed an architect, and pronounced findings in accordance with his report. The heritors appealed to the Sheriff, under § 3 of the Ecclesiastical Buildings Act, 1868, and the case was ultimately disposed of on further appeal to the Lord Ordinary on Teinds. The Presbytery did not appear in the appeal, but decerned against the heritors for the amount of their architect's account, and, not receiving payment, raised an action for payment of the account as duly incurred by them. It was held that they were entitled to decree.[1] It was observed by the Court that the Presbytery ought not to have pronounced decree for their expenses after the case had been appealed to the Sheriff (*Presbytery of Deer* v. *Heritors of Pitsligo*, July 5, 1876, 3 R. 975).[2]

A Presbytery pronounced a deliverance finding a parish minister, on his petition, entitled to have a *glebe* assigned to him by the heritors. Certain of the heritors appealed against the deliverance to the Sheriff, as provided in the Ecclesiastical Buildings Act, 1868. Before the appeal had been disposed of, another of the heritors brought a suspension of the deliverance

[1] At p. 978 Lord President Inglis said, "These expenses are not the expenses of any process whatever. It is a sum due by the heritors to the Presbytery because of the necessity of the Presbytery calling in an expert to advise them in an important step of public duty. It is a debt fairly incurred, and I see no good ground of defence to the action."

[2] The Presbytery may give decree for expenses of men of skill and Presbytery clerk's fees when making a finding, *or* subsequent to the deliverance of the Sheriff finally disposing of a cause which has been appealed to him.

in the Bill Chamber, alleging that the parish in question was wholly a burghal parish, and that the minister was therefore not entitled to a glebe, and that therefore the deliverance of the Presbytery was *ultra vires*. It was held that the note of suspension must be refused, as the question was in dependence before a competent tribunal [*i.e.*, the Sheriff-Court] (*Magistrates of Arbroath* v. *Presbytery of Arbroath*, March 13, 1883, 10 R. 767).

The designation of an addition to a churchyard by the Presbytery, and the regulation of the procedure thereanent, are not subject to the review of the Court of Session, who will only interfere if there be shown to have been some violation of the ordinary rules of procedure common to all courts whereby injustice has resulted (see *Walker* v. *Presbytery of Arbroath*, Mar. 1, 1876, 3 R. 498).

A question has been raised as to the power of the Presbytery or the Sheriff to compel a minister to reside in his manse. It has been decided that neither has such power (*Heritors of Pitsligo* v. *Gregor*, June 18, 1879, 6 R. 1062). The circumstances were narrated as follows in the judgment of the Lord President: "The manse of Pitsligo was declared to be a free manse by the Lord Ordinary in 1874, and his judgment under the statute is final. The minister was not satisfied with it, and refused to live in the manse. The heritors were dissatisfied with this refusal of the minister, and they presented a petition to the Sheriff, in which they asked that the minister should be ordained 'to take up his residence, with his family, in the said manse and offices, and to continue to reside there during his incumbency of the parish of Pitsligo, and to take due and proper care of the said subjects, and failing the respondent doing so, or should he refuse to do so, then to authorise the petitioners to put a housekeeper into the said manse, and to have the same and the offices properly cared for.' Now, that petition has been dismissed, with expenses, by the Sheriff as incompetent. The Sheriff has no authority to insist on the minister residing in the manse, still less has he any authority to compel the family of the minister to reside in the manse. The Sheriff suggested that the heritors might perhaps get the minister ordained to reside in the manse by going to the Presbytery. They accordingly presented a petition to the

Presbytery, and craved the Presbytery to ordain the minister to reside in the manse with his family. The Presbytery took up consideration of the petition, and ordained Mr. Gregor to give in answers. He does give in written answers, in which he states that he has again and again tried to reside in the manse, and that his health suffered in consequence. He complains that the manse is in such a condition that he cannot reside in it.

"The petition and answers came before the Presbytery on the 28th November, when Mr. Gregor put in a Minute in which he states that he is quite willing to occupy the manse 'so soon as it should have been put into such a state as to be fit for his occupancy thereof, which he denies it to be at present, and craved the Presbytery to take the necessary steps for ascertaining its actual condition, and providing to make a suitable residence for himself and his family, and his successors in office.'

"That was a demand on the part of the minister that the Presbytery should make an order on the heritors to put the manse in a proper state of repair. It was perfectly incompetent for the minister to make such a motion, and for the Presbytery to entertain it. Yet they do entertain it, and remit to Mr. Clyne to report upon the manse. Upon receiving his report they proceed to 'find, with regard to the first alternative conclusion of the heritors' petition, that they have not the power to ordain the minister, Mr. Gregor, to reside with his family in the manse of Pitsligo. With regard to the second or remaining conclusion of the heritors' petition, find, in terms of Mr. Clyne's report, that the manse is becoming little, if at all, deteriorated by the non-occupancy of it by the minister: Find that the minister offers to occupy the manse so soon as it shall have been put into such a state as to be fit to be occupied by him: Find, further, from the reports of the architect, Mr. Clyne, that it is not at present in such a condition as to be a suitable and comfortable residence for the minister and his family in consequence of certain structural defects of a serious nature, specified in said reports, as existing in the walls and woodwork thereof, and particularly in the portion of the building containing the kitchen,' and so forth; and 'notwithstanding of the manse having been declared a free manse in 1874, an obligation rests upon the heritors of the parish to remedy the said defects:

Therefore decern and ordain accordingly, and appoint the petitioners, the heritors of Pitsligo, to take the necessary steps for having the manse made a suitable and sufficient residence for the minister of the parish, and his successors in office.' They further find that the heritors are liable in £20, 7s. 9d. of expenses, and apportion these among the heritors, and grant decree against them. Now, the question is, whether that was such a proceeding before the Presbytery as fell under the 3rd section of the Ecclesiastical Titles Act, which enables the heritors to remove the proceeding from the Presbytery to the Sheriff. I am very clearly of opinion that it was. It is true that it was incompetently instituted, and incompetently dealt with, but that does not make the statute less applicable. The decree was incompetent, and it does not matter from what cause it was incompetent. If it be a proceeding before any Presbytery of the Church of Scotland, relating to the building, rebuilding, repairing, adding to, or other alteration of churches or manses, that is all that is necessary to open to the heritors the power of transferring the proceedings from the Presbytery to the Sheriff. They did so by the second petition, and under it the Sheriff has pronounced a judgment. It may be that the deliverance is wrong. But there is no appeal from it to this Court, because the appeal is not given to us but to the Lord Ordinary on Teinds. Therefore the appeal under the second petition is incompetent, and must be dismissed."

(The older doctrine was that a minister must reside in his manse.—*Parson of Muckarsie* v. *Abercromby*, 1558, M. 7935; Act 1584, c. 132; *Minister of Falkland* v. *Johnston*, 1793, M. 5156).

The position and responsibilities of a Presbytery are illustrated in the case of Duddingston, where tradesmen who had been employed to execute repairs upon the parish church of Duddingston pursued the minister and Presbytery, conjunctly and severally, for payment. Before the summons was called in Court the minister died, and the action was transferred against his widow as executrix. No defences were lodged, and the pursuers took decree in absence against the executrix, but not against the Presbytery. This decree was afterwards opened up, and defences lodged for the executrix, against whom the Lord Ordinary (Ormidale) ultimately gave judgment on the

merits, reserving any right of relief she might have against the Presbytery. The Court held that the pursuers were not entitled to proceed directly against the executrix without following out their action against the Presbytery, and the case was remitted to give the pursuers an opportunity of doing so (*Sanderson and Muirhead* v. *Macfarlane*, March 30, 1868, 6 Mac. 701).

Under the provisions of the Ecclesiastical Assessments (Scotland) Act, 1900 (63 & 64 Vict. c. 20, § 2), when it is resolved to levy an assessment in any parish according to the real rent, intimation of such resolution is to be made to the Presbytery of the bounds. It is presumed that the requirements of the section will be satisfied by the receipt by the clerk to the Presbytery of a certified copy of the resolution, and that he will report the intimation in the Presbytery, and record it in the Presbytery's records. The scheme of assessment itself is not to be communicated to the Presbytery, and the object of intimating the resolution to the Presbytery is not clear, as they have no control over the method of assessment or the mode of collection of ecclesiastical rates. As the section will entail considerable extra work upon Presbytery clerks, without fulfilling any useful purpose, they will probably desire to charge a uniform fee for their trouble, but this is not provided for by the Act.

A parish minister is privileged in bringing before his Presbytery a charge of misconduct against another minister of the Presbytery (*A. & B.*, July 20, 1895, 22 R. 984).

It is much to be desired that Presbyteries should agree as to uniformity in their procedure in the cases that come before them. The Presbytery is a court, and it is injudicious to sit with closed doors,—the only result is a crop of rumours. It may seem fair to a minister that a charge involving personal fault should be investigated by the whole Presbytery (rather than by a Committee), but it is most unlikely that if the inquiry is continued over two or three days all the court will attend each day, and for members to vote on matters as to which they have not heard the evidence is unjudicial. Presbyteries are sometimes averse to having a shorthand report taken of evidence, but the procedure should as nearly as possible proximate to that in a Sheriff-Court when a Sheriff is taking a proof.

The right of a Presbytery to enforce a contract of union with the Church of Scotland, entered into between trustees holding a church built by subscription, and the Presbytery, to the effect of recovering possession of the church building, was dealt with in the case of *Presbytery of Edinburgh* v. *De La Condamine, &c.*, Dec. 11, 1868, 7 Mac. 213, and is referred to *infra*, p. 272 (Dissenting Churches).

In the event of any circumstances causing a vacancy in a parish to be prolonged beyond the period during which a widow, heirs, or executors have right to feu-duties and rents exigible under the Glebe Lands (Scotland) Act (29 & 30 Vict. c. 71), the Presbytery of the bounds and the heritors are entitled (§ 15) "to uplift and to apply the said feu-duties and rents to the provision of spiritual superintendence and the supply of religious ordinances in the parish during the vacancy."

PART IV.

CHAPTER XII.

DISSENTING CHURCHES.

Any number of persons may associate themselves together for religious purposes, and, in so far as they do not encroach upon the law of the land, may frame bye-laws. These bye-laws may be regarded as the terms or conditions of the contract which bind the persons together. By them various courts or judicatories may be organised, and various titles or descriptions given to members holding office in such associations. The extent and nomenclature of such courts, and the authority of such office-bearers, is a matter with which the Law Courts of Scotland have no concern, so long as they are truly part of the contract of the association using the terms. The authority of the regulations is limited to the members of the association professing to be bound by such regulations. The Church of Scotland has had conferred on it by statute law ecclesiastical jurisdiction, exercised by kirk-sessions, presbyteries, provincial synods, and general assemblies. No such statute law is applicable to the courts of other religious associations. The minister of a parish church is a recognised officer of the ecclesiastical system of Scotland. No status, except by contract among members of a voluntary religious association, belongs to the clergyman of such an association, whatever the term by which he is known. There is no prohibition of the use of any particular term which may approve itself to the taste of such an association.

By Act 14 & 15 Vict. c. 60, the assumption of the title of archbishop or bishop of a pretended province or diocese, or

archbishop or bishop of a city, place, or territory, or dean of any pretended deanery in England or Ireland not being the see, province, or diocese of an archbishop or bishop or deanery of any dean recognised by law, was prohibited under penalties. This statute is repealed by 34 & 35 Vict. c. 53, July 24, 1871. It narrates the prohibition of the above Act, and continues: "And whereas no ecclesiastical title of honour or dignity derived from any see, province, diocese or deanery recognised by law, or from any city, town, place, or territory within this realm can be validly created, nor can any pre-eminence or coercive power be conferred otherwise than under the authority and by the favour of Her Majesty, her heirs and successors, and according to the laws of this realm; but it is not expedient to impose penalties upon those ministers of religion who may, as among the members of the several religious bodies to which they respectively belong, be designated by distinctions regarded as titles of office, although such designation may be connected with the name of some town or place within the realm, be it," &c. The Act provides that the repeal of the 1851 Act shall not be deemed in any way to authorise or sanction, conferring, or attempting to confer, any rank, title, or precedence, authority or jurisdiction, on or over any subject of this realm by any person or persons in or out of this realm other than the Sovereign. A religious association, said Lord Deas, "may call themselves a Christian Church, or a Synagogue, or a Free Church, or a True Church, or any name they please, and the law will not even inquire whether they merit the name they so appropriate, nor whether their doctrines be heterodox or orthodox, provided only their objects be not unlawful" (*Macmillan* v. *Free Church*, cited *infra*, 23 D. 1346).

It is impossible within the limits of the present chapter to deal with all the decisions given by the Courts relative to Dissenting Churches in a country where dissent, or rather secession, has been so constant and so prominent. The object of the writer has been to gather for reference some of the leading judgments of recent years in reference to the more practical, as opposed to the more doctrinal, cases which have come before the Courts of law.

The Court of Session have repeatedly refused to interfere with or to deal with questions relative to status or rights

within such a voluntary association, acting within the terms of its contract of association; and in the case of *Brook* v. *Kelly*, Aug. 3, 1893, 20 R. (H. of L.) 104, the House of Lords affirmed a judgment of the Court, holding that an action raised by a canon residentiary of the Scottish Episcopal Cathedral Church of St. Andrew, Inverness, who sought to have it declared that the Board of Management of that cathedral was bound to make provision for his fitting support as one of the canons, was irrelevant, as he set forth no contract between him and the defenders.

But equally the Court have not hesitated to interfere whenever the matter brought under their notice is of the nature of breach of contract, and anything in the form of proceedings, or the nature of judicatories, or the course of appeal or review, or otherwise, which goes against what is definitely set in the constitution or contract, is an infringement of the compact which unites the persons forming the religious association (see Lord Ivory in *M'Millan* v. *General Assembly of the Free Church of Scotland, &c.*, July 19, 1861, 23 D. 1314). In that case it was held that sentences of suspension and deposition pronounced by a voluntary religious association against one of its ministers are not such spiritual acts as cannot competently be taken cognisance of by the Civil Courts, and that an action of reduction and damages against the General Assembly of the association, and certain individual members, on the allegation that such sentences had been irregularly pronounced, in excess of their powers, and in violation of the conditions which regulated the proceedings of the association among themselves, and which are alleged to form a contract among the members of the association, is competent, and inquiry into the constitution and regulations of the Free Church was directed. The courts of the Established Church must, in the exercise of their powers, see that the rules which they make and which they administer are consistent with the law of the land, otherwise they are void. The spiritual courts, said Lord Gillies in the *Strathbogie* case (Feb. 16, 1840, 2 D. 591), have no jurisdiction to enforce illegal rules, though made by themselves; and any person injured by an attempt to do so in his person, property, statute or reputation, may apply to a Civil Court for redress, just as in the case of any lawless wrong. "The principles which thus apply to sentences

pronounced by judicatories of the Established Church in excess of their powers," observed Lord Curriehill in *M'Millan's* case, *supra*, "apply *à fortiori* to sentences pronounced by the governing bodies of voluntary religious associations, because, while the former derive their authority from the law, and have power to some extent, as stated by Lord Gillies in the case of *Strathbogie*, to make rules for themselves, which, if consistent with the laws of the country, are binding on the office-bearers and members of the Church, the case is different as to the latter, who have no powers whatever except those conferred upon them by the members of their associations, and whose proceedings, therefore, can be of no force or effect against their ministers and members, unless they be exercised within the bounds and in conformity with the conditions prescribed by their constituents in the contract of the association."

The law thus laid down may be illustrated from various cases, such as that of *Dunbar* v. *Skinner*, in which judgment was pronounced in 1849 (March 3, 1849). There the Court repelled a preliminary plea by a bishop of the Episcopal Church in Scotland that the Court had no jurisdiction to try the case, as the ground of action was a spiritual and ecclesiastical one, "performed by the defender in his ecclesiastical capacity as the pursuer's bishop." Lord Fullarton there said: "Of the rights and powers of a bishop in the Scottish Episcopal Church, we can know nothing until they are established in evidence, like the terms and conditions of any other association." The law is not, however, to be understood as giving a right to every member of a religious association to enforce its contract. In *Forbes* v. *Eden and others* (Dec. 8, 1865, 5 Mac. 143), a clergyman of the Scottish Episcopal Church brought an action against the members of a general synod of that Church, concluding—(1) for reduction of certain canons enacted by the synod, which altered the canons in force when the pursuer was ordained; (2) for declarator that it was *ultra vires* of the synod to enact these, and that he was entitled to celebrate divine service according to the former canons; and (3) for damages for injury done to him through his bishop refusing to license a curate engaged by the pursuer who would not subscribe the new canons; these averments were held not relevant or sufficient in law to support the conclusions of the libel. The

Court, following the law as stated in the decisions above, did not regard the general relevancy of such an action as liable to objection, but the Lord Justice-Clerk (Inglis) observed: "There may, no doubt, be breaches of contract where the party complaining has no such interest to enforce the contract as can be recognised by a court of law. Thus an association may be formed for mere sport or amusement, which every member is at liberty to leave as soon as he feels inclined, and which he can leave without any pecuniary loss. In such a case the law will not interfere; and though the subject-matter of this contract be as far removed as possible from sport or amusement, still, if the complaint here were at the instance of a mere lay member of the Scottish Episcopal communion, his interest and title to defend the constitution of the society might be seriously questioned; for he would be met with the ready answer, that as soon as the practice of the religious body became disagreeable to him, he was at liberty to bring his connection with it to an end;" and it was observed by Lord Cowan, that to entitle a party to call upon the Court to adjudicate upon the acts of a voluntary church court in matters ecclesiastical, he must set forth some civil wrong, justifying a demand for redress, or patrimonial injury, entitling him to claim damages. In the same case, in the House of Lords, Lord Cranworth said: "There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or indeed to inquire into them at all, except so far as may be necessary for some collateral purpose. The only remedy which the member of a voluntary association has when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it. If connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house or land, or a chapel, or a school, then incidentally the Court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the status in the society of any individual member of it." In another case relating to the Scotch Episcopal Church, where a clergyman raised an action against the board of management of a cathedral of his denomination for declarator that the board was bound to make due provision for his fitting support as one of the canons out of the funds in their hands, the Court of

Session, and subsequently the House of Lords, held that the action was irrelevant, in respect that the clergyman set forth no contract between himself and the board, and no trust under which he was a beneficiary (*Brook* v. *Kelly*, Aug. 3, 1893, 20 R. (H. of L.) 104, affirming judgment of C. of S., March 3, 1893, 20 R. 470).

The right of appeal to the Civil Court will not be lightly shut out, even by an allegation of the illegality of the original contract. The cause of the schism in the Reformed Presbyterian Church in 1863 was the question whether the taking the oath of allegiance, and exercising the elective franchise, on the part of members of the church should continue to involve suspension of church membership, and expulsion from the church or not. It was held in *The Ferguson Bequest Fund* case, 1879, *infra*, that the principles avowed by the minority, who opposed the abolition of such ecclesiastical consequences as contrary to the "testimony" and subversive of the fundamental principles of their church, did not render the contract which they alleged to be the bond of union of their church an illegal fact, so as to disentitle them from appealing to the Courts of the country in vindication of a patrimonial right. A minister of the United Presbyterian Church, who asked for reduction of a decree of suspension pronounced against him by a committee of Synod, to whom the Synod had remitted the trial of a libel against him, on the ground that the remit was *ultra vires*, was held by Lord Kyllachy (1) to have averred a relevant breach of contract, causing patrimonial injury, or injury akin to it; (2) that it being alleged that the suspension was *ultra vires*, the appeal to the Civil Courts was not excluded by a provision in the contract that members should not have recourse to the Civil Courts against judgments of the church courts; but (3) that the Court was not in use to grant, and should not grant, reduction in such cases, of the sentence of suspension to the effect of restoring the minister to office; and the action was dismissed (*Skerret* v. *Oliver*, Jan. 30, 1896, 23 R. 468). It was held in that case that it was sufficient to call as defenders in the circumstances:—(*a*) the prosecuting members of the Presbytery, (*b*) the Synod, and (*c*) the commission of Synod by whom the sentence of suspension was pronounced; the Synod was validly cited by its office-bearers being called, and the

Presbytery was not a proper defender, but was validly cited for its interests by its office-bearers being called in the same way.

The questions of property arising out of the union of religious associations of different names and creeds of historical or verbal peculiarity are numerous. The principal cases prior to this century are summarised in Lord Justice-Clerk Hope's judgment in the *Kirkintilloch* case.[1] (*Craigie* v. *Marshall*, Jan. 25, 1850, 12 D. 523.) In all these cases the Court went on the principle that the property of a dissenting congregation belonged necessarily to the majority of the congregation, "and laid aside, as a point quite irrelevant, the inquiry whether that majority had departed from the religious principles on which the association was formed"—the view taken in all being "that a trust for a permanent religious association, or for the maintenance of particular opinions, was not a trust which law could support, or at least, if not unlawful, the only party to decide on the matter was the congregation itself—that is, the majority; and that the course taken by the majority, although they separated from such judicatories, was one of which the minority could not complain. This view rested on the principle, that the property was in the members of the congregation." The feeling against these judgments spreading, it was determined to test the question afresh, and this was done in the case of *Davidson* or *Craigdallie* v. *Aikman*. This case was twenty years before the Courts. As ultimately decided in the House of Lords, the principle was laid down that the property of a chapel of a religious association should be appropriated to those who hold the religious principles of those who originally attended the chapel, Lord Eldon, on July 19, 1820, thus stating his views: "When this matter was formerly before the House, we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel,

[1] *Bryson and Others* v. *Wilson and Others*, commonly called *Gib's* case—decided by Lord Elchies, June 30, 1752, Decisions (Elchies), vol. i. "Title to Pursue," No. 1; *Morrison* v. *Struthers*, 1757, called *Allan's* case (Lanark); *Wilson* v. *Jobson*, Dec. 13, 1771 (Dundee); *Allan* v. *M'Crae*, Mar. 8, 1793 (Berean); *Auchencloss* v. *Black*, Hume, 595, 1792; *Smith* v. *Kidd*, May 26, 1797; *Dun* v. *Brunton*, May 13, 1801; *Bulloch* v. *Douglas*, May 27, 1800, see 12 D. 535 and 537. The cases relative to Dissenting Churches have been brought together with much care in Mr. Taylor Innes's "Law of Creeds in Scotland;" see also *Scottish Law Review*, vol. iv. (1888), pp. 53, 86.

we should hold the building appropriated to the use of persons who adhere to the same religious principles, and in that view it became necessary to determine whether any, and, if so, which of the persons who were contending for the use of this place of worship, with a view to determine what was to be done if the right principle was to appropriate the building to those who continued to hold those religious principles and were in communion with those who did so." The Court of Session had found that "as far as they are capable of understanding the subject," the Old-Light party, who were the pursuers, had failed to show deviation by the Associate Synod party, the defenders, from the original principles, and this somewhat unusual worded judgment was adopted by Lord Eldon, who, addressing the House of Lords, said: "If they [the Court of Session] were obliged to qualify their finding, as they do, intimating that they doubt whether they understood the subject at all, under the words 'as far as they are' capable of understanding the subject,' I hope I may be permitted without offence to say, that there may be some doubt whether we understand the subject, not only because the Court of Session was more likely to understand the matter than we are, but because I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they have or have not deviated from them; and I have made the attempt to understand it, till I find it, at least on my part, to be quite hopeless" (2 Bligh's "Reports," 543).

In the *Campbeltown* case (*Galbraith* v. *Smith*, March 10, 1837, 15 S. 803) the numerical theory of the earlier decisions was entirely disregarded, Lord Meadowbank laying down as general principles: "*First*, I take it to be clearly and finally settled that a trust may be legally established, a civil right created for behoof of a body of dissenting Christians, professing certain tenets, and agreeing to have those civil rights fixed by and dependent upon the observance of such rules and regulations as are inherent in, and calculated to maintain, the principles they support."

"*Secondly*, That it is a legal object of such a trust that it may profess to be constituted with a view to perpetuity, even by placing in the hands of a recognised body the right and power of controlling and modifying those rules and regulations,

in conformity with the fundamental principles of that sect of dissenting Christians to which those constituting the trust may have professed to adhere, and that the Civil Court will not take cognisance of the proceedings and determinations of those ecclesiastical *judicatories*, as they may be termed, upon matters of doctrine and discipline, but hold them to be *probatio probata* of the principles of the sect.

"*Thirdly*, That the original deed or other instrument by which the trust is created need not, in order to be effectual, specify within itself the particular conditions of its creation, but that these objects may be ascertained, in order to their recognition and enforcement by Courts of law, by facts and circumstances, and by a train of proceedings indicative of the purposes and the views of the parties.

"*Fourthly*, That in order to confer upon a party the right of enforcing the objects of the trust, it is only essential that he should possess a *persona standi in judicio*, and qualify an interest to have it enforced. But it is not required, and that is the point which, though now settled, was originally doubted, that in those cases where the parties contributing their money and their means to the constitution of such a trust, and forming a congregation of dissenting Christians, shall have differed in opinion, and both claim possession of the trust-estate, the success of either will depend, not upon the greater amount which each may have contributed in the creation of the subject, or in their numerical superiority, but in their adherence to the original principles which it was their professed object to maintain in the constitution of the trust."

This judgment has been severely criticised. See Lord Justice-Clerk Hope's observation in *Craigie* v. *Marshall* (Kirkintilloch), January 25, 1850, 12 D. 823; and this and succeeding judgments point to the inaccuracy of Lord Meadowbank's view that inquiry into the original opinions or doctrines of a congregation differing from the synod of its Church is to be excluded. His doctrine of *probatio probata* has been expressly repudiated. See "Law of Creeds in Scotland" (A. T. Innes, 1867, p. 346); *Couper* v. *Burns* (Thurso), Dec. 2, 1850, 22 D. 120.

The rule of law established by the last named case has been defined to be that "where church property is dedicated to the use of a congregation holding certain definite religious tenets,

the property cannot lawfully be used as a place of worship in connection with a different religious body, and the conditions under which it is held cannot be lawfully altered in any material respect unless with the consent of the whole congregation" (Lord Ordinary (Curriehill) in *Kennedy, &c.*, v. *Morison, &c., and Lee, &c.*, March 20, 1879, 6 R. 879).

It has been decided that it was competent for trustees holding a building (which had been erected by subscription) in trust for the purpose of being occupied as a place of meeting "for divine worship" to enter into a contract with the Presbytery of the bounds connecting it permanently with the Established Church of Scotland, and that the Presbytery were entitled to enforce implement of the contract against the trustees twenty-five years after they had separated from the Established Church (*Presbytery of Edinburgh* v. *De La Condamine*, Dec. 11, 1868, 7 Mac. 213). The circumstances under which the trustees were held to have completed a contract with the Presbytery cannot be adequately summarised for insertion here, but it should be mentioned that the managers of the church from 1843 to 1868 allowed it to be used as a Free Church.

"There cannot be any doubt," said Lord Kinloch, "of the general principle that where a church is, by its original foundation, attached to a particular body or denomination of Christians it is for that body or denomination that the property of the church is to be preserved. To what body or denomination the church shall be held to have been devoted may, and probably in most cases will, appear from writings framed for the purpose at the time of its institution. But such writings may not exist, or may be ambiguous. It has happened in more than one case that nothing was said except that the building was to be kept 'as a place of meeting for divine worship,' or words used of a similar kind. In such a case the object of the founder or founders is legitimately to be gathered from *the circumstances of the case*, as these may be disclosed in evidence, from the acts of the parties, the history of the congregation, the contemporaneous ecclesiastical events. It was laid down by Lord Chancellor Eldon in the well-known case of the *Attorney-General* v. *Pearson*, that 'if land or money were given (in such a way as would be legal, notwithstanding the statutes concerning dispositions to charitable uses) for the purpose of building

a church or manse, or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, the Court would execute such a trust by making it a provision for maintaining and propagating the established religion of the country.' I consider this to be a reasonable principle, and nothing more than is directly involved in the existence of a church establishment. But, unquestionably, any presumption in favour of the Established Church is capable of being overruled by distinct evidence that it was not to the Establishment but to some particular body of dissenters—it matters not of what opinion—that the founder or founders intended the church to be attached" (Lord Kinloch in *Presbytery of Edinburgh* v. *De La Condamine, supra*). In a case decided in the following year, the titles to certain church property belonging to a congregation of the Reformed Presbyterian Church were taken in 1836 in favour of trustees "for behoof of the members whose names are duly registered in the session books of the congregation professing the terms of ministerial and Christian communion agreed upon by the Reformed Presbyterian Synod." A sale of this property took place under authority of the Court in 1875, and a new site was purchased and a chapel erected thereon. The titles to the new subjects were taken, after due consideration, and by unanimous resolution of a *pro re nata* meeting of the congregation, in terms different from those of the deed of 1836, viz., in trust for the said Reformed Presbyterian Congregation in connection with the Synod of the Reformed Presbyterian Church in Scotland, and "in the event of the Synod of the said Church resolving to unite with any other denomination or in the event of there being at any time hereafter a split or schism in the synod of said church, or in the synod or superior court of any church with which said synod or congregation may be hereafter united, the said subjects shall be held for behoof of that section of the members of said congregation who shall adhere to the majority of the synod or other superior court; but declaring that if a majority of the members of the congregation shall determine not to adhere to the majority of synod or other superior court at a meeting of the congregation duly called, and if such resolution shall be afterwards approved of and confirmed in writing by two-thirds of the members whose names shall have been twelve

months on the communicants' roll of said congregation prior to said union, split, or schism, and who shall be in full communion at the time, and provided such resolution shall be so carried, approved of, and confirmed within three months of the date of said union, split, or schism, then and in such event the said subjects shall be held for behoof of such two-thirds, on their relieving the other members of all liability in respect of said subjects." On 25th May, 1876, the Reformed Presbyterian Church united with the Free Church, retaining, however, its organisation *quoad civilia*. On 14th August, 1876, at a meeting of the congregation duly called, it was resolved by a majority not to adhere to the majority of synod in their resolution to unite with the Free Church. The congregation resolved instead to join the Established Church of Scotland; the resolution was confirmed in writing by more than two-thirds of the members who had been on the communicants' roll for twelve months prior to 25th May, and were still in full communion. Thereafter the majority were received into the Established Church, carrying with them the church, which it was proposed to make the church of a *quoad sacra* parish. In an action brought by a small minority of the congregation to vindicate their right to the church property, it was held—(1) that the property of the church having been held under the deed of 1836 in trust for a congregation professing certain distinctive principles, and the whole congregation having assented to or adopted the alterations made in 1875 in the conditions under which the property should be held, the title of 1875 became thereafter the regulating deed; (2) that the union of the Reformed Presbyterian Church with the Free Church was such an event as was contemplated by the altered trust-provisions of that deed; and (3) that the requisite proceedings had been duly taken in conformity with those provisions, to transfer the property to the two-thirds majority of the congregation (*Kennedy, &c.*, v. *Morrison, &c., and Lee, &c.*, March 20, 1879, 6 R. 879).[1] In 1743 a chapel was built by, and for the use of,

[1] Lord Shand observed: "It was said that the letter of the provision in the title was not strictly conformed to, because the resolution of the congregation was not one 'not to adhere to the majority of the Synod,' but one directly to join the Established Church. This is, I think, a hypercriticism. It could hardly be maintained that, if there had been a resolution by a majority not to adhere to the

the Episcopalians in Brechin. It was held by the First Division of the Court of Session that the moneys arising from the sale of the chapel in consequence of its disuse, and the failure of the trust on which it was held, ought to be given to the Scottish Episcopal Congregation of St. Andrew's, Brechin, as being the only parties who now represent the Episcopalians of Brechin. The High Street United Presbyterian Church, Brechin, claimed the moneys on the ground that, in 1830, a large number of the Episcopal Congregation joined the Relief Church, and their descendants are now members of the United Presbyterian Congregation. "This averment is obviously incapable of proof," observed the Lord President, "and would not be very material even if proved," and the Court refused a proof to the United Presbyterian Congregation (*Burnett* v. *St. Andrew's Episcopal Church, Brechin*, June 12, 1888, 15 R. 723).

But it is not essential that in all cases the fundamental principles of the Church should be enquired into.

A testator bequeathed a fund, the income of which was to be devoted to certain purposes in connection with the Established, Free, U.P., Reformed Presbyterian, and Congregational Churches in Scotland. The Reformed Presbyterian Church having in 1863 split into two bodies, each claiming to be the only true representative of that Church, it was held, in an action of declarator of right to share in the fund, brought at the instance of the minority against the trustees and the majority, that it was unneccessary to inquire strictly into the fundamental principles and standards of faith of the Reformed Presbyterian Church, so as to determine which section had adhered to, and which had departed from them, insomuch as, looking (1) to the indefiniteness and elasticity of the contract or bond of union of the church, (2) to the intention of the testator and the scope of his bequest, and (3) to the wide discretion left to his trustees, that both sections still remained channels of the testator's bounty, and the trustees directed

majority of the Synod, the two-thirds of the congregation might not, after a time, say six months, or a year, have joined the Established Church if they thought fit, and retained the building for congregational purposes in connection with that use. If so, there can be no difficulty in the whole having been done directly in one resolution" (p. 890).

in the fair exercise of their discretion, to admit both to the benefit of the fund (*The Ferguson Bequest Fund* case, Jan. 16, 1879, 6 R. 487). Where a trust for religious purposes subsists the Court will, in fact, not interfere with the legal actions of the persons in whom it subsists; this was illustrated in the recent case arising out of a petition by the Synod of the United Original Seceders to have the surviving trustees for the Congregation of the United Original Seceders who worshipped in Adam Square, Edinburgh, ordained to pay over the trust funds and convey the trust property. The Court held that it had not been proved that the purposes of the trust had failed, and dismissed the petition (*Thomson* v. *Anderson*, July 10, 1887, 14 R. 1887). In the case of *M'Lean*, Nov. 4, 1898, 1 F. 48, the Court refused an application by the minister and kirk-session of the First United Presbyterian Congregation, Alloa, for authority to transfer the management of an educational bequest under the will of Alexander Paton, of which they were trustees, to the School Board of Alloa. The testator died in 1860; the operation of the Education Acts had rendered the maintenance of a school under the provisions of the testator's will unnecessary, and the School Board were willing to take over the trust estate and its management. The ground of the Court's refusal was that "by selecting the minister and session of a dissenting church as, *ex officiis*, his trustees, the testator denotes his will that a denominational body shall administer his bounty." "Diffidence and self-abnegation," said Lord President Robertson, p. 51, "are virtues not to be indulged in by *ex officiis* trustees." The case of the *Kirk-Session of Largs* v. *School Board of Largs*, June, 10, 1899, 1 F. 915, is not clearly to be reconciled with the foregoing. In the case of Largs, the French School of Industry at Largs was instituted about 1852, to be under the inspection of the Presbytery of Greenock, and to remain in perpetual connection with the Church of Scotland. The erection of a large public school in Largs, and the abolition of fees rendering the school no longer necessary—the kirk-session proposed that, on sale of the site and buildings, the income of the price should be applied to the maintenance of the library of the Largs Parish Church Sunday School, and for providing class-books for its scholars. The School Board objected that under

this scheme the charity would be restricted to children of one denomination. The Court approved of a new scheme prepared by the advocate to whom a remit was made, providing (1) for the vesting of the funds in the minister and kirk-session of Largs as trustees; (2) the annual income to be applied by a committee of nine, of whom six should be appointed by the trustees and three by the School Board; (3) that the committee should buy books which should be housed in the Largs Parish Sunday School Library, but be available for the free use of any children attending public or state-aided schools in Largs parish. In the case of *Bannerman* v. *Bannerman's Trustees*, July 4, 1896, 23 R. 959, it appeared a lady who died in 1876, directed her trustees to pay the interest of £3000 to the incumbent, for the time being, of St. James Episcopal Church, Aberdeen, "so long as the congregation worshipping in said church shall not be united to, or in connection with, the Scottish Episcopal Church:" should the congregation unite, or be in connection with that body, the trustees were directed to pay over the money among her residuary legatees. In 1877 the clergyman of St. James' obtained a licence from the bishop of the Scottish Episcopal Church in Aberdeen, so did his successors, and candidates for confirmation were confirmed by the bishop in Aberdeen, but not in St. James' Church. No change was made in the constitution of the church, and the congregation entered into no agreement with the bishop. In 1895 the residuary legatees of Miss Bannerman raised an action for declarator that the sum of £3000 should become payable to them in respect St. James' Church was in connection with the Scottish Episcopal Church, and the Court granted decree, holding *inter alia* that no overt act on the part of the congregation as such was necessary to create a connection in the sense of the trust deed. Lord M'Laren dissented.

That dissenting congregations are not entitled to use a *bell* for summoning their members to worship was decided in 1835 in the *Paisley* case (*Macnaughton* v. *Magistrates of Paisley*, Feb 7, 1835, 13 S. 432). Interdict was there granted against the magistrates of Paisley, authorising the bell of the High Church to be rung for other purposes than national rejoicings, and the daily summoning of labourers to and from their work accord-

ing to usage, and with the acquiescence of the minister and session. The judges' opinions were expressed with great emphasis, Lord Meadowbank said: "I conceive that, with the single exception of the King's Chapel Royal, the bell of which was transferred by royal charter to the Episcopal Chapel in Edinburgh, where it still is, no body of dissenters are entitled to a bell. This is not a new idea. An attempt was made in Fife some time ago to put up a bell at a dissenting meeting-house. Opposition was given, however, and the law officers of the Crown (including the late President Blair) gave a clear opinion that no dissenting body were entitled to have a bell at all, and the attempt was subsequently abandoned." Lord Medwyn spoke as "the only dissenter from the Established Church at present on the bench;" he gave an interesting historical account of the use of church bells, prefaced by the remark, "being of opinion that it is the privilege of the Established Church alone to assemble her members for public worship by the sound of a bell, I feel it my duty to protect the Church in her rights, and to check every encroachment upon them."

This declaration of the law has been uniformly disregarded, and the good sense and sense of decency of the various congregations have generally prevented the question arising. It arose, however, in a later case—that of *Peebles*—where Lord Deas observed: "If it be the law that dissenters can have no bells in their meeting-houses, I think the sooner that law is altered or modified the better. For the purposes of the present case it may be assumed that every dissenting meeting-house in Peebles or elsewhere may lawfully have a bell" (*Kirk-Session of Peebles* v. *Magistrates of Peebles*, July 10, 1874, 1 R. 1179), and Lord Ardmillan said in the same case: "If we are called on now to recognise and enforce the law as declared in the *Paisley* case, and to proclaim now that the right to use a bell—any bell—summoning to worship, is limited exclusively to the Established Church, while the prohibition to use a bell as a call to worship is a penalty of non-conformity—I must decline to do so. I think that such a proposition is opposed to the constitutional toleration which law recognises and justice demands" (p. 1153).

The point was not dealt with in the House of Lords, as the case was decided on grounds which did not call for its considera-

tion. It seems improbable that the view of the law taken by the Court in 1835 would be taken in the present day.

In an English case the constant daily ringing of a peal of heavy bells in the chapel of dissenters, viz.—the Redemptorist Fathers at Clapham,—adjoining a private residence, was held to be an actionable nuisance, and an injunction was granted to restrain it (*Soltau* v. *De Hold* (1851), 2 Sim. N.C. 133, 21 4 J. Ch. 153, Garrett's Law of Nuisances (1890), pp. 178-9).

The responsibilities which parties acting in all good faith for a dissenting church may incur is illustrated in a recent case, where three persons (the minister and two of the managers) connected with a dissenting church in Stranraer signed a promissory-note in the following terms, "We, the under-signed, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay, &c." The Second Division of the Court of Session held that the three persons who signed were personally liable for payment of the note (*M'Meekin* v. *Easton* (Stranraer), Jan. 25, 1889, 16 R. 363), Lord Young observed: "The idea that this Reformed Presbyterian Congregation was the proper debtor in a personal obligation is, of course, absurd. A congregation could not be debtors on a promissory-note, and there is therefore no personal obligation on them." (He, however, indicated there was a moral obligation on the congregation to relieve those who became debtors for their behoof, p. 364.)

In the case of the *General Trustees of the Free Church of Scotland* v. *Inland Revenue*, Feb. 4, 1897, 24 R 492, it was held by the First Division of the Court of Session (1) that the Free Church Assembly Hall and Free Church College were "halls or offices" within the meaning of Rule V. of Schedule B. of the Act 48 Geo. III. c. 55, and being charged for poor and school rates were liable to inhabited house duty under the House Tax Act, 1851; and (2) that the hall and college were not entitled to the exemption conferred by the Customs and Inland Revenue Act, 1878, in respect that they were not occupied for the purposes of a business or calling by which the occupier—the General Trustees of the Free Church—sought "a livelihood or profit."

With regard to houses provided by dissenting congregations for their ministers, there is usually not much question.

The minister is a "liferenter" so long as he holds the charge. A Congregational minister, whose congregation had bound themselves to provide him with a manse, stood enrolled as liferenter and occupier of a house which was feudally vested in trustees "for the use and behoof of the Congregational Church." The Sheriff found it not proved that he held his charge *ad vitam aut culpam*, and expunged his name from the roll, stating, however, that no instance had occurred in the body to which the party belonged of a minister being dismissed. On appeal the Court reversed, holding that both Established Church ministers and dissenting ministers are entitled to be enrolled as liferenters in respect of their manses (*Robbie* v. *Meiklejohn*, Dec. 19, 1868, 7 Mac. 296). Where the feudal title of a manse occupied rent free by a minister of the Free Church of Scotland was in trustees for behoof of the congregation, the Court held that the annual value of the manse did not fall to be computed in the minister's "total income from all sources" in the sense of the Customs and Inland Revenue Act, 1876 (*Inland Revenue* v. *Sutherland*, Free Church, Rothesay, Mar. 20, 1894, 21 R. 753). For circumstances under which certain land-owners were held to be under obligation to maintain the manse of the clergyman of a Scottish Episcopal church, see *Pearson* v. *Malachi*, Dec. 6, 1892, 20 R. 167. No assessment by heritors on the real rent is, by 63 & 64 Vict. c. 20, section 3, to be imposed on the dwelling-house of the minister of any religious body in Scotland.

The clerk of a kirk-session of a dissenting body cannot give out extracts which will be admissible in evidence, because neither the court nor the clerk has an official character (*Mathers* v. *Lawrie*, Dec. 26, 1849, 12 D. 433; Dickson "On Evidence," vol. ii. ed. 1887, p. 722).[1]

A probationer of a dissenting church applied to be admitted to the poor's roll in order to bring an action of damages against the synod of the church for not giving him a fair share in certain lucrative employment open to probationers, and the

[1] A letter written by the clerk of a Free Church Presbytery containing incorrect but not calumnious statements as to the status of a minister residing within the Presbytery bounds and written in reply to a private inquiry by an official of another voluntary church, has been held to be privileged, and that a suspension from the ministry following the reply was not an injury resulting from it for which the clerk of Presbytery could be held responsible (*Wallace* v. *Bremner*, July 11, 1900, Sh. Court of Lanarkshire, Sh. Ct. Rep. xvi. 308).

reporters on the *probabilis causa* were equally divided in opinion; the Court, in respect of the special nature of the action, refused the application (*Shanks* v. *Moderator, &c., of the Reformed Presbyterian Church*, March 11, 1886 13 R. 749).

A nun sued the Mother Superior of the community to which she belonged, as representing the community and the bishop of the Roman Catholic diocese, for damages on the ground of breach of contract by their dismissing her from the community without sufficient reason. The Second Division of the Court of Session dismissed the action as irrelevant (*Mulcahy* v. *Herbert*, July 12, 1898, 25 R. 1136). The opinions of the Court are very brief, but the opinion of the Lord Ordinary (Lord Kincairney) refers to the absence in the pleadings of any relevant averment of a verbal contract, and of the non-production of the "constitution" of the community if such existed.

The courts of the Established Church are entitled to the aid of the Civil Courts to secure their efficiency. It does not appear that the courts of Dissenting Churches are entitled by law to this privilege, but Lord Ardmillan in the *Uig* case observed: "I am further of opinion, and on broader ground, that the aid of the civil court to enforce the attendance of witnesses may be given, and ought to be given, when craved and required, even in causes within *churches not established*—that is, within a voluntarily constituted jurisdiction. This is well illustrated by the case of arbitration. The interposition by the civil court to compel a witness to attend and depone before an arbiter has been frequently exercised, and authoritatively recognised. On this point there are decisions from time to time between 1690 and 1860, and the practice has been accordingly" (*Presbytery of Lews* v. *Fraser*, May 16, 1874 (*Uig* case), 1 R. 894). In the case of the *Rev. Henry Johnston, Petitioner*, November 7, 1899, 2 F. 75, the authority of the Court of Session was asked to allow the Petitioner, Henry Johnston, to assume the name of "Lindsay," and to call and subscribe himself Henry Lindsay Johnston, and to ordain the Petition and the deliverance upon it to be recorded in the Books of Sederunt. It appeared that in the Petitioner's Baptismal Certificate he was named Henry Johnston, that he subsequently adopted the name of Henry Lindsay Johnston, that he took his degree at Cambridge under that name, but that when he was ordained as a deacon, the

Bishop of Rochester refused to enter in the Petitioner's letters of orders any other name than was contained in his Baptismal Certificate without evidence that that name had been assumed with authority, and that the Petitioner was informed that the Bishop would again refuse to insert his adopted name in his letters of orders as priest. Lord Adam observed: "Any person in Scotland may, without the authority of the Court, call himself what he pleases, and accordingly when a Petition for such a purpose is presented we are in use to dismiss it as unnecessary unless sufficient reason is shown for the application. . . . We are in use to grant Petitions of this kind in the case of notaries and other such persons, and it rather appears to me that we should grant the application." The authority asked for was therefore granted.[1]

[1] For an interesting paper suggested by the *Skerret* case (*supra*) on "The Law of Presbyterianism in Scotland and America," by A. Taylor Innes, see *Juridica Review*, viii. p. 159.

PART V.

A NOTICE OF THE HISTORY OF TITHES IN SCOTLAND.

CHAPTER XIII.

THE CIVIL INSTITUTION OF TITHES IN EUROPE.

THE theory of the legal devotion of one-tenth of the produce of man's cultivation of the soil to the maintenance of religion and of its servants, owes its origin to the Jews, but for its recognition in the Christian civil law we must look to the reign of Charlemagne. There is scarcely any subject which more effectually illustrates the rise of the Church of Rome, or which can be less understood without recourse to the pages of history, than tithes. From 476, when the Western Empire ended, and Constantinople, instead of Rome, became the nominal capital of the nominal successors of Augustus, the Church steadily became more and more a political as well as a religious power. Her progress was irregular, for the character of her Popes varied; but it never ceased. In the absence of Cæsar, the heir of St. Peter became with every century more markedly the chief man in Rome. The Church, whatever her faults, was fulfilling her mission in sending missionaries to the heathen, and in succouring the poor at home. Such demands upon the Church's purse necessitated the creation of sufficient revenues, but they were long defective. Bit by bit estates were given her, or were acquired by purchase; but the attention of the clergy was directed, not unnaturally, to the restoration of the Levitical doctrine of the religion which they taught—a

restoration which would have brought into the treasury a more or less regular income from tithes. They are frequently referred to in the early history of the Church, but no trace of enforcement under even ecclesiastical penalties is found earlier than the Council of Rouen in 630. Their payment as a religious duty was certainly recognised not long after 567, the date of the second Council of Tours, and had been taught on Scriptural analogy by St. Augustine and St. Jerome, and positively by Cæsarius, Archbishop of Arles, 503–544. To enforce the collection of tithes was, however, in the nature of things impossible when there was no power other than the Pope's to see to the payment, and his authority as yet was quite inadequate to the task.

It is therefore to the time when Charlemagne rescued Rome from the fear of the Lombards, and was welcomed by Hadrian as the deliverer of both Church and people, that we have to look for the dawn of a real civil connection between the Church and the State; and accordingly it is from an ordinance made by Charlemagne as King of the Franks, in a general assembly of his Estates, spiritual and temporal, in 778–779, that any outline of the history of tithes must start. The ordinance was in the following terms:—"Concerning tithes, it is ordained that every man give his tithe, and that they be dispensed according to the bishop's commandment."

A Capitular for Saxony in 789 appointed tithes to be paid out of all public property, and that all men, "whether noble, or gentle, or of lower degree," should "give according to God's commandment, to the churches and priests, of their substance and labour: as God has given to each Christian, so ought he to repay a part to God." A Capitular of 800 made the payment of tithes universal within the fiscal domain of the whole Frankish kingdom.[1]

From the year last mentioned dates the rise of the Church as Catholic. When, on Christmas Day, 800, Leo III. placed the crown on the German king's head in the basilica of St. Peter at Rome, as he knelt before the high altar, with the words, "Karolo Augusto a Deo coronato magno et pacifico imperatori

[1] Selborne, "Ancient Facts and Fictions concerning Churches and Tithes," pp. 50, 51.

vita et victoria," then, as has been truly said, "modern history begins."

Henceforward the political and religious unity of the world was, at least in theory, an accomplished fact. The Holy Roman Church and the Holy Roman Empire were but two aspects of one idea. The spiritual aspect of the Visible Church was represented by the Pope, the political by the Emperor. It was an attractive idea which rules all mediæval history, and for a time it was not only a metaphysical conception, but a fact. To the people the Catholicity of the Christian Church was embodied in the twin powers of Emperor and Pope, each equal, each exercising in his sphere the authority and dignity without which the one could not be universal emperor nor the other universal priest.[1]

To Charlemagne and Leo the apparent realisation of a universal Empire and Church, of which one was the world-monarch and the other the world-priest, was personally advantageous. Henceforth the cause of Charlemagne must be the cause of Christendom; to be his enemy was to be in schism; henceforth, too, the rights of the Church were the rights which the world would enforce. Each was the complement of the other. The empire of Charlemagne was no longer a collection of states won by the sword of his fathers or of himself; it was the empire of the Christian world. The diocese of the Bishop of Rome, on the other hand, was no longer southern Italy, but the broad realms over which the sword of the Emperor waved. From this time onwards, therefore, we may say the civil law superseded any merely spiritual admonitions as to the payment of tithes. Their payment was no longer a religious duty alone—it was a legal obligation, enforceable by the laws of the civil head of Christendom.

When this mediæval theory is understood, the history of tithes becomes comprehensible. Much ingenuity has been wasted on considerations whether they were due *jure divino* or not; and although Selden expressly disavows any intention of

[1] "As they could not imagine, nor value if they had imagined, a communion of the saints without its expression in a Visible Church, so in matters temporal they recognised no brotherhood of spirit without the bonds of form, no universal humanity save in the image of a universal State" (Bryce, "The Holy Roman Empire," p. 98).

dealing with such controversial questions, many curious pieces of misguided ingenuity will be found in his citations.[1] For us it will be sufficient that until five years after Charlemagne, as Patricius Romanorum, freed Rome from the fear of King Desiderius of Lombardy, there was no civil law in Christendom as to payment of tithes; and until 800, the same year in which he became Roman Emperor, the law did not apply to the whole of his dominions. Thenceforward, apart from any ecclesiastical theories, the payment of tithes was part of the law of the Christian world.

In 829 the payment of tithes was made enforceable by distraint both by the Emperor Louis the Simple and by Lothair for Lombardy. The means for dealing with defaulters was, first, by priestly admonition; then (in the words of Lord Selborne)[2] by exclusion from the Church; then by the intervention of the civil power and the infliction of fines; then by a sort of interdict against defaulters' houses; and last, if the use of all those means failed to produce the desired effect, by bringing the offenders in custody before the imperial or royal courts.

It will have been noted that Charlemagne directed the tithes to be paid to the bishops. There were then no parishes in our modern sense, and at all events it had long been the practice of the Church that the funds contributed for the support of religion should be distributed by the bishop who was recognised as entitled to receive them.

Such funds were, according to Roman custom from at least the time of Pope Gelasius, 501, divided into four portions. One the bishop retained for himself and those who were dependent upon his hospitality; a second portion was distributed by him among his clergy; a third was administered for the benefit of the poor and strangers, and the fourth went towards maintaining the fabric of the churches. In 801 a quadripartite division was established for Lombardy by Charlemangne, and it was adopted generally in Gaul and in Germany; in Spain, however, the bishop took one-third of the whole fund, at the same time himself undertaking the repair of the churches—at least from A.D. 516, the date of the Council of Tarragona; and there are

[1] For some "cabalistic and doting curiosities," as Selden well styles them, see "Historie of Tithes" (1618 ed.), pp. 7, 8.

[2] Selborne, p. 54.

evidences that in some districts of France and the Low Countries in the ninth century (exclusive, however, of the metropolitan diocese of Paris and of Orleans) tithes were divided into three portions, one going to the Church, one to the poor, and one to the priests.[1]

In each bishopric there were generally several Mother Churches or Baptismal Churches, known under that name because, as Lord Selborne (who calls the districts attached to such churches and their dependent chapels, "subdioceses") has observed such a church contained a baptistery where alone, except in cases of emergency, baptism could be administered. To the bishop the tithes were originally payable, but it was not long until questions arose between the bishop and such churches as to the right of the former to receive all the revenue and himself administer it. Even in Charlemagne's times the ordinance of 778–9 seems to have required modification, for by his Capitular *de villis* in 800, while guarding the rights of the bishops, he provided that "if by gifts of kings or other good and God-fearing men, anything from which the older churches had been accustomed to receive tithes, under ancient titles, should have been granted to bishoprics or monasteries, the earlier gift or devotion should continue in force, and the tithes should be paid by those in possession of the land."[2]

One of the most serious obstacles to the continuance of the ancient system of payment of tithes to the bishop was the founding by private donors of private chapels, which, as wealth increased and zeal for religion spread, were erected upon the donor's own lands, and endowed either with lands and their revenues or with the tithes of certain lands. The localising of tithes was a thing virtually unknown. Payment of tithe was both a religious and a civil duty, but it was not a local duty until lay-founders led the way by their arbitrary appropriations. The priests of such chapels were in a different position from the mission priests sent out by bishops to stations and paid by the bishops. The preachers under the bishop had no distinct parochial position. It was different when lay-founders

[1] As to the revenues of the episcopal treasuries and their distribution on the Continent in mediæval times, see Selborne, pp. 27–45.

[2] Selborne, p. 62.

took to appointing local priests. Against all the canon law, foundations in which the lay patron retained the property of the chapel became common; and curious scandals arose, such as the division of a church among co-heirs of such a founder; and the unseemly spectacle of three or four priests, the nominees of the three or four co-proprietors, struggling round a single altar, was not unknown. Charlemagne in 804 allowed any man to build a church on his own ground with the bishop's consent but provided that this should not interfere with the right of the older churches to receive their tithes. Such a law shows that the bishop's pretensions to receive the whole tithe had not been well received. Public opinion is generally ahead of statute law in matters of social or religious reform, and in all probability the development of local districts is most effectually illustrated by the necessity which immediately arose of modifying Charlemagne's rule as to payment to bishops. By 816 the parochial system had grown, for by the ordinances of the Council of Aix-la-Chapelle it was required that priests should not be appointed or removed by lay-founders without the bishop's authority. While this jealousy was shown for the bishop's authority, it is impossible not to see that the ordinance recognised the necessity of not limiting the zeal of lay-founders, if only the conditions of ordinary episcopal supervision were preserved. Each church was to have a manse attached, and the tithes arising within new townships in which new churches were founded might be granted to those churches. This is virtually the birth of the parochial system; but, although in theory the parish priest has had a right to local tithes from an early date, in practice, as we shall see, it was made very difficult for him to get them.

Parishes were bound to come, sooner or later; and it was comparatively early in the modern history of the Church, as we have noted, when the parish priests, or presentees of the lay-founders of chapels with arbitrary appropriations of tithes, were admitted to have a right to such tithes as were derivable from the township in which the chapel stood. But such priests had two enemies. On the one hand, the monastic orders were constantly invading the rights of the churches which were nominally founded by bishops or in connection with the diocesan system. On the other, the laymen sometimes, instead of paying their tithes to

the local priest, made gifts of churches and tithes either to monasteries or to bishops, on condition of receiving back the tithes as vassals of such bishops. Neither monks nor laymen might, canonically, hold tithes, which were the heritage of the diocesan clergy; and a synod of bishops, met at St. Denis, near Paris, in 997, to endeavour to get back tithes that were improperly held. But Abbo, Abbot of Fleury,[1] offered a strenuous resistance; the mob broke in, and the synod separated in confusion.[2]

Such disputes between the two branches of the Church did not tend to make it easier to deal with laymen. The monastic orders were glad to receive gifts of tithes, on such terms as might be agreed upon, and to defend both the right of the donor to present them and of their houses to receive them.

The bishops, not to be outdone, were willing, while they insisted on the tithes nominally being their own, to return them to the laymen under favourable conditions of feudal tenure. There was great restlessness in the mediæval Church; the monastic orders blamed the greed of the bishops; the bishops turned their finger to the vows of poverty which the monks professed, and then pointed to the great demesnes and large revenues of those "poor sheep of Christ's flock." Between them the Church seemed likely to lose much of her tithes, by the compacts she made with laymen as to the terms upon which tithes might be paid or even retained or collected by laymen.

At the Lateran Council of 1078 the possession of tithes by laymen, whether received from bishops or kings or any other person, was declared to be sacrilege, and their restoration was demanded. The canon was admirable in its comprehensiveness, but the number of Councils in mediæval times shows how very little binding effect most of their canons had upon the Christian world in general; this canon, at least, was unworkable, and

[1] Selborne, p. 65.

[2] Again, as the orders settled down and acquired lands they advanced claims to immunity from payment of tithe for such lands. Hadrian IV., who ascended the papal throne in 1154, limited such exemptions, which were a fertile source of dispute, to the Cistercians, Templars, and Hospitallers; and the Lateran Council of 1215 still further confined it to lands acquired prior to that date. The exemptions were chiefly limited, however, in practice to the Templars, and Hospitallers (Selden, pp. 121, 122. See *infra*).

Pope Urban II. in his turn found it necessary, for the sake of peace and to avoid scandal, to confirm the holding of tithes by lay persons as such rights then existed, but he prohibited the creation of such rights in future without the bishop's consent. The Council of Poictiers in 1100 denounced the action of bishops who created such feudal holdings; Alexander III., confirming a canon of the Council of Tours in 1163, decreed that any bishop granting tithes to a layman should be deposed; and at last, at the third Lateran Council, in 1179, we come to a canon which was intended emphatically to end the matter.

The time was not unsuitable. Here again we pass a milestone in the Church's highway through history. In 779 the Church was leaning on the arm of the State. The year 800 saw the recognition of the absolute equality of Pope and Emperor, each in his sphere. But much happened in the three hundred and fifty years which followed. The Empire had fallen among Charlemagne's sons, had risen afresh under Otto, and had been degraded by Henry IV. It was in the very year that followed the Emperor's penance at Canossa that the second Lateran Council declared in unambiguous terms the Church's position towards laymen. The third Council only takes up the tale when it provides, "We forbid laymen, detaining tithes at their soul's peril, to transfer the title to them, by any means, to others; and if anyone shall receive, and not restore them to the Church, let him be deprived of Christian burial."

The Church had grown strong while the Empire had wavered. The Pope now claimed an authority over the Emperor which Charlemagne might with ease have asserted over the Pope. In the see-saw of history the clergy and the laity had changed places. The Church called in the aid of the Emperor to ensure payment of ecclesiastical revenue to her bishops; the successors of those bishops are now restrained by an ecclesiastical Council from having any dealings as to such revenues with laymen.

Before the end of the twelfth century the right of parish churches on the Continent to tithes was so general that "the burden of proof was thrown upon those claiming against them."

It is not necessary that we should follow further the history of Continental tithes. We have seen their development, from the days when a merely religious duty of paying them was known, to their legal enforcement. We have pointed out that

their payment was in the early days of the Empire due only to the bishops, and that the delimiting of parishes and the recognition of a local priest's right to local teinds were matters which it took some centuries to determine. (The varieties of teind on the Continent were numerous; see Du Cange *sub voce* "*Decimae.*")

CHAPTER XIV.

TITHES IN ENGLAND, 970 TO 1066.

ENGLAND was the first country outside of what was to be the Holy Roman Empire of Charlemagne which became Christian as a country. Before the end of the seventh century its conquest by Christianity was complete, and it was only a question of time when the observance of payment of tithe would become in England, as in the Empire, a civil as well as a religious duty. In England too, as on the Continent, bishoprics long preceded parishes; and how those bishoprics were determined is an interesting proof of the fact that, despite changes of the most revolutionary kind, England in her political and religious policy has preserved territorial boundaries, and specially designated districts, with marked conservatism. The limits of a diocese in early times answered commonly to those of a kingdom or principality. "The supremacy of Kent at the beginning of the conversion," says Freeman,[1] "the supremacy of Northumberland at the stage when Christianity was first preached to the northern English (627), is still shown to this day in the metropolitan position of Canterbury, the city of the Bretwalda Æthelberht, and of York, the city of the Bretwalda Eadwine." Indeed, the place-names of England are a very museum of historical relics if only we take them the right way.

For the same reasons which led us to traverse rapidly the history of tithes on the Continent prior to Charlemagne, we may pass almost unnoticed the alleged recognition of the legality of payment of tithes prior to the reign of the English Charlemagne, Edgar the Peaceful. Precepts, however, ascribed to Archbishop Theodore, but at all events written after 690, direct "that no priest is bound to pay tithes," "that local custom in regard to gifts to the Church should be observed," and

[1] "Norman Conquest," i. p. 29.

"that it is not lawful to give tithes except to the poor, and strangers or laymen to their own churches" (*sivi laici suas ad ecclesias*).

Considering that there were many Englishmen at the Court of Charlemagne, and that the communication between the Emperor's Court and England was constant for centuries, it is probable that the duty of paying tithe was well understood from an early period. But there was no civil law as to the appropriation of tithes before Edgar's reign, when for seventeen years there was almost unbroken peace over the whole island. Edgar in 970 enacted, by the first article of his ecclesiastical ordinance made at Andover, "That God's churches be entitled to every right; and that every tithe be rendered to the old minster to which the district belongs; and be so paid, both from a thane's in-land (*i.e.*, land in the lord's hands), and from geneat-land (*i.e.*, land granted out for service), so as the plough traverses it."

The second article qualifies this right. "But if there be any thane who on his bocland (*i.e.*, his private estate) has a church at which there is a burial-place, let him give the third part of his own tithe to his church. If anyone have a church at which there is not a burial-place, then, of the nine parts, let him give to his priest what he will; and let every churchscot go to the old minster, according to every free health; and let plough-alms be paid when it shall be fifteen days over Easter."

The third runs thus: "And let a tithe of every young be paid by Pentecost; and of the fruits of the earth by the equinox, and every church-scot by Martinmass, on peril of the full 'wite' which the doom-book specifies; and if any one will not then pay the tithe, as we have ordained, let the king's reeve go thereto, and the bishop's, and the mass-priest of the minster, and take by force a tenth part for the minster to which it is due; and assign to him the ninth part; and let the eight parts be divided into two, and let the landlord take possession of half, half the bishop; be it a king's man, be it a thane's."[1]

The foundation of churches and the appointment of priests by lay-founders led to this abuse, that when the cure became vacant it was not necessarily filled up. The tithes in the

[1] Thorpe's "Ancient Laws," 1840, i. pp. 265–65.

meantime might well remain in the founder's hands, for the bishop had no power to interfere. At the third Lateran Council, however (1179–80), at which four English bishops were present, it was settled that upon the lapse of private patronage the right to appoint devolved upon the bishop. This direction was not, of course, binding by the law of England; but it was gradually adopted, and with it the modern parochial system became established.[1]

As with Charlemagne the Empire was at its greatest before it sank in disorder, so with Edgar the unity of England passed away for many a day; but Canute—who was certainly the greatest legislator prior to the Conquest—re-enacted Edgar's law about tithe, with other laws, about 1018–21. The troubles which overtook England between 975 and 1020, a period of forty-five years, prevented anything like the development of ecclesiastical and parochial government which might have been expected. England started well on its progress as a Christian Power; but the troubles with invaders who were but half-Christian, and the weakness of the native kings, prevented any steady or civil recognition of ecclesiastical territorial divisions, much less of a strict law of tithes. The laws of both Edgar and Canute, however, are valuable, not only for what they say, but for what they do not say. When Edgar provides for a certain portion of the tithes being paid to the manorial church, it is sufficiently clear that there were not only baptismal churches, but churches of a semi-parochial character upon manors, and that there had been doubts as to the right of tithe-payers to withhold any portion of their tithe from the bishop's church and devote it to dependent chapels.

Parochia was acquiring a new meaning just as it had done on the Continent. The evidence that in England, as abroad, it had originally meant a diocese and nothing more, is, as Selden says,[2] very obvious both in Latin and in Saxon. Two instances will perhaps suffice (in Selden's words): "It is related," he says, "of King Cenwalh [660] that he divided *Provinciam in duas Parochia*, when he made a new Bishoprique at Winchester that was taken out of the Diocese of Dorchester. And in the Council of Hertford held under Theodore, Archbishop of Canterburie, one canon is *Ut nullus Episcoporum Parochiam*

[1] Selden, p. 388, 295. [2] Selden, p. 257.

alterius invadat sed contentus sit gubernatione creditæ sibi plebis."

Yet districts had been assigned to local churches for the convenience of both priests and people, although there was no obligation on the people to confine their devotion or their gifts to the church which happened to be near their residence, nor did the clergy of the districts reside within their districts. Their general place of abode was the bishop's house, and their maintenance was from the fund apportioned out of the tithe payable to the baptismal church for the service of which they were ordained. The appearance of the priests in public, indeed, from Bede's account, was in early times very rare; "so rarely were they seen abroad that whenever any of them were espied in the country, the people used presently to flock about him, and with all reverence humbly to beseech his Benison, either by signing them with the Crosse, or in holy prayers for them; and with all earnestness of attention they heard what he preached. How long this communitie in every Diocese between the bishop and the attending clergie continued, fully appears not. But, that it was not out of use till past more then C yeers after Augustine's comming, that is till past DCC years from Christ, may be conjectured out of those testimonies of Bede which extend as farre." Thus Selden.

The early Church, then, was essentially non-parochial. It was not, however, so purely an Episcopal Church as that of the primitive Church in Italy. The theory of the Church was the same, but the rise of the Orders early introduced a new element into the English Church's economy. To discuss the relative position of the secular clergy and of the regular clergy[1] would

[1] The words Secular and Regular have so entirely changed their meaning that it may be permitted to remind the reader that the Secular clergy were the clergy pertaining to the Episcopate, or non-monastic; the Regular clergy were the members of the religious orders who lived under special regulations of the founders. Thus, to take a modern illustration, the officers of the Salvation Army from a mediæval point of view might be regarded as Regulars, while the Archbishop of Canterbury is certainly one of the Secular clergy. The word Regular in ecclesiastical phraseology has, in fact, made a complete somersault.

We have perhaps an illustration of the distaste of the Secular clergy for the Regulars in one of the *Exempla* of Jacques de Vitry, Bishop of Acre, 1214, when he tells of two brothers, one of whom was brought up in a monastery and the other in the world. When the two attained majority, "plures civillationes et dolos scivit claustralis et multo magis maliciosus fuit quam qui in seculo remansit" ("*Exempla*," ed. by Crane, 1890, p. 19).

be foreign to the purpose of this chapter, but it is necessary that it should be remembered that there were two monastic movements in the Church.

Augustine, the apostle of English Christianity, was a monk, but of the system of primitive monasticism; and Gregory's directions to him were that, although trained as a monk, he ought not to live separately from his clergy, but should institute an English Church conforming so far as possible to the administration of the early Church. Augustine, therefore, did not found a Benedictine monastery, but collected around him a college for clergy, the germ of the chapter of Canterbury Cathedral, although subsequently to Dunstan's time its organisation was altered.

The monasteries were, as we have seen, the residences of the clergy; and all priests, whether in colleges or in monasteries, were directly under the bishop of the *parochia*. Some of the houses which were known as monasteries were scarcely more than asylums, places of retirement, as Stubbs says, for worn-out statesmen and for public functionaries—kings, queens, and ealdormen, "whose forced seclusion gave to their retreats somewhat of the character of reformatories."[1] Some of them in Bede's time were already too rich, and full of abuses calling even in the eighth century for a reform which separated, at least nominally, the secular from the monastic clerks. In the history of some there are traces of the hereditary descent of the priesthood.[2] Some were certainly houses where both men and women were received. The early monastic houses were, indeed, very different from those of the Benedictines which Dunstan found at Ghent during his exile; and although he does not seem himself to have been a violent partisan of the new order of things, it was in his time that the regular clergy began to assert their superiority, if not their independence of the secular

[1] Stubbs, "Constitutional History of England," i. p. 257.

[2] "Either clerical celibacy was unknown, or the successive heads of the monasteries must have delayed ordination until they became fathers and mothers of families large enough to continue the succession" (Stubbs, i. p. 256). There is no ambiguity as to the conditions upon which Abbot Headda left his monastery to the See of Winchester: "quod mei heredes in mea genealogia in ecclesiastico gradu de virili sexu percipiant, quamdiu in mea prosapia tam sapiens et præsciens inveniri potest qui rite et monastice ecclesiasticam normam regere queat et nunquam potestati laicorum subdetur" (*Cod. Dipl.* clxix.). Theodore forbade such succession.

clergy. Without digression upon the matter it is important to bear in mind that the second monastic movement was very different from the first, because it was the independence of the new monastic houses which was undoubtedly responsible for many of the arbitrary appropriations of tithes to which reference will afterwards be made. The monks in succeeding generations taught a somewhat free doctrine as to *parochial* liability to pay tithes, so long as tithes were paid to *some* ecclesiastical body, and reaped the reward of their liberal doctrines in appropriations to their own foundations. Such teaching was abhorrent to the secular clergy.

The so-called laws of Edward the Confessor direct the payment of not only prædial, but personal tithes to the Church, but Lord Selborne considers the MS. apocryphal, "and not to be relied upon for any historical purpose."[1]

In the laws of William the Conqueror, however, we indirectly find the growth of parishes illustrated, for he provides that if a cathedral or a monastery, or other religious house (*cenobium vel quæcunque religiosorum ecclesia*) is violated, the forfeiture will be 100 shillings; if "a mother parish church" (*matrix ecclesia parochialis*), twenty shillings; if a chapel, ten shillings. This mother parish church, as Lord Selborne says, can only be Edgar's church with a burial ground. By the end of the twelfth century, there was a general presumption that every parish church was endowed with its own tithes, if they could not be proved to have been appropriated to a particular monastery, but such endowments were never made by any general law. The endowment was the result of custom. No law ever restricted local tithes to a local church up to the end of the twelfth century. The obligation to pay tithes was indeed universal, but where they should be paid was a matter for the payer's choice. Thus in the Chronicle of Battle Abbey, written about 1176, the Chronicler says:

"As it was permitted up to that time [the foundation of the Abbey in 1066] for every one to pay his tithe where, or to whomsoever he would, many of those who resided in the neighbourhood assigned theirs to the Abbey in perpetuity, and these, being confirmed by episcopal authority, remain payable to the Abbey until this day." Other instances of a century

[1] Selborne, p. 302.

later, 1279, are cited by Selden, p. 357, and Selborne, p. 308. In 1371 Ludlow, one of King Edward III.'s Judges of Assize, said, "Anciently every man might grant the tithe of his land to any church that he pleased." [1]

If a lord could grant his tithes to any church, it is clear he might endow his own church, and this brings us to the *crux* of most writers on tithes, the "arbitrary appropriations" of which Selden speaks. In the nature of things nothing seems more reasonable or more natural than that a lord of a manor should appropriate his tithes definitely to his own church. No doubt, ecclesiastically, the consent of the bishop may have been necessary to this; but the founder had it in his power to make his bargain with the bishop before he undertook to erect his church. There was thus, as Lord Selborne has said, two minds to the contract; and, once made, there was no reason why the carrying out of the bargain should not have been insisted upon by the founder, and the parish in its first ecclesiastical form grew out of the manor. As time passed on, and churches increased, the ecclesiastical district became practically identical with the ancient township; it is the ancient *vicus* or tun-scipe regarded ecclesiastically. Many of the townships were too small to support a separate church and priest, so one parish might contain several townships, "but the fact of a township lying partly in one parish and partly in another, without being very uncommon, is rare enough," says Bishop Stubbs, "to be exceptional, and may generally be accounted for by more recent history." [2]

We have seen how the civil obligation to pay tithes, instituted by Charlemagne, was recognised in England as the circumstances of the time permitted; that bishoprics, as on the Continent, long preceded parishes; that parishes were the result of the widening out of the Church's work, that the tithes, which originally were payable to bishops, were gradually appropriated to the clergy of such parishes, and it has been

[1] The stages of progress may be stated thus:—690, Ina, king of Wessex, imposes penalties on those who fight in several secular buildings, which he names, or in a mynstre (minster), or monastery; evidently there was no other recognised public church. 970, Edgar speaks of the "old minster," and the manorial church. 1066, we have (1) William's "minster," (2) the mother parish church, originally manorial, (3) chapels, afterwards to develop into local parish churches.

[2] "Constitutional History," i. p. 260.

indicated that while the early Church was shaped by the secular clergy, there was, subsequent to the time of Dunstan, a marked advance of the new regular clergy, who were not parochial or necessarily diocesan, and whose interest it was for the benefit of their religious houses to encourage appropriation of tithes, either to parochial churches or to themselves, for religious purposes which might be parochial or which might not.[1] It is not necessary that the history of tithes in England should detain us longer, for it was at the point, reached about the time of the Norman Conquest, that the religious system then developed, or in course of development, was imported into Scotland by Queen Margaret, the niece of the Confessor, and the many English gentlemen who followed the Atheling and his sister to the court of Malcolm Canmore. The change in the history of Scotland at this point is, indeed, from a social point of view, startling, for when we read of St. Margaret and of Turgot, it is difficult to believe that the Queen's immediate predecessor on the Scottish throne was the Lady Macbeth of Shakespeare.

[1] We find instances of churches which were both parochial and monastic. Thus Dunster church in Somersetshire was, after 1499, double, one church being used by the vicar of the parish, and the other by the neighbouring priory of Benedictines. The Benedictine portion is now in ruins. Again Davington Priory was originally two churches under one roof, the western portion being the church of the Benedictine Sisters of Davington, the eastern portion, that of the vicar of the parish. In this case, it is the parochial portion of the building which has long been destroyed. Sherborne minster was also partly monastic, partly parochial. See *Notes and Queries*, 8th S. iii. pp. 257-8.

CHAPTER XV.

TITHES IN SCOTLAND BEFORE THE REFORMATION: 1058–1560

No statute in Scotland made tithe-paying compulsory. Where does the Scottish law custom of tithes-paying begin?

Sir John Connell says that "the existence of tithes in Scotland, prior to the time of David I., and their establishment during the reign of that monarch, are fully proved." This statement is perhaps rather too general.

It is true that grants were made to religious houses at a very early date. So early as the ninth century Cyric (the "Grig" of Connell, whose name is perpetuated in Cyruskirk = Eccles Grig) transferred the privileges of Dunkeld, which itself had succeeded Abernethy, the heir of Iona, to the church of St. Andrews, and the historical Macbeth and his queen (1040–1058) were among the benefactors of the Culdee priory of Lochleven; such grants were numerous. It is also true that the first Scottish parish, that of Ednam in Roxburghshire, was created by Thor the Long, in the reign of William I., King David's brother and predecessor, and that tithes are referred to in a document of David's reign, as having been given to the chapel of Stirling by Alexander, to which we shall again refer; but one swallow does not make a spring: the establishment at Ednam was exceptional, and the tithes of Alexander's times seem to have been a royal gift and nothing more.

There is no proof that tithes, or anything like the payment of tithes, was *ordinarily* recognised as a civil obligation for long after the time of Alexander. He and his brothers, brought up under the influence of an English mother and of a very English court, were early acquainted with the practice of England; but Scotland was in no condition, in Alexander's

time, to render the obligation of general tithe-paying possible. Nor was it in David's reign.

Connell speaks of the "existence of tithes *in Scotland*," and his words might lead the reader to suppose that Alexander was King of Scotland in the sense in which the later Stuarts were kings; but this, of course, he was not. Up to the accession of David, while the royal authority extended practically as far north as the Spey,[1] the country between the Forth, the Tay, and the central ridge of the Grampian range was the real home and centre of Alban. David was Prince of Cumbria, and with his accession Southern Scotland began to develop, but even in his time the Lord of Galloway was rather an ally than a vassal, and was indeed married to a natural daughter of Henry I. of England, David's brother-in-law. The kingdom of the Isles was under the Scandinavian crown. All, therefore, that remains of Connell's statement which can be historically affirmed, is that Alexander, while king of a portion of modern Scotland, recognised the duty of paying tithes in certain instances. Even had he wished to make tithes obligatory, he could not have done so; and looking at the ecclesiastical difficulties between the Culdees and the Anglican Church in the reign of David, it is not doubtful that that sovereign only established the payment of tithes to the extent of making grants of land under burden of tithes, or of making grants of tithes, or confirming such grants to the houses of the clergy who derived their orders from the English Church, *not* that he regarded such tithes as payable as a matter of course for the maintenance of the ordinary or parochial clergy, which, at least at the beginning of his reign, would have meant the endowment of the Culdees, with their non-canonical Easter, distinctive tonsure, and tribal rather than territorial basis—a thing very far from his intentions. Tithe-paying, as the English Church of the time understood it, too, was foreign to the Culdee theory of church maintenance.

The state of things in St. Andrews at David's accession will illustrate this. The college of Kilrimont, or St. Andrews, was served by a prior and twelve Culdees, of whom five never officiated at the altar. The remaining seven seem to have had each his chapel, and the offerings at each chapel were divided into seven, one going to the bishop, one to the hospital—the

[1] Robertson, "Scotland under her Early Kings," i. p. 232.

invariable appendage of a Culdee monastery—and the five lay-Culdees (if we may so call them) received the rest, on condition of maintaining pilgrims when the hospital, which held six, was full. The Culdee houses were nearly always made up of members of the same family, the leading one of the neighbourhood, or that of the founder, and in this case they seem to have been connected with the Comyns.[1]

King David's reforming work was as thorough as it was speedy, and the Culdee Church was practically superseded by his efforts,[2] but for the reasons we have given, it is in the highest degree improbable that in his time the establishment of tithes can be "fully proved." He led the way and the Church was glad to follow. It would probably be correct to say that from and after the reign of King David, when feudalism burst into flower in Scotland with more speed than probably in any other country, the duty of paying tithes was generally recognised, and the law of England as to tithe-granting and tithe-collecting was, by the influence of the clergy under the new church dicipline, as rapidly as possible introduced into the practice of Scotland. In David's principality of Cumbria the work was easier for him than elsewhere, because the Culdees seem never to have been established south of the Forth, and therefore it was natural that in that fertile land the foundation and endowment of ecclesiastical houses should be speedy. How far David was from associating churches specially with their localities is shown by his gift of the patronage of the Priory of the May, in the Forth, to the Monastery of Reading in England; Alexander III. re-acquired the right of purchase. The See of Dunblane, on the other hand, long nominally enjoyed the lordships of Appleby, Troclyngham, Congere, and Malemath, though the bishop's rights would have been somewhat difficult to enforce in later years. David declared lands in Peebles, Dumfries, and Roxburgh to be pertinents of the Church at Glasgow. We take up, in fact, in David's reign, the theory of tithes as it existed at the court of his granduncle, Edward the Confessor. Tithe-paying is regarded as a duty, but certainly

[1] Mr. Andrew Lang suggests that the Culdees, as hermits grouped together under canonical law, "became something not unlike married Fellows of a College" ("History of Scotland, 1900, i. p. 96).

[2] Strangely enough, one Culdee House, that of Kirkheugh, survived, with prior and twelve prebendaries, at the time of the Reformation (Robertson, i. p. 344).

the maxim, *decimæ debentur parocho*, was not understood by David or his predecessors, or was regarded only as a maxim, not as a precept to be acted upon, for long afterwards.

As a specimen of King David's grants, we may take the gift to the Priory of St. Andrews of the church of St. Mary of Haddington, with all the chapels, lands, rights, and customs belonging to it within the shire of Haddington, free from the King, the thane, and all who held of the King or the freeholders of the shire. The tithes were attached to the Kirktown, which was also donated, the effect being that they might be alienated from the church by the Persona who held the Kirktown. The Aberdeen bishopric received "the whole vill of old Aberdeen, and the church of the Kirktown, with the shire of Clat, the shire of Tulinestyn, the shire of Rayn, and the shire of Daviot, with their pertinents and churches, and the tithes of the rents of the thanages and escheats within the sheriffdoms of Aberdeen and Banff."[1]

David had enough to do in dividing the country into bishopries without seeking to secure a compulsory recognition of parishes. He found four bishopries existing, those of Glasgow, St. Andrews, Dunkeld, and Moray, but in two of them the old abbacies had become appanages of the royal family.[2] He left behind him five new bishopries, viz., Dunblane, Brechin, Aberdeen, Ross, and Caithness, but of some of them the chapter must have been little more than nominal.[3] Dunblane and Brechin were probably formed out of the remains of the old Pictish bishopric of Abernethy.

As illustrating the want of sufficient geographical boundaries to church lands, the case of the Crags of Gorgie may be referred to. Ethelred, one of the sons of Malcolm Canmore, towards the end of the eleventh century, presented the church and lands of St. Cuthbert's, Hales, or Colinton, to Dunfermline Abbey, or rather to its predecessor the Church of the Holy Trinity. David I., who was a younger brother of Ethelred, about 1128, presented the church and lands of St. Cuthbert's, Edinburgh,

[1] Robertson, "Historical Essays," pp. 126, 127. It should perhaps be noted that the word Kirktown in succeeding centuries ceased to mean the township belonging to the minster, and carrying tithes, and as a designation was transferred to the carucate or half-carucate of land made over as glebe to a vicarage (*ibid.*, p. 128).

[2] Robertson, "Early Kings," i. p. 334. [3] Skene, "Celtic Scotland," ii. p. 397.

with other churches and lands, to the Abbey of Holyrood. Within a century later a vigorous dispute arose between Dunfermline Abbey and the rector of Hales acting together, and the abbot of Holyrood, as to the teinds of the Craggs of Gorgie, which the one claimed to be in the lands of St. Cuthbert, Hales, and the other of St. Cuthbert's, Edinburgh. The dispute was compromised under the authority of the abbot of Lindores and the prior of St. Andrews, acting "with the mandate of the Pope," Dunfermline renouncing its rights to the teinds in question, on condition that "for the sake of peace" Holyrood should give each year one bezant or two shillings at Martinmas towards providing lights in the church of St. Cuthbert at Hales. Probably the sum to be thus paid was about equal to the surrendered teinds.[1]

There is one good historical definition of tithes, more or less parochial, in early times which should not be omitted. A dispute arose between the royal chapel of Stirling Castle and the parish church of Eccles, within which the Castle stood, and it was decided, in presence of King David *apud castellum puellarum*, not in an ecclesiastical tribunal. Evidence was given that when King Alexander dedicated the Castle chapel he granted to it the tithes of his demesnes in the soke of Stirling whether they should increase or decrease. The lords decided "that the parish church of Eccles ought to have all the tithes paid by the Hurdmen and Bonds and Gresmen with the other dues which they owe to the church; and that whoever died, whether of the demesne lands, or of the parish, their bodies should lie in the parish cemetery, with such things as the dead ought to have with them to the church; unless by chance any of the burghers die there suddenly . . . and if the demesnes shall increase by grubbing out of wood or breaking up of land not tilled before, the chapel shall have the tithes . . . and if the number of men of the demesne increase, the tithes of them and of all who cultivate it shall go to the chapel; and the parish church shall have their bodies."[2] This anxious delimitation of the parish rights was, however, of course, due to the proximity of the royal chapel,

[1] "The Teinds *De Craggis et Gorgin*," by the Rev. W. Lockhart, "Proceedings of the Socy. of Antiq. of Scotland," vol. xxi. pp. 275 *et seq.*

[2] Innes, "Early Scottish History," p. 16.

and its careful organisation must have been merely an islet in a sea of irregular ecclesiastical constitutions. It was only with regard to parishes under the shadow and protection of royal castles that such regulations as are above cited could be made, and we cannot regard the case as illustrating ordinary knowledge of parochial requirements. On the contrary, the parish of Eccles seems to have been exceptional and remarkable to the men of David's time, hence the solemn council to decide as to what Alexander exactly meant by his royal gift *more Anglicano* of tithes.

By the end of the reign of William the Lion, David's grandson, the powers of a Scottish king had been greatly consolidated. The general payment of tithes was enforced throughout the kingdom. William founded the monastery of Arbroath, dedicating it to Thomas à Becket, with whose contests with the English king his own career had been so strangely associated, and gave it "Aberbrothoc with the whole shire," and various miscellaneous endowments such as a net's fishing in Tay, called Stok, and one in the North Esk; a salt-work in the Carse of Stirling; the ferry-boat of Montrose, with its land; and the patronage and tithes of at least twenty-two churches.[1]

The Abbey of Inchaffray was endowed by its charter of 1200 with five churches, and with the tithe of the founder (the Earl of Fife), kain, and rents of wheat, meal, malt, cheese, and all provisions used year by year in his court, tithe of all fish brought into his kitchen, tithe of his hunting, and tithe of the profits of his courts of justice.[2]

William tried to improve the sees of Aberdeen and Moray, but Brechin and Dunblane still remained little more than nominal bishoprics for the Church lands were in the hands of laymen.

The term parish in Scotland, as in England, long meant a diocese. In the Inquest of David while as yet Prince of Cumbria concerning the early possessions of the Church of Glasgow (a document to be dated between 1115 and 1124), the diocese of Cumbria is referred to as *parochia*.[3] Of this see of Cumbria, the parish of Glasgow, properly so called, is the historical survival. By the middle of the thirteenth century,

[1] Innes, "Early Scottish History," p. 146. [2] *Ibid.*, p. 209.

[3] See "The Inquest of David," text, translation and notes by J. T. T. Brown, "Scots Lore," 1895, p. 36.

the words *parochia et parochiani* were used much in their present sense;[1] the district of the mother church, which Selborne calls a sub-diocese, was known sometimes as Plebania,[2] but perhaps was more correctly described as a mensal barony.

A map illustrating the state of the Church in the reign of David I. is given by Skene;[3] the bishopric of Caithness, however, which is there shown, he admits to have had "little reality,"[4] as Caithness was in the possession of the Norwegian Earl of Orkney, and there is no doubt that the development of parishes followed the same lines in Scotland as in England, arising out of the bishoprics, with their baptismal churches.[5] Probably more rapidly than in England, came monasteries and manorial churches, both forces tending towards decentralisation; and it should not be forgotten that while the Culdee Church was reformed it was not entirely suppressed, and in every group of Culdee cells there was the germ of parochial organisation. The actual mapping-out of parishes was a very slow thing—the work of centuries.

That the duty of paying tithes was understood generally in the reign of Alexander II. is illustrated in the report of the murder, in 1222, of Adam, bishop of Caithness, who it appears was over rigorous in exacting tithes; but as the bonders of Caithness's chief grievance was that Adam, at the instigation of a monk named Serlo, had *doubled* his exactions, we also learn from this incident what lax notions the clergy entertained as to what was their legal due.[6]

[1] Innes, "Early Scottish History," p. 209.

[2] "Of this kind was Stobo, with its four subordinate parishes of Broughton, Dawie, Drummelyier, and Tweedsmuir, where the parson was styled Dean, and was, it would seem, in very early times, hereditary, like some of the heads of the regular convents" (*Regist. Glasg.*; Innes, "Early Scottish History," p. 3, note.) Stobo was itself one of the endowments of the Glasgow bishopric.

[3] "Celtic Scotland," vol. ii., facing p. 418.

[4] *Ibid.*, p. 383.

[5] Many appropriations of churches, &c., by David, in which the authority of the bishops is recognised, as in the early English Church, will be found in Connell's work. See as to his pious foundations, Bellesheim's "History of the Catholic Church in Scotland."

[6] Three hundred men took the bishop, beat, bound, wounded and stripped him, they then threw him down into his own kitchen, which had been set on fire: there he was burnt to death ("John of Fordoun's Chronicle," Edinburgh, 1872, vol. i. 289, ii. 284). A sixteenth century reminder of the common negligence as to tithe-paying occurs in the following passage:—A knight who had an office about

In the time of Alexander III. the great religious houses usually gave one-third of the tithes to the vicars.[1] In his reign the ancient kingdom of the Isles was made over to the Scottish Crown, with the patronage of the bishopric, reserving the ecclesiastical rights of the Archbishop of Drontheim.[2]

How soon Scotland might have settled down into a rich, well-governed, well-taught nation, another England, a survival of the kingdom of Edgar reappearing north of the Forth, with most of its nobility of Anglo-Saxon origin, we can only speculate; history shows us how speedily the Wars of the Succession threw our land back into semi-barbarism. When regular warfare between England and Scotland made settled life in the Lowlands impossible, the Anglo-Saxon nobles retired, and Norman England received again the descendants of the men who had followed the fortunes of the Atheling and Queen Margaret. The native lords regained in large measure the position they had lost under the firm rule of Malcolm Canmore and his sons.

Scotland presents for many centuries a melancholy picture, not only as regards her politics, but also in respect to her ecclesiastical organisation.

There was much litigation between the various religious foundations as to tithes and lands to which they had acquired rights. Such disputes were generally settled by Rome, except in the case of the abbots of Melrose, Dryburgh, Jedburgh, and Kelso, who established a rule that when any difference arose between two of the monasteries, the other two should act as arbiters, and thus save the cost of Roman litigation.[3] The Culdees, such as survived, took small part in the suits, which were generally waged between a bishop and a religious order. As in England, the regular clergy had become very powerful; and their doctrine as regarded tithes was so loose as to call down the censure of Innocent IV. in 1250, who calls those who, like

the mint, "on his deathe bedde, (as he was a verie honest man of good conscience,) perceavinge that he had gotten in that office muche more then his fee, bequethed to the Kinge, as I hearde crediblye abowte M. markes, in satisfaction of his unlawfull gaynes had from the Kinge, *much like as men weare wont to give to theire parishe churches for tithes forgotten*" ("A Discourse of the Common Weal of this Realm of England" [written about 1549], 1893, pp. 117, 118).

[1] Robertson, ii. p. 138. [2] *Ibid.*, p. 105

[3] Innes, "Early Scottish History," p. 115.

the Dominicans and Franciscans, taught that tithes might be disposed of in charity as a man pleased, *isti novi magistri et prædicatores qui docent et prædicant contra Novum et Vetus Testamentum.* The Council of Verona condemned this teaching in 1340, and in England, one William Russell, a Franciscan, who preached the pernicious doctrine—which was supposed, rightly, to be most to the benefit of the begging friars—was condemned in Convocation and ordered to recant on a fixed day at Paul's Cross; he fled the kingdom, and was pronounced a heretic, and his opinions were condemned by both Oxford and Cambridge Universities.[1]

When they did not teach that tithe was merely charity, the Orders took up the other position, that as they were the poor of Christ's flock, they were not liable in payment of tithes for such lands as they had come to possess. Ultimately the exception was limited to the Cistercians, Knights Templar, and Knights Hospitallers, and but a limited exception was allowed to other Orders in respect of such lands—*novalia*—as they might themselves have brought under cultivation, so long as the land remained in their hands; but tithe became payable if such lands were leased. It was by the influence of monasticism that in Scotland, as Innes says, "the goodly framework of a parochial

[1] Of the ordinary or orthodox teaching as to tithes in the Middle Ages, Selden gives the following curious example from "a Penitential Mode for Direction of Priests in Auricular Confession, and written (as my Copie is) about Henrie the sixth, the Priests examination and advise upon the point of Tithing is thus expressed :—'Hast thou truly doo thy Tithings and Offrings to God and to holichirch? thou shalt understande that at the beginning of the worlde, whan ther was but 00 man, that is to say, Adam, God chargyd him that he sholde truly of al maner thyng give God the xth parte, and bad hym that he sholde teche his children to doo the same maner, and so forthe al men into the worldis ende. And forasmuch as ther was that tyme no man to receive it of hem in the name of holichirche, and God wolde not that thei sholde have but ix parties. Therefor he commandid hem that of every thyng the Tithe parte should be brent. I fynd that afterward Adam had two sonnes, Caime and Abell, Abell tithed truly and of the best. Caym tythed falsely and of the werst: at last the fals Tyther Cayme slough Abell his brother, for he blamyd hym and seyd that he tythed evel, wherefor our Lord God accursid Caym and al the erth in his werk. So ye mow se that fals tything was the cause of the first manslaughter that ever was, and it was cause that God cursid the erthe,' it is literally transcribed as I find it; that writing of *Cayme*, or *Cain*, is ordinarie in the moniments of that age, as you may find in Wickleves works, Waldensis his Doctrinal, and others of like nature" ("Tithes," 1618 ed., pp. 169, 170). Such teaching was probably as common in Scotland as in England.

establishment was shipwrecked when scarcely formed."[1] A useful list of religious Orders in Scotland is given at the end of Spotswood's "History"; the distinction between monks and friars should be noted—it was the begging friars who were most objectionable to the laymen of the Middle Ages.

The possessions of the excepted Orders, particularly of the Knights Hospitallers or Knights of St. John of Jerusalem, tended very much to run in family lines, which almost remind us of the hereditary semi-laic, semi-clerical establishment of the Culdees.

An evidence of the close connection between the head of the Order of St. John and the Livingston family of Torphichen is incidentally afforded by a tack of certain Temple lands granted in 1461 by Frere Henry of Levyngstoune, "Knight Commander of the Order of Saint John of Jerusalem, within the kingdom of Scotland," to his "derraste cusings William of Levyngstone and Alisiandre of Levyngstoune, sonnys til umquhile our derraste brothir William of Levyngstone of Balcastell."[2]

Although the monasteries succeeded in attaching to themselves the tithes which in early days were paid to the baptismal church, as they grew richer they felt it a great injustice when, although indirectly, they in turn were required to contribute to the civil power. With the sanction of Pope Alexander VI., the religious houses in England however were required to contribute towards the cost of a crusade. They resisted. "Such a demand was unheard of," they said. "Hitherto the laymen had paid tithes to the Church. Now churchmen, *et inviti*, against their will, were to furnish money for knights and men-at-arms." But their resistance was overcome by the stratagem of Peter de Egilbanke, Bishop of Hereford. On his suggestion the Pope borrowed the necessary money from Italian merchants, and granted them powers of distraint upon the abbeys which had claimed exemption.[3]

The Pope from time to time demanded payment of one-tenth

[1] "Early Scottish History," p. 17; see also "Scotch Legal Antiquities," pp. 162 *et seq.*

[2] See "Notice of an Original Tack of Temple Lands," by Joseph Bain, F.S.A. Scot., "Proceedings of the Society of Antiquaries of Scotland," xvii. pp. 312 *et seq.*

[3] Froude, "Annals of an English Abbey" (St. Albans) ("Short Studies," 1888, iii. pp. 46, 47).

of the revenues of the Scottish religious houses—a species of tithe, but rather of tithes of rents than of the produce of the soil alone, which tithes are; and he even granted this tenth for a time to the service of the King of England. Such exactions were very unpalatable to the Scottish kings, who preferred themselves to have the produce of taxes on monasteries, and who were never friendly to the interference of foreign legates in their affairs.

It would be tedious, and here scarcely profitable, to follow step by step the growth of the Church in Scotland. It grew with the king's power, but it did not fall with the king's weakness. While the fortunes of the State rose and fell with the firm reigns or the long minorities, the Church, on the whole, progressed steadily without one backward step. Her good fortune was, indeed, her curse, for with her increasing wealth came the abuses which have accompanied ecclesiastical wealth in all ages. The tendency of a wealthy and luxurious corporation is to draw within itself persons who are ambitious of enjoying the benefits of wealth; and the Church suffered her fold to be entered, not by men possessed only by a holy desire for religion, but by those who saw the easiest and quickest way to political eminence was through the Church, and who, as statesmen, regarded the means of their rise rather as a political than as a religious organisation. We must not forget, also, that so late as the reign of William the Lion there were lay-holders of many rich Church lands on the old Culdaic foundations; so that the idea of holding Church lands was never unfamiliar to the Scottish aristocracy. Between the two sets of ideas, that of the political Churchman and that of the semi-clerical layman, the Church as a corporation took a middle course. She reconciled the latter to the idea of owning the Church's superiority by giving him the right to draw the real profits; and she made the path of the clerical politician the more easy by making it, so far as possible, the interest of such feudal lords to support those who spoke in the nation's councils in the name of the Church, rather than oppose them.

The country, when with its increasing civilisation and its wealthy Church it gradually settled into parishes, had, at least in name, the cures served by rectors, who drew the *decimæ*

garbales, or teinds of corn or wheat, barley, oats, pease, &c., but more often by vicars, the substitutes and servants of the great churches which owned the tithes, who drew the lesser teinds of lamb, wool, milk, flax, cheese, and eggs. Personal teinds from the fruits of personal industry, profits of commerce, wages of labour, &c., were scarcely known in Scotland.[1] One doubtful instance occurs in the case of *Birnie* v. *Brown*, Nov. 29, 1678 (M. Dict. 11,000), where the Court decerned for a yearly sum out of each weaver's loom, and for the salt made in the parish.[2] From a presumption that personal tithes had not been paid at the time of a man's death, arose the custom, sanctioned by canon, of mortuaries payable in beasts, which existed in England up to 21 H. VIII. The mortuary was presented with the body at the burial, as a satisfaction for omission to pay personal tithes, and the custom was styled *corse-present*. Selden says he has seen a justification in the Eyre of Derby of 4 Edw. III., to an action of trespass brought by Thomas of Goustill against the parson of Whitwell for taking a horse, in which the parson pleads that it was the horse of one I. Leyer, his parishioner, who had died.[3] In Scotland, on 3rd March, 1471, the Lords Auditors of Causes, in an action by a chaplain against a parishioner for withholding teinds, gave decree for four sacks of wool, twenty lambs, twenty stone of cheese, and five "corps-presands."[4]

Personal tithes, no doubt, where as in Venice there were no prædial tithes, were exactable; but for obvious reasons prædial tithes were in the Middle Ages much preferable to a

[1] "Decimarum aliæ sunt personales, aliæ reales. Personales sunt, quæ debentur ex negotiatione, artificio, scientia, militia, et hujus modi, quæ potius respiciunt ipsam personam quam rem ipsam" (Du Cange, "*Decimae*").

[2] The tithe paid by Abraham to Melchisedek, on which all canonists found, is described as follows:—"And he gave him a tenth of all." What the "all" was has been copiously considered, but common sense would suggest that it was the "all" he had captured, *i.e.*, it was *personal* teind. This view was taken in England, for *The Story of Genesis and the Exodus*, the Early English song written about 1250, tells how Abraham gave, "of alle if begete," *i.e.*, of his spoils or winnings (Early English Text Society ed., line 896). Milton long afterwards finds it necessary to give the same reading: "Abraham on the other side honours Him with the tenth of all, that is to say (for he took not sure his whole estate with him to that war), of the spoils" ("The Likeliest Means to Remove Hirelings out of the Church").

[3] Selden, p. 287.

[4] Acts of the Lords Auditors, p. 23.

non-enforceable income-tax, culminating in a death-duty, which the demand for personal tithes really amounted to.

Buchanan's statement that in Scotland the rector or parson originally did the whole duty of the benefice, and drew the whole teinds, great and small, and that it was owing to the practice of annexing churches, with their teinds, to a monastery that the institution of the vicar began,[1] is obviously incorrect, because it proceeds, as is usual with legal writers, on the assumption that Scotland's ecclesiastical organisation started parochially, and that there was an Arcadian time when every parson drew all the tithes of his parish from willing parishioners, and without any fear of monastery or bishop. This is mere dreaming, for, as we have seen, the diocese, as in England, long preceded local organisation. The rector, indeed, who drew all his tithes at any time and locally, must have been a *rara avis in terra*, and only did so, probably, because he was either the younger son of some great family or was under the special protection of some lay lord who was strong enough to see that the rector got what the heritors conceded that the law allowed him. The privileges of the clergy were cruelly restricted by the annexation of tithes to monasteries; but, on the other hand, it was from the churches founded by lay patrons and conveyed to such monasteries, and by churches founded by the monasteries themselves, that the local organisation of parishes developed.

The right of the local clergyman to receive the teinds was no doubt theoretically recognised, as for instance in a bull of Gregory IX. in 1230, which confirmed the right of the Monastery of Dryburgh to the Church of Golyn "when it shall be vacant"—*i.e.*, reserving the right of the then incumbent; but the difficulty of the local clergyman was generally to get his teinds. It is clear that when Golyn became vacant the new priest would have no teinds; he would require to receive a salary from Dryburgh. The local clergy were in fact throughout Scotland stipendiaries, who only received as salary what they might bargain for, however liberal their proper local endowment might be.

The explanation of the absence of a statutory recognition of the obligation to pay tithes is to be found in the altered position of the Church, when settled in Scotland under David, to what

[1] "Law of Teinds," p. 9.

it had been either in Germany in the time of Charlemagne, or in England under Edgar.

The Church in Scotland stood by herself, and as far as possible resisted any State interference with her "rights," among which that of collecting teinds was undoubtedly included. It was sufficient for the Church that the right had been enunciated by the canonists, and that the sovereigns of Scotland recognised the pious duty, and were ready, if necessary, to assist in enforcing it, at all events on their own lordships and manors. No Act of Parliament made the collection of tithes lawful, because none was necessary.

The Papacy and the Scottish Crown were it may be observed often on terms of somewhat constrained friendship, despite individual instances of royal munificence. The sovereigns of Scotland rather dealt with the clergy as regards tithes on the basis of custom and use and wont than otherwise.

That this use and wont included the right of bishops, or judges appointed by the Pope, to exercise a jurisdiction in relation to teinds was generally admitted, and is sufficiently proved by numerous cases.[1] In 1319, it is true, the civil rights of the Rector of Kinross regarding some lands, a servitude of pasturage, and a fishing in Lochleven, were decided in presence of a justiciar of the King; but the general ecclesiastical jurisdiction of Rome seems undisturbed.

In 1424, in the first parliament of James I., "to the honour of God and halie Kirk; It is statute and ordained, that the halie Kirke joyis and bruke, and the ministers of it, their aulde privileges and freedomes; and that no man let (hinder) them to set their landes and teindes, under the paine that may follow be spiritual law or temporal."[2] This, however, is not a law establishing tithes and the application of them when paid, like that of Edgar in England, but a general confirmation of the Church's rights, with a special authority to do what we shall

[1] See Connell "On Tithes," i. pp. 131–6.

[2] As to James's relations with Rome see Lang's "History of Scotland," i. 310. *Inter alia*, "He sent eight representatives to the Council of Basel, which was anti-papal. He bade the Bishop of St. Andrews recover possessions of the See which his predecessors had alienated in the interests of their kindred. He ordered the Benedictines and Augustinians to put their houses in order 'lest royal munificence, which built and nobly endowed your monasteries, repent that it erected marble dwellings, when it observes how impudently you have abandoned religious conduct' (17th March, 1424-25)."

hereafter see was the cause of much of the difficulty attending the subject, *i.e.*, to set or let out the right to draw teinds.

The ecclesiastical organisation of Scotland prior to the Reformation was something like this:—There were thirteen bishoprics. The Archbishop of *St. Andrews*, whose chapter arose out of a Culdee settlement, had eight suffragans; *Dunkeld*, of which the original chapter was Culdaic; *Aberdeen*, *Moray*, *Brechin*, also originally Culdaic; *Dunblane*, the only bishopric founded by a subject; *Ross*, *Caithness*, and *the Orkney Islands*—originally a Norwegian diocese and under the episcopal superintendence of the Archbishops of Drontheim till the reign of James III. The Archbishop of *Glasgow* had three suffragans: *Galloway*, a very ancient bishopric arising from the Church of St. Ninian; *Argyle*, at one time part of the see of Dunkeld (which retained Iona at the time of the foundation of the Argyle bishopric); and *the Isles*, which arose out of the old bishopric of Man and the Western Isles—a see under that of Drontheim—but which ultimately took shape as bishopric of the Hebrides, including Bute and Arran, with the bishop's seat at Iona (which had passed away from Dunkeld).

The chapters of St. Andrews, Dunblane, Galloway, and the Isles were at one period or another composed of regulars, but other bishoprics probably had similar chapters. Generally the chapter of each cathedral consisted of certain secular or parochial clergymen holding benefices within the diocese, canons deriving their title from their prebenda or living, and other clerics who held office in the cathedral. The churches of the diocese whose fruits, tithes, lands, or gifts were appropriated to the maintenance of the bishop were styled *mensal* churches;[1] those whose fruits went to the support of the prebendaries, *common* churches. When a parish minister, as sometimes, though infrequently, happened, drew his whole tithes himself, he was called *persona ecclesiæ*. A priest whose right came through the chapter was called in England *parson imparsonee;* he drew the rectorial or great tithes, and the lesser tithes were drawn by his vicar, who served the cure of the parish, with the title of *vicarius pensionarius*.

[1] The Bishops of Argyle had no mensal churches, and instead received the teinds of particular lands in each parish. This was known as the *bishop's quarter* (Elliot, "Teind Court Procedure," p. 34).

The revenues of a bishopric were derived from the lands held by the see, and known as the *temporality;* and from tithes and ecclesiastical dues, which were termed the *spirituality.* It was only a share of the spirituality which fell to the minister who served the cure: the following table will illustrate more clearly the different rights of parties:—

A cathedral, or monastery, drew all temporalities.

A cathedral, *or* monastery, *or* rector, drew all the *decimæ bladi* or great tithes (*or* the rector received a share, while the cathedral or monastery drew the rest).

The vicar drew the *decimæ fœni*, or small tithes, and personal offerings—subject, however, to arrangement with the cathedral, *or* monastery, *or* rector, if it was thought the vicar was getting too much.

In addition to the cathedrals, there grew up collections of secular clergy in what were known as collegiate churches, which were never richly endowed, and which only maintained their prebendaries and collegiate churches. There were thirty-eight such colleges; the last founded before the Reformation was that of Biggar, in 1545; and it received, among other gifts, the patronage of the church of Thankerton, with the rents, fruits, and emoluments, from Lord Fleming, to whom the Abbey of Kelso had surrendered its rights, and the perpetual vicarage of the parish church of Dunrod in the stewartry of Kirkcudbright from the Abbey of Holyrood. Of such miscellaneous endowments were the riches of cathedrals, of monasteries, and of collegiate churches alike composed. Sometimes a kind of tithe called *can* and *conveth* is referred to. *Can* subsists in the word *cain* or *kain* fowl, *i.e.*, a reek hen, or hen payable from every house where a chimney smoked. *Conveth* seems originally to have been a due collected by a feudal lord from his vassal. Innes cites a grant by Malcolm IV. to the canons of Scone, whose church had recently been burnt, from every plough belonging to their church, "for their *conveth* at the Feast of All Saints, a cow and two swine, and four *clamni* of meal, and ten thraves of oats, and ten hens and two hundred eggs, and ten bunches of candles, and four nummatus of soap, and twenty half malæ of cheese."[1]

[1] "Scotch Legal Antiquities," pp. 204–5.

Where the churches and tithes were in the possession of a monastery, they were dealt with by the Order according to their rules and the canon law. The Abbey of Kelso was probably the richest of all such foundations. Those great institutions were of course formidable rivals to the bishoprics, and they afforded the most tempting spoil to laymen, in so far as their endowments could be received *in commendam*. Thence, as we shall see, arose the lordships of Erections, which were merely great religious lordships converted into civil lordships.

We have no means of knowing when Scotland was generally covered with parishes, but the work was not complete in 1581, for by *c.* 100 of that year it is provided that "every paroch kirk, and sameikil (so much) bounds *as sall be found to be a sufficient and competent parochin theirfoir*, shall have their awin pastour," &c.[1]

What, then, was the position of the Church in Scotland when the Reformation storm burst?

We have seen that the Culdees did not exact tithes, but owned lands, possibly in family and hereditary groups; that those lands were attached to the churches or monasteries which, under the reformation carried out by David I., took the place of the Culdees' establishments; that the duty of tithe-paying was recognised under David and his immediate successors; that when lands were given to a monastery, the tithes of the lands were usually bestowed with them, but not necessarily so; that when the king gave grants to his nobles, it was usually under burden of payment of tithes; that tithes were not exigible parochially, except where the cure was served by a rector; that in the great majority of cases the tithes of parishes were drawn by monasteries, or clergy of monasteries, who gave the vicar who served the cure such sum as might be agreed upon. In Scotland, at the date of the Reformation, there were 940 parishes, and of these 262 were patronate, *i.e.*, the patronage was in the hands of laymen, whose presentees, as rectors, nominally had right to the whole parochial teinds, but often by arrangement left a large portion of them in the hands of their patrons; and the remaining 678 were patrimonial, *i.e.*, the patronage and teinds were in the hands of

[1] Connell, i. p. 210.

bishops or monasteries, who from the time of Alexander III. usually allotted one-third of the teinds to the vicars. The rich clergy were very rich; the parochial clergy, unless they were sons of noble families, were very poor.

Prior to the Reformation the *ipsa corpora* of teinds was usually drawn, unless by usage or agreement a fixed number of bolls of victual was accepted annually in place of the teinds being actually drawn.[1]

Before leaving the pre-Reformation period, it may be remarked that, although parochial churches are frequently referred to in the records, too much is not to be understood by the term church. The stone churches were very few. The chancel of the church of Dollar, in Clackmannanshire, was praised in 1336, but it was constructed of hewn oak; at the same date the chancel of Edrom, in the Merse, was thatched with straw. The Reformation is not responsible for the destruction of our parish churches, for such as existed were for the most part built of unsubstantial materials, and hence easily fell into decay. It was the army of Henry of England that was responsible for the ruin of Melrose, Kelso, Dryburgh, Jedburgh, Eccles, Newbattle, Holyrood, and Haddington.[2]

[1] A number of cases relative to teind and the withholding of it will be found in the "Acts of the Lords Auditors of Causes and Complaints, 1466 to 1494" (1839).

[2] *Quarterly Review*, vol. lxxxv., art. by Joseph Robertson, pp. 146, 147.

CHAPTER XVI.

TITHES IN SCOTLAND DURING THE REFORMATION PERIOD AND SUBSEQUENTLY: 1560–1707.

What Machiavelli wrote of the ecclesiastical principalities of Italy in the beginning, may be applied to Scotland in the end, of the sixteenth century. The greatest difficulty, he says, is to get into possession, "because they are gained either by fortune or virtue, but kept without either, being supported by ancient statutes universally received in the Christian Church, which are of such power and dignity they do keep their prince in his dignity, let his conversation or conduct be what it will." "These," he continues with a cynicism which scarcely veiled the truth, "are the only persons who have lands and do not defend them; subjects, and do not govern them; and yet their lands are not taken from them, though they never defend them; nor their subjects dissatisfied, though they never regard them; so that their principalities are the happiest and most secure in the world by being managed by a supernatural power, above the wisdom and contrivance of man" ("The Prince," chap. xi.).[1]

Before the Reformation came it had been long foreseen. The wealth of the upper clergy, whose lands covered half Scotland, brought plentiful abuses in its train, and the poverty of the vicars and of the curates contrasted strangely with the

[1] As regards the "subjects," however, the tenants and vassals of the great abbeys of Scotland had, as Sir Walter Scott points out, "many advantages over those of the lay barons, who were harassed by constant military duty, until they became desperate and lost all relish for the arts of peace. The vassals of the Church, on the other hand, were only liable to be called to arms on general occasions, and at other times were permitted in comparative quiet to possess their farms and feus. They, of course, exhibited superior skill in everything that related to the cultivation of the soil, and were, therefore, both wealthier and better informed than the military retainers of the restless chiefs and nobles in their neighbourhood" ("The Monastery," chap. i.).

magnificence of their superiors. Too much weight must not be placed on the verses which satirically describe the clergy, because the abuses of the Church have at all times afforded material for satire; but the words put into the mouth of Duncan Laidens *alias* Makgregouris (who was beheaded 16th June, 1552) are as interesting in their way as those of Piers Plowman on the same subject. Thus run three verses of his "Legacy":—

To my Curate, negligence I resign,
  Therewith his parishioners for to teach;
Another gift I leave him as condign,
  Sloth with ignorance, seldom for to preach,
  The souls he commits for to bleach
In purgatory till they be washen clean,
Pure religion thereby for to sustain.

To the Vicar I leave diligence and cure
  To take the utmost cloth and the kirk cow[1]
More than to put the corpse in sepulture;
  Have poor widow six grice and a sow,
  He will have one to fill his belly fou.
His thought is more upon the Pasch fines
Than the souls in purgatory that pines.

Coppression the Parson I leave until (unto)
  Poor men's corn to hold upon the rig
Till he get the teynd all whole at his will,
  Suppose the bairns their bread should go thig (beg),
  His purpose is no kirks for to big:
So fair a bairn teme God has him sendin,
These seven years the choir will ly unmenden.[2]

Those verses graphically illustrate the ordinary heritor's view of things before the Reformation. The parson who has nominal charge of the parish insists on his teinds of the crops, whoever suffers, while he fails to carry out what was then his

[1] See *supra*, p. 311, for similar demands for burial dues in England in lieu of hypothetically unpaid personal tithes.

[2] Cf. Langlands:—

For the tithing of a duck,
  Or an apple or an aie (egg),
They make men swere upon a boke,
  Thus they fouler Christes faie.

legal obligation, to maintain the choir of the village church; his vicar is as particular about the vicarage teinds or their equivalent, which he seizes when a poor man dies; and the curate, who should preach, is too lazy to do his work. Such was the state of rural Scotland, and it was a state which, as Froude says of the Reformation in England under Wycliffe, "begot in the mind of the people indignation at lies and injustice, and the revival of earnestness was accompanied with a furious spirit of political revolt."

That the Church was thoroughly rotten at the time of the Reformation is sufficiently clear if we confine our attention to the statutes of her diocesan and other councils, without regard to the accusations of the Reformers. Such regulations reveal the state of things which made them necessary. Thus, Archbishop Foreman (Archbishop in 1514), in a synod at St. Andrews, sanctions statutes sternly censuring clerical non-residence and concubinage, ordering that chapels which are not sufficiently endowed should be closed; that those who have the cure of souls are only to have their faculties renewed after examination; that beneficed clergy are themselves to administer the sacraments to their parishioners, and to dismiss their substitutes; and that all rectors, vicars, curates, and chaplains are to be present *in propria persona* in their churches on Sundays.[1]

A Provincial Council of Clergy at Edinburgh in 1549, presided over by Archbishop Hamilton, passed many laws to the same effect—forbidding, especially, concubinage by the clergy; the promotion of clergymen's illegitimate children to benefices; the wearing of yellow, green, and other unbecoming garments; ordering the inspection of monasteries; condemning the practice of deans receiving bribes to hush up offences; enjoining rectors of parishes to preach at least four times a-year; strictly enjoining residence on all beneficed and pensioned clergy; providing for an examination of all parochial clergy on account of the known want of qualification of many, and for an income of at least £20 annually to all vicars.[2]

[1] Bellesheim, "Catholic Church in Scotland," ii. pp. 119–24.

[2] "Howe can men be content to paie the xth part of theire goode, which they get with sore labor and sweate of theire browes, when they can not have for it agayne neither ghostly comforte nor bodely? What ley man will be anie thinge

In January, 1552, another Provincial Council met, also in Edinburgh; and among other matters it forbade the alienation or letting on long lease of Church property, with the view of enriching the friends and relations of the clergy, and the consequent impoverishment of the successors to the benefices.

The years between 1546 (when Cardinal Beaton was murdered) and 1553 were the breathing-time of the Church, and the statutes of the two Edinburgh Councils show that the Church was desirous of putting her house in order; but it was too late. Not that those in high places always sympathised with reform, as is shown by the curious memorial submitted by Aberdeen chapter to their bishop, in which, after begging him to cause his diocesan clergy to reform their lives, and to provide for at least one sermon before the beginning of Lent, and one more between that and Easter in every parish church, they appeal to the bishop himself to show a good and edifying example, particularly by breaking off an illicit connection by which he is "greatly slandered."

This is indeed, as the Roman Catholic historian of the Church says, "a convincing and melancholy testimony to the decay of moral and religious discipline in the Scottish Church, and to her urgent need of reform."[1]

A Provincial Council held in Edinburgh in 1559 enacted *inter alia* that archbishops and bishops should not collate their sons to benefices in their own churches—such collation should be *ipso facto* void and null; that prelates who marry their daughters to barons or landed gentry having less than £100 of rental should not give them portions from the patrimony of the Church[2]—an abuse satirised by Sir David Lindsay in his "Three Estates;"[3] feuing or leasing out Church lands is prohibited; but the greater tithes, when not collected by the clergy for themselves, may be leased to farmers and labourers on the glebe

scrupulous to kepe those tithes in his owne handes, when he sees vs doe nothinge more then he for it?" ("A Discourse of the Common Weal of this Realm of England," p. 134).

[1] Bellesheim, ii. p. 240.

[2] *Ibid.*, p. 245.

[3] That Prelatis dochtouris of this natioun
Ar maryit with sic superfluitie,
They will nocht spair to gif twa thowsand pound
With their dochtouris to ane nobill man.'

at a moderate sum.[1] This was the last Provincial Council of the Church before the Reformation.

From the words of the clergy themselves we can best judge of the abuses of the day. We see the parish clergy ignorant and neglectful, with small or irregular stipends; while the higher clergy live in luxury, wear gorgeous apparel, promote their sons to benefices, and give the husbands of their daughters portions of the Church's patrimony, and feu or lease out Church lands to their own profit, while the parochial churches suffer. Such was the state of the Church in Scotland at the time of the Reformation. Any one who imagines that the country was neatly mapped out into parishes, each with its presentee drawing a comfortable stipend, and that on the bursting of the storm the lords rushed into the Church's vineyard, trampling it down and leaving a waste where once had been a garden, is entirely mistaken. The appropriation of tithes and ecclesiastical lands by the laity was one of the most flagrant scandals of the Reformation; but the Church had familiarised the nobles to the idea of holding benefices on the easiest terms. James, Duke of Ross, brother to King James IV., was only twenty-one when he was made Archbishop of St. Andrews. He died in 1503, and the see was kept vacant for six years until Alexander Stuart, a natural son of King James IV., was twenty-two; shortly afterwards Pope Julius II. conferred on him the Abbey of Dunfermline and priory of Coldingham *in commendam*. The ecclesiastical position of such a prince was nominal: he died fighting by his father's side at Flodden. James V. is said to have threatened the bishops of his time that unless they reformed their lives he would send some of them to be dealt with by his uncle Henry VIII.; and in his last Parliament, that of 1541, he warned Churchmen that it was their disorderly lives which brought the Church into contempt.[2] Yet James's own natural children as infants held many abbeys *in commendam*. The Regent Arran's illegitimate brother, John Hamilton, became Abbot of Dunkeld; and in July, 1547, the Regent wrote to the Pope urging that another brother, James, should be made Archbishop of Glasgow, with a grant from the revenues of that see of £100 to still two other brothers, David and Claud. A son of the Earl of Huntly became Bishop of

[1] Bellesheim, ii. pp. 249–50. [2] *Ibid.*, p. 161.

Aberdeen; a son of the Earl of Lennox was Bishop of Caithness when only twenty years of age. Pope Paul III., when appointing Robert Reid to be Bishop of Orkney, charged the revenues of the see with a pension of £20 to a youthful cleric of fourteen, and another of 80 marks to an illegitimate son of James V., also a cleric, who had not yet attained the maturity of eight years![1]

Although the Reformation did not take regular form until 1560, there had of course been loud mutterings long before, almost contemporaneously with the suppression of the monasteries in England; and among the charges against John Rough and John Knox in 1545, we find there was one that they had taught "that tithes by God's law do not appertain necessarily to Churchmen." Spotswood, who tells the tale, adds: "This last article I would not omit, because it is alleged by those that penned the story. Whether it was a point of John Rough's preaching or not, I cannot say; but for John Knox, it is clear by his sermons and writings still extant that he held it a point of high sacrilege to rob and spoil the Church of tithes. It is true that many in these times, offended with the extortion of Churchmen, did hold that tithes belonged not to the Church by any divine right; and knowing that this opinion would find easie passage among the people, as also serve to abridge the means and power of Churchmen, they were the more ready to deliver such doctrines; but this was done rather out of passion than judgment."[2]

When John Knox framed his Constitution for the Reformed Church in January, 1560, he certainly did not forget the tithe and the Church property, which he appears to have fondly believed would pass from the old Church to that of the Reformer. He did not suggest that every minister should receive the same stipend, for, if so, with unequal demands upon each "one would suffer penury and another superfluity." "Therefore we judge [fifth head] that every Minister should have sufficient wherewith to keep an house, and be sustained honestly in all things necessary, forth of the Rents of the Church which he serveth, conform to his quality and the necessity of time: wherein it is thought that every Minister shall have forty bolls meal, and twenty bolls malt, with mony to buy other provision

[1] Bellesheim, ii. pp. 196–7.

[2] Spotswood, "History," p. 86.

to his house, and serve his other necessities; the modification whereof is to be referred to the judgment of the Church; which shall be made every year at the chusing of the Elders and Deacons; providing always, that there be advanced to every Minister provision for a quarter of a year beforehand of all things."[1]

There is no ambiguity about the sixth head, "Of the Rents and Patrimony of the Church," which may be cited in full :—

The Sixth Head, of the Rents and Patrimony of the Church.

"Two sorts of men, that is, the Preachers of the Word and the Poor, besides the Schools, must be sustained upon the rents of the Church; wherefore it would be considered how and of what the same is to be raised. For to our grief we hear that some Gentlemen are now more rigorous in exacting the tithes and other duties, paid before to the Church, than ever the Papists were, and so the tyranny of Priests is turned into the tyranny of Lords and Lairds. For this we require, that the Gentlemen, Barons, Lords, Earls, and others be content to live upon their own Rents, and suffer the Church to be restored to her right and liberty, that by her restitution the poor that heretofore have been oppressed may now receive some comfort and relaxation.

"It is a thing most reasonable that every man have the use of his own Tithes, providing that he answer the Deacons and Treasurer of the Church of that which shall be reasonably appointed unto him, and that the uppermost cloth, the Corpresent, the Clerkmail, the Pasche-offerings, Tith-ale, and other the like exactions be discharged for ever. And because not only the Ministers, but also the Poor and Schools must be sustained upon the Tithes, we think it more expedient, that Deacons and common Treasurers of the Church be appointed to receive the whole Rents appertaining thereto, than the Ministers themselves, and that commandment may be given that no man either receive or intromit with anything belonging to the sustentation of the foresaid persons, but such as shall be appointed thereto by the Church.

[1] Spotswood, "History," p. 157.

"If any shall think this prejudicial to those that profess the Tithes by virtue of leases, we would have them know that unjust possession is no possession before God; and that those of whom they acquired their right were thieves and murtherers, and had no power to alienate the Patrimony and common good of the Church: yet do we wish recompence to be made to such as have debursed sums of money to these unjust possessors, so that the same had not been given of late in prejudice of the Church, or no collusion used. For which purpose we think it expedient, that whosoever have the tithes of any Church in part or whole, be warned to produce his right, that, cognition being taken thereof, a reasonable recompence may be given them, before the years that are to run, the profits of years past deduced and considered, so that the Church in end may receive her liberty and freedom.

"The Tithes that we think must be lifted for the use of the Church, are the Tithes of Hay, Hemp, Lint, Cheese, Fish, Calf, Veal, Lamb, Wool, and all sorts of Corn. But because these will not suffice to discharge the necessaries of the Church, we think that all things dotate to hospitality in times past, with all annual rents both to Burgh and Land, pertaining to Priests, Chanteries, Colleges, Chaplanries, and Friers of all orders, to the sisters of the Seynes, and all other of that sort, be retained to the use of the Church or Churches within the Towns or Parishes where they were founded: likewise the whole revenues of the Temporalities of Bishops, Deans, and Archdeacons; with all rents of lands pertaining to Cathedral Churches, which must be applied to the entertainment of Superintendents and Universities. And farther, we think that Merchants and Craftsmen in free Burghs, who have nothing to do with manuring the ground, ought to make some provision in their cities and towns and dwelling-places for the support of the Church, and necessities thereof.

"The Ministers, and failing of them the Readers, must be restored to their Manses and Gleibs, without which they cannot serve nor attend their Flocks; and where any Gleib exceedeth six acres of land, that which is more shall remain with the possessor till farther order be taken."[1]

"Whence he took that device of annual Deacons for collecting

[1] Spotswood, pp. 164, 165.

and dispensing the Church-rents," says Spotswood, "I cannot say. A Noble man being ask'd his judgment thereof, answered that it was a devout imagination, wherewith John Knox did greatly offend; yet was it no better than a dream, for it could never have taken effect. The Churchmen that went before had been provident enough in these matters, and good it had been for these that succeeded to have kept fast that which they found established to their hand, as the Archbishop of S. Andrews did at the same time advise them. For he imploying John Brand, a Monk of Halyrudhouse (who served many years after Minister at the Canongate), to go unto John Knox, willed him to say from him, that albeit he had innovated many things, and made Reformation of the Doctrine of the Church, whereof he could not deny but there was some reason; yet he should do wisely to retain the old Policy which had been the work of many Ages, or then put a better in place thereof, before he did shake the other. 'Our Highland-men,' he said, 'have a custome, when they will break young Colts, to fasten them by the head with strong tethers, one of which they keep ever fast till the beast be thoroughly made. The multitude, that Beast with many heads, would just be so dealt with. Master Knox, I know, esteemeth me an enemy; but tell him from me he shall find it true that I speak.'"[1]

The archbishop was right. Although many nobles signed the Book of Policy, it was with a significant addendum, "That the Bishops, Abbots, Priors, and other beneficed men who had joyned themselves to the Religion, should enjoy the Rents of their Benefices during their lives, they sustaining the Ministers for their parts, as was prescribed in the said Book."

This was as devout an imagination as Knox's; while the ink was drying on the signatures, the Church was as rapidly as possible getting rid of her possessions to Churchmen's friends and kinsmen, and of the very signatories the great majority, getting into their hands such possessions, forgot their adhesion to Knox's device for collecting Church rents, and kept a firm hold of what they got, thus turning, as the historian of the time says, "greater enemies in that point of Church Patrimony than were the Papists or any other whatsoever."[2] The Confession of

[1] Spotswood, p. 174. See also Carlyle, "Heroes and Hero-Worship"—"Knox."

[2] Spotswood, p. 175.

Faith was adopted by the Assembly of the Estates at Edinburgh in August, 1560, and here the formal history of the Reformation may be said to begin. There were, however, many of the clergy owing obedience still to Rome who attended the Assembly and who voted for the adoption of the Confession, and it was long after this ere the old Church could be said to be disestablished, or her clergy to be disendowed.

In 1561 the Crown, however, took a share in the work of annexing the benefices of the Church. The revenues of the Crown were found insufficient to maintain the Court of Queen Mary, who had now returned from France; and as an easy way of raising funds the prelates of the weakened Church were called before the Council and asked to make a suitable contribution from their benefices. As it was only by the Queen's favour that the prelates could hope for any revenue at all, looking to the Reformers' attitude, they were scarcely in a position to refuse, and with great reluctance they agreed to allow the Queen to appoint collectors to gather one-third of their whole revenues, to be disposed of at the Queen's pleasure, the prelates on the other hand being secured in the remaining two-thirds.

The Assembly of 1564 presented a petition to the Queen that some provision should be made for the ministers, "and their livings assigned them in the places where they served, or at least in the parts next adjacent;" that benefices which had become vacant since March, 1558, should be filled; "that no Bishoprick, Abbacy, Priory, Deanry, Provostry, or other Benefice having more churches than one annexed thereto should be disponed in time coming to any one man, but that the churches thereof being dissolved, the same should be provided to several persons, so as every man having charge may serve at his own church according to his vocation;" and as to teinds, "that some order should be devised for the relief of the poor labourers of the ground who are oppressed in their Tithes by Leases set over their heads, and they thereby forced to take unreasonable conditions."

The Queen answered that she did not see her way to "defraud herself of so great a part of the Patrimony of the Crown as to put Patronages of Benefices forth of her own hands, seeing the publick necessities of the Crown did require a great part of the

Rents to be still retained. Notwithstanding, Her Majesty was pleased that her own necessity being supplied, after it should be considered what might be a reasonable sustentation to the Ministers, a special assignation should be made to them forth of the nearest and most commodious places, wherewith Her Majesty should not intermeddle, but suffer the same to come to their use." As regarded the trouble caused by the exactions of those who had leased the right to tithe land, the Queen's answer is included in a general phrase that Her Highness promised to do therein as the Estates convened in Parliament should appoint.[1]

The Assembly replied that as to the Queen's offer to provide for the ministers when her own necessities were supplied, "That good order did require Ministers first to be provided, Schools for instructing the youth maintained, the fabrick of Churches repaired and upheld, and the poor and indigent members of Christ sustained; all which ought to be furnished out of the Tithes, which are the proper Patrimony of the Church. These things done, if any thing were remaining, that Her Majesty and Council might use it as they should think expedient."[2]

At James's baptism in 1566 the rite was celebrated by the Archbishop of St. Andrews and the Bishops of Dunkeld, Dunblane, and Ross, and other Romish clergy, and about the same time the Crown restored to the archbishop his former jurisdiction in confirming executors, collating to benefices, &c. The General Assembly took this greatly to heart, but it does not appear that the archbishop attempted to exercise the restored functions;[3] and to meet the ministers' constant complaints the Court offered them a sum out of the teinds which were collected. By an Act of the Privy Council, therefore, in that year, all benefices not exceeding 300 merks Scots, or £16, 1s. 4½d. sterling, annually were assigned to such persons as the General Assembly should appoint; and by another Act a portion of the rents of such other benefices as should amount to the sum of £10,000 Scots and 400 chalders of victual were appropriated for the general support of the ministry.[4] This was "accepted under protestation that the same should not prejudice their right to the Tithes, nor be accompted as a satisfaction for the same." "For these they held to be the proper Patrimony

[1] Spotswood, pp. 190, 191.
[2] *Ibid.*, p. 193.
[3] *Ibid.*, p. 198.
[4] Connell, i. p. 154.

of the Church," continues Spotswood, "and so justly belonging thereto, as that they ought not to be paid to any others, under whatsoever colour or pretext. But this protestation availed not, only it sheweth what was the judgment of the Church in that time concerning Tithes."[1]

The marriage of Mary and Bothwell was celebrated on 15th May, 1567,[2] by Adam, Bishop of Orkney, after the manner of the Reformed Church; and it was the same bishop who crowned the infant James at Stirling, when John Knox preached the sermon.[3] In the same year, among the Articles agreed to by the Assembly and the few noblemen who accepted the invitation to join with the Assembly were the following:—

"That until the perfect order might be taken for restoring Patrimony of the Church, the Act of Assignation of the thirds of Benefices for the sustentation of the Ministry should be put in due execution. That in first lawful Parliament which should be kept, or sooner if occasion might serve, the Church of Christ within this kingdom should be fully restored unto the Patrimony belonging to the same. . . . It was farther agreed that in the next Parliament, or otherwise at the first occasion, order should be taken for the ease of the labourers of the ground in the payment of their Tithes, and that the same should not be disponed to any others without their advice and consent."[4]

This was very well in theory, but a significant comment upon it is that one of the rewards given to Kirkcaldy of Grange for his pursuit of Bothwell was the gift of the Priory of Pittenweem.[5] A petition to the Regent in 1568 from the Church asked "that remedy might be provided against the chapping and changing of Benefices, diminution of rentals, and selling of Tithes in long Leases to the defrauding of ministers and their successors."[6]

By the Act 1567, c. 10, the complaints of the clergy were to some extent acknowledged, for that Act narrates that "ministers hes bene lang defrauded of their stipends, swa (so) that they ar becummin in great povertie and necessity," and enacts that "the haill thirds of the haill benefices of this Realme sall now instantlie and in all times to cum, first bee payed to the ministers of the Evangel of Jesus Christ and their successours . . . ay

[1] Spotswood, pp. 199, 200. [2] *Ibid.*, p. 203. [3] *Ibid.*, p. 211.
[4] *Ibid.*, pp. 209, 210. [5] *Ibid.*, p. 213. [6] *Ibid.*, p. 228.

and quhill the kirk come to the full possession of their proper patrimonie quhilk is the teindes." The Assembly was authorised to appoint collectors to uplift the thirds, and immediately did so.

The thirds of the teinds were thus collected, until in 1573 the Regent Morton procured the consent of the Church to their collection by the Crown, under promises of more liberal provisions to the clergy, and that the stipend of each parish should be paid out of its own teinds. The Commission of Platt was appointed to modify stipends, but its proceedings were very unsatisfactory to the ministers, whose financial position was in no way improved by the new arrangement.

Year after year they made their complaint, but little or nothing was done to help them. Worse than all, they saw the patrimony of the Church disappearing before their eyes during the king's minority. The form of bestowing benefices on laymen as commendators was abandoned, and those who had acquired "rights" to religious houses and their endowments obtained from the king *jure coronæ* grants as Lords of Erection. Such grants were under burden of payment of the thirds, or of providing suitable stipends for ministers; but to exact those beneficial provisions was a hard and sometimes an impossible task. Many churches were left without provision, and were abandoned by the ministers. It appears that in 1596 there were about four hundred parish kirks destitute of ministers "by and attour the kirks of Argyll and the Isles."

When in 1587 James VI. attained majority, an Act was passed (c. 29) to annex to the Crown the whole lands of the beneficed clergy. It proceeded on the narrative that much of the clergy's lands had been given to the Church by the Crown, and that it was necessary for the exigencies of the State, and to avoid the imposition of taxes, that all Church lands should be held in future by the Crown. Teinds (which at any rate are spirituality not temporality) were excluded from the annexation effected by the Act. In 1592 a new Act to the same effect was passed, for the king had continued his ruinous habit of making Erections of Church benefices to those who were only too ready to take all they could get. In 1592 the Presbyterian form of government was established by Parliament; and a commission was appointed to deal with the burning

question of ministers' stipends, but nothing was done. In 1596 the General Assembly proposed a plan by which every clergyman should be provided for from the teinds of his own parish, but nothing came of it.

All this time the tithes of the old Church were payable and paid as before, although under altered circumstances, Presbyterians in many cases holding the nominal rank of the "dignified clergy" of the olden time. When in 1606 James succeeded in restoring bishops who should really discharge episcopal functions as they were understood in England, he discharged their benefices of the payment of thirds to the collectors, making it obligatory upon the bishops, however, to maintain the ministers "serving at the cure of the kirks of their saids bishopricks, upon the readiest of their saids thriddes, according to the ordinar assignations made, or reasonablie to be made thereanent." This was not a satisfactory state of things, but up to 1617 the clergy had to get on as best they could upon what they could extract from the fund made up by the thirds of the tithes as collected.

When in 1617 James came back from England to visit his elder kingdom, its ecclesiastical position was somewhat extraordinary. The suppression of the Catholic Church in 1560, six years before he was born, had been confirmed by the Parliament of 1592, when he was twenty-six; yet he had been baptised by a Catholic Archbishop of St. Andrews, and his queen, though the daughter of rigid Lutherans, had been received into the Catholic Church by Father Abercromby about 1600. The period of the Reformation in Scotland is almost exactly covered by his life of fifty-nine years; that the avowed Presbyterianism of the people took so long to settle itself was largely due to his want of real dependence upon any particular form of Church government. In England he was so persuaded of the appropriateness of the kind of episcopacy of which he approved, that it is not at all surprising that he should have thought fit to remodel the Scottish Church on similar lines; but that he can have imagined that by taking in hand the virtually civil offices of the Scottish bishops which still existed, and having the holders of them consecrated by English bishops, he had succeeded, seems to show an extraordinary confusion of ideas. As Father Bellesheim observes, the so-called Scottish prelates

being in the eyes of the Roman and the English Church simply laymen, "the result of this singular proceeding, of course, was that whereas Anglicanism recognises as essential the three orders of bishop, priest, and deacon, the unfortunate Church of Scotland had to content herself with the episcopate alone." In other words, when James came to Scotland in 1617 the country was covered by Presbyterian parishes, and yet possessed certain nondescript bishops who were not Romish, nor Anglican, nor Presbyterian. James brought with him to admire his work the Bishop of Ely, and Laud, the future archbishop, and it is to be hoped they understood it.[1]

It was to the Scottish Church of this anomalous kind that the great benefits of a reform of the law of teinds was conferred, Parliament in 1617, on the narrative that "there be divers kirks within this Kingdome not planted with ministers, where through ignorance and atheisime abounds amongst the people; and that many of those that are planted have no sufficient provision or maintenance appointed to them, whereby the Ministery are keeped in poverty and contempt, and cannot fruitfully travel in their charges," appointing a Commission, which numbered eight prelates, with power, "out of the teinds of every parochin to appoint and assigne at their discretions, ane perpetual local stipend to the ministers present and to come." It is really from this date that the maxim *decimæ debentur parocho*—the tithes belong to the parish—can be said to be recognised in Scotland. Theoretically it had been admitted for centuries, but as a matter of practice it had been little known during the subsistence of the Catholic Church, and was entirely ignored by the civil power from 1560. The clergy, now, were no longer to receive certain stipends out of a general fund formed of such Thirds as could be collected and were not otherwise required, but were definitely to obtain from the tithes of their own parishes such sums as might be fixed by the Commission. The minimum stipend was fixed at five chalders (16 bolls=1 chalder) of victual, *i.e.*, corn or meal, or 500 merks, £27, 15s. 6⅔d. sterling, "or proportionally part of victual and part thereof in money, according as the fruits and rents of the Kirk may yield and afford, and as the said Com-

[1] As to the Tulchan bishops, see Carlyle's "Oliver Cromwell," 1871 ed., i. p. 36. Laud found in Scotland "no religion at all."

missioners shall think expedient." The Commissioners were not to meddle with any stipends that were already above the minimum. The maximum stipend was fixed at eight chalders of victual, or 800 merks, £44, 9s. sterling.

This Commission was very welcome to the clergy, but its powers expired at Lammas 1618. A new Commission was appointed in 1621, but it seems never to have acted. James died in 1625, and the record of his work for the Church of Scotland is meagre and confusing enough. Meantime, it has to be observed that the disastrous practice of leasing out tithes went on quite as commonly in the early days of the Reformation as in the latter days of Catholicism, and by ministers who happened to be in right of their teinds as titulars just as openly as by the bishops. The practice was strictly prohibited by Acts 1581, c. 101, and 1585, c. 11. Tacks were, however, conditionally recognised by Acts 1594, c. 203; 1617, c. 4; 1621, c. 15. Several curious instances of such tacks are given by Connell, as in the cases of the parishes of Glassary, Auchterarder, and Birss.[1]

An interesting glimpse of the fortunes of a post-Reformation parsonage and its teinds is given in the case of *Duff* v. *The Earl of Seafield*, Nov. 9, 1883, 11 R. 126. The parish of Keith, in the bishopric of Moray, fell into the hands of James VI. on the death of the Bishop of Moray, and was erected into a parsonage by the king in 1590, confirmed by a special Act of Parliament in 1592. In 1601 the minister of Keith granted a tack of the teinds to Lord Saltoun for nineteen years for a teind duty of 500 merks for parsonage teinds and £10 for vicarage. In 1609 an Act of Parliament was passed containing a ratification of Lord Saltoun's title, and, taking into account the great services of his family, it declared "the tack of teinds and the rights of parsonages to be good and sufficient lawful and valid rights for bruiking of the teind sheaves and other sheaves during the lifetime and space contained in the said tacks, and for bruiking the rights of patronage in all time coming." In 1612 Lord Saltoun assigned the tack to Lord Ochiltree. In 1618 the Commissioners appointed under the Act 1617, c. 3, to see that churches had ministers and that ministers had stipends (it had nothing to do with the valuation

[1] Connell, i. p. 190.

of teinds), proceeded to inquire into the state of Keith. There were two churches in the parish, the parish church proper and the kirk of Grange. The Commissioners called upon those interested in the teinds of Keith to produce their titles. There appeared the Bishop of Aberdeen, who was also minister of Keith parish; and the Bishop of Moray, in whose diocese the parish was, and who appeared in name and as procurator for the minister of Grange. The two bishops declared that, although Grange was not a "paroche kirk bot allenarlie ane pendicle of the paroche kirk of Keythe," yet for many years it had been provided with a separate minister, and that, "in respect of ye gritnes of ye charge of ye cure and function of ye said haill parochine of Keythe," the arrangement should be adhered to, and a suitable stipend should be provided for the minister of Grange. Lord Ochiltree also appeared, and produced the tack to Lord Saltoun, which Lord Saltoun had conveyed to him. He renounced his right as tacksman of the vicarage benefice, and in respect of that renunciation asked a prolongation of his tack, which indeed had then but two years to run. The Commissioners, with great care, then divided the parish and apportioned the stipend, giving the minister of Keith the vicarage teinds above renounced, to the extent of 400 merks, and 700 merks of parsonage teinds, while to the minister of Grange they gave vicarage teinds to the amount of 300 merks, and 300 merks from the parsonage teinds. So far Lord Ochiltree had fared badly. He had renounced his vicarage teinds, and had been made liable in parsonage teinds to the amount of 1000 merks, whereas his rent for the tack of the whole teinds, parsonage and vicarage, was only 500 merks. However, the bargain was no one-sided one, for Lord Ochiltree received a very liberal prolongation of his tack from the date it would expire, *i.e.*, 1620, for ten terms of nineteen years, bringing it down to 1810. In 1646 Lord Ochiltree granted a sub-tack of the teinds to Gordon of Park. Two years later Gordon of Park found himself in this position:— He was tacksman of the teinds of Kempcairn in Kilsyth and proprietor of the lands of Park, paying teind for a portion of those lands called Ordiquhill to Ogilvie of Kempcairn, while Ogilvie of Kempcairn had no right to the teinds of his lands of Kempcairn, which Gordon drew, but drew the

teinds of Gordon's lands of Ordiquhill in the Park estate. So the two proprietors by contract of excambion exchanged their teind-rights, so that each should draw the teinds of his own lands.[1] It is a curious and instructive case.

In October, 1625, King Charles I. endeavoured to save as much as possible for the Crown, by a general revocation of James I.'s grants of vacant Church benefices and of *brevi manu* usurpations after the Reformation, and in 1626 followed this by an action of reduction of all grants and claims inconsistent with the Act of Annexation of 1587. The king's procedure caused great alarm, and in November, 1626, a petition was presented to the king by the nobles, which sets forth that many of them or their predecessors, for "faithful and memorable service" when the Crown "was endangered by the joyned counsallis, forces, and fraud of Popische potentats and rebellious subjects, tending to subversioun of religioune and State," had received grants of lands, teinds, &c., some of which were granted by, and others ratified in, Parliament; that the petitioners are "not without causs affrighted at the large extent of your Majesties revocationes;" that they have no fear of their title, but beg the king to cause the actions of reduction to be stopped, and either to hold a Parliament, or to appoint "ane competent nomber of best experienced counsellours, prelates, judges, and lawiers and pairties interest in the bissines, to conveene and treate of all that may concern your Maiestie profeite and patrimonie, and your subjectis lawfull sureties."

To this the king, whose main object seems to have been to receive a sufficient personal grant on tolerably easy terms from those who enjoyed the Scottish benefices, agreed, and in January, 1627, appointed a Commission—probably at the time intended solely in the interests of the Crown, and to force on the general submission of the doubtful rights which the king had threatened to challenge, of which the lordships of erections and other teind-rights were among the most important. He directed the Commissioners to treat with such persons as might be willing to treat as to erections and temporalities of benefices, feu-duties, "or uthir certaine rents of silvir or victual of the said

[1] The teinds of Ordiquhill had been acquired on tack, likewise, from the parson of Fordyce in 1601 for a period of thirty years; the tack was ultimately prorogated for a period of 203 years.

temporalities, teynds, and patronages of the said benefices;" as to what should be given them for their "pretended rights," or for their holding on terms of new arranged with the Crown; as to the establishment of "a certain patrimonie to the Crowne, therewith to remain in all time coming," the endowing of ministers, dividing parishes, and establishing manses. The Commissioners found the information before them insufficient to enable them to deal with so large a subject, and they issued a proclamation to the presbyteries directing them to institute an inquiry into the state and worth of the teinds in each parish within its bounds—a proceeding which caused much alarm to the holders of the rights of titularity of teinds, whose oppressive action had been long resented by both ministers and heritors. "This proclamation," said Lord Justice-Clerk Hope in *Dunlop, &c.*, v. *Commissioners of Woods and Forests*, June 2, 1858, 20 D. p. 1032, in a case in which the original papers were reprinted, and from which this account of King Charles's inquiry is largely drawn, "was very rapidly and extensively acted upon in most parts of Scotland, with a celerity quite remarkable in those days, but accounted for by the deep interest which the parties to whom the inquiry was committed had personally in the matter. No instance is known in those days, and with the then difficulty of communication, in which the same rapidity of action took place."

But the Commissioners had no authority to compel those with whom they were empowered to treat, to agree to their terms, and they stopped short in the end of June, 1627, referring the whole matter back to the king, their only decision being that the king ought to receive a constant rent and duty paid out of the whole teinds of the kingdom. The appointment of the Commissioners had its uses, however, for their inquiries frightened many titulars into voluntary submission to the Commissioners.

Matters took a new turn by the submission of the various questions which had been raised as to teinds—by (1) lords of erection, titulars and heritors; (2) bishops and clergy; (3) burghs enjoying grants for pious uses (ministers, schools, colleges, and hospitals); and (4) tacksmen of the teinds—to the Crown for decision; the king accepted the submission, and appointed in September, 1628, the Commissioners of 1627 to proceed with the Commission with new and additional

powers. The general scheme of the inquiry and submission was (1) to prevent the teinds being drawn in kind from the heritors; (2) to enable those liable in payment of teinds to purchase them at a fixed price; (3) to allot competent stipends to parochial clergy, and to relieve the holders of teinds from any claims at their instance, or of the patrons directly against the teinds; (4) to arrange a plan for a valuation of each heritor's teinds, which was intended to be universal over the kingdom, and to secure a fixed revenue to the king out of the teinds which would yield larger funds than the Church was supposed to require—a royal tax, also, which might fittingly be paid by those who were confirmed in rights which, more or less, were of questionable character. (Lord Justice-Clerk Hope, *ut supra.*)

The Commissioners were authorised to appoint sub-commissioners for valuation purposes, and in practice sub-commissioners were directed generally to presbyteries.

The decrees of the king following upon the submission may be briefly summarised :—

As regards teinds held by (1) lords of erection, titulars, and heritors, and (2) tacksmen, the rate of teind was fixed at "the fifth part of the constant rent[1] which each land payeth in stock and teinds where the same are valued jointly."

When the stock and teinds were valued separately, it was for the Commissioners to make the proper valuation. From the sum they arrived at, a fifth was to be deducted for the provision to the Crown, which King Charles had so constantly in view, and which now goes by the name of "the King's-ease." Nine years' purchase of the sum which remained was the price at which a heritor might purchase the teinds from a titular, or tacksman, under burden of stipend and King's-ease or annuity.

On the final abolition of Episcopacy in 1689 the bishops'

[1] Mr. Elliot observes :—"One-fifth of the rent for teind. This is shown to have been a fair equivalent for the tenth of the produce when, as was usual at the time, the rent consisted of teind and third—*i.e.*, the tenant paid (1) the teind and (2) a third of the remainder of the produce of his farm in name of rent. Thus the rent of a piece of ground, the product of which was 100 bolls, is computed at 10 bolls to meet the titular's claim and 30 bolls for stock to meet the landowner's claim. These together amount to 40 bolls, one-fifth of which is 8 bolls as the valued teind. By the other method the teind of 100 bolls is 10 bolls, from which deduct one-fifth for the king's ease ; the valued teind duty remains 8 bolls" ("Teind Court Procedure," p. 24, footnote 3).

teinds were appropriated by the Crown, and cannot be purchased except upon special terms.

Teinds held by burghs were to be estimated on similar terms to those held by titulars and tacksmen.[1]

Teinds held for pious uses could not be compulsorily purchased. The decreets were ratified by Parliament in 1630; subsequent Commissions were appointed in 1629, 1663, 1641, 1644, 1647, 1649. From 1649 to 1660, during the Commonwealth, Commissioners were appointed who were called "Comsioners for visiting universities and appointing maintenance for ministers." From 1660 to 1700 the business of valuation was not so vigorously proceeded with; the Commission was renewed in 1693. Shortly after the Union the business of the former Parliamentary Commissioners was transferred to the judges of the Court of Session, as Commissioners for Plantation of Kirks and Valuation of Teinds, by the Act, 1707, c. 9, which enacts—"Therefore Her Majesty and the said Estates do hereby empower, authorise, and appoint the Lords of Council and Session, to judge, cognosce, and determine in all affairs and causes whatsoever, which by the laws and Acts of Parliament of this kingdom were formerly referred to, and did pertain and belong to, the jurisdiction and cognisance of the Commissions formerly appointed for that effect, as fully and freely in all respects as the said Lords do, or may do, in other civil causes." "The Court of Teinds and the Court of Session are not separate courts," said Lord Kinnear in *Presbytery of Stirling* v. *Heritors of Larbert and Dunipace*, Feb. 2, 1900, 2 F. 562, "since the Act of 1707 the Court of Teinds is nothing but the Court of Session under another name."

[1] See "Teind Court Procedure," pp. 15, 23, 25.

CHAPTER XVII.

TEINDS IN THE PRESENT DAY.

We have now traced the gradual development of the law of tithes. Originally an ecclesiastical duty alone, the payment of tithes was recognised as a civil obligation under Charlemagne, and the laws he made were adopted in England. Both on the Continent and in England the Church derived great benefit from the sanction given by the State to the collection of a portion of the year's produce as a contribution to the maintenance of the clergy. With the development of the pretensions of the Papacy, the Church, however, ceased to depend upon civil rulers for the observance of the duty; and when tithes were introduced into Scotland it was at a stage when the Church felt strong enough to require their payment as a thing recognised by the universal custom of Christendom. The Church law which Queen Margaret and her son David I. introduced into the Scotland of their day was that of Edward the Confessor; and it was necessary to its adoption here that it should be acknowledged, not primarily as an English observance, but as one which the whole world owned as binding upon it. There was nothing illegal in the Culdaic system; it was irregular according to the rules which were held binding in England, but it was ancient, it was associated intimately with the fortunes of powerful families, and it was familiar to the people. The innovations from the south could not well have been forced upon the nation—such as it was; the part David played was that of the reformer only. He remodelled existing institutions in so thorough a manner upon an Anglican model that the change he accomplished well deserves to be known as the First Reformation; but he did so purely as an ecclesiastical statesman who was a true son of the Church, not as a law-giver. The Culdaic tribal system.

excellent in many things, had many defects—some of them almost incident to clan government; and David may well have thought that by his work in restricting the existing institutions, and in introducing not only the regular government of dioceses but the monastic orders in their second Anglican form, he was doing much not only to forward religion—an object always very dear to him—but to settle the country. Every gift of land to bishop or monastery meant so much the more territory safe from occupation by the territorial subject-lords, who were always the chief dangers of a Scottish king. It was a great protection to such a sovereign, both as ecclesiastical reformer and politician, to work out his remedial measures for Church and State, not under any law of his own devising, but with the sanction of laws which knew no national limits, and which were accepted as obligatory by all who looked to Rome as the seat of Christ's Vicegerent. On the other hand, the Anglican Church as introduced into Scotland was distinctly an intruder, and willingly welcomed the protection of the king, as Leo had welcomed Charlemagne or John XII. had welcomed Otto, and acknowledged his authority as readily as it owned his piety.

Under David's successors until the Wars of the Succession, things went well enough, although the Crown for one system of tribal churches had for the most part only substituted another. Nothing is so permanent as a corporation; and while a family might rise to great power in one of its sons, and sink with another, most of the monasteries went steadily on in prosperity. During the wars of Wallace and Bruce, and the long minorities of the Stuarts, this was very evident; and when James V. died, the Church had for long been independent of civil authority, and lived under a law of her own, too strong to need aid from the uncertain and brief power of any king. Power and wealth brought their own abuses, and during the long and troublous times of the Second Reformation the Church and her lands and her tithes fell a prey to the civil power she had generally, though not consistently, ignored.

The Church of the Reformers had no David at its head. There was no bold reconstruction of the old Church on new lines save in Knox's brain. The Culdees had been re-organised the Church of Beaton was simply submerged; and all the

Reformers saved was from the wreckage that floated on the surface of a turbulent river.

That in the long-run the tithes, or a portion of them, were saved to the Church on a business plan does not seem to have been in any way due to Charles I.'s desire to assist the Church. His motive in carrying out the systematic valuations of teinds was to secure a provision to himself by the tax or burden called King's-annuity, and was as unconcealed as was his grandmother's bold demand to the prelates of her day to surrender one-third of their benefices for her privy purse. The history of the King's-annuity may be told in a few words. It was fixed in 1627. Charles subsequently assigned it to James Livingstone, Groom of his Bedchamber, in security of a debt of £10,000. It came by-and-by into the hands of the Earl of Loudoun, and in 1674 it was stopped by royal warrant.[1] It is still allowed as a deduction from the price of teinds in actions of valuation and sale, but it is purely fictitious.

Out of Charles's selfish legislation came much good both to the Church which collected and the heritors who paid teinds. The clergy were secured in payment of stipends by those being localled, or fixed upon the teinds of the localities where they served their cures; and the heritors were afforded a ready way, if they pleased, of ridding themselves of the payment of teinds, otherwise than to ministers with such localled stipends, by purchasing their teinds after valuation at fixed rates. Thus the tithes once again came under the direct recognition of the civil authority of the sovereign, as in the days of Charlemagne and of Edgar.

At the present day all lands in Scotland are liable in payment of teind except (1) glebes (even though feued), (2) lands held by heritors with titles which bear to be *decimis inclusis*, (3) lands of which the heritors have purchased the teinds (except as regards existing stipends), and (4) Crown lands—but Crown lands, if sold to subjects, become liable for teinds, and teind-paying lands continue to be liable for teinds when purchased by the Crown.

All teinds in Scotland belong (1) to the Crown, which draws the bishops' teinds, *or* (2) to burghs for pious uses, *or* (3) to universities, *or* (4) to titulars, *or* (5) to tacksmen, *or* (6) to

[1] See Stair, "Institutions," bk. ii. tit. viii. 13.

patrons, *or* (7) to the proprietors of lands who have purchased their teinds or who hold their lands under titles *cum decimis inclusis, or* (8) to parish clergymen to whom they have been surrendered, and who hold them, as they hold their manses, for life.

All teinds may be valued by the Commissioners of Teinds on the application of (1) the heritor liable in payment, *or* (2) the person entitled to receive the teind, *or* (3) the minister of the parish in which the teind-bearing land is situated.

Bishops' teinds, teinds held by burghs for pious purposes, or by universities, cannot be compulsorily purchased. Teinds (1) in the possession of titulars or tacksmen may be bought at nine years' purchase, and (2) teinds in the possession of patrons at six years' purchase, in each case allowance being made in the purchasing heritor's favour for King's-annuity. Bishops' teinds (3) are sold by the Crown at such price as the Commissioners of Woods and Forests may fix, say, from eighteen to eleven years' purchase.[1]

The right of patrons as titulars of teinds has been acquired in a curious way. After the Reformation, the patron of a parish, who had at that time no right to teinds, was entitled (and specially by the Act 1612, c. 1) to make arrangements with the minister as to how much of the teinds the minister should draw, he taking the rest. In Acts of 1649, 1662, and 1690 relative to patronage, the patron's right to such teinds as are otherwise owned is, subject to the minister's stipend, expressly recognised. This right is *qua* patron, and was given as a compensation in 1649, when patronage was abolished; patronage was restored, but the patron kept the titularity of teinds he had acquired, and he keeps it still. This is one of the singular anomalies of the law of teinds.

Much of the difficulty which undoubtedly attends this branch of law has been due to popular confusion of *teind* and *stipend*. It is quite common to hear it said, in answer to an inquiry as to what teind means, that teinds are the contributions of the land-owning classes to the upkeep of the Church of Scotland. However true this once may have been, it is not true now; for whether the Church existed or did not exist, teinds would continue to be paid, and stipend is rather an

[1] Or less. The price depends on the probabilities of allocation.

inseparable burden on teinds than teind an equivalent term for stipend, which it has never been since the Reformation, and seldom was before that time.

The law may be more clearly stated thus:—Teinds are a property which, with certain exceptions, may be sold like feu-duties, but, unlike other property, are subject to the chance, at intervals of not less than twenty years, of the amount receivable by those owning them being affected by the Court of Teinds allowing the minister of the parish an increase or augmentation of his stipend from such teinds.

Teinds are not a *burden* on lands. As Lord President Inglis said in *Duff* v. *The Earl of Seafield*, Nov. 9, 1883, 11 R., at p. 141: "Some confusion in argument is always introduced by looking upon teinds as a burden upon lands. Teinds are not a burden upon lands. They are a separate estate; although, it may be added, a separate estate liable to diminution, contingent on certain circumstances of a nature more or less essentially periodic." Stair gives his definition as follows: as "of a burden *affecting* lands, and the profits thereof, and *being also a distinct right from the lands*."[1]

The stipend is an inherent burden on the teinds. Lord Robertson, in the case of Prestonkirk, observed:—"The rule *decimæ debentur parochæ* never took place with us in its full extent; but all our lawyers lay it down that teinds, in whatever hands they may be, or under whatever title they may be possessed, are never held as absolute property, but are at all times subject to the burden of a suitable provision to the minister. This burden *inhæret ossibus*, and is in the eye of law perfectly inseparable from the teinds. This I consider as a fundamental proposition in the law of teinds. It is laid down as such by all our lawyers. It is a proposition which is universally true, and which admits of no exception nor no limitation whatever."

While from time to time reference has been made to vicarage or lesser tithes, the reader's attention in the preceding pages has been chiefly directed to rectorial or greater tithes. Vicarage tithes, indeed, continued to be paid after the Reformation

[1] "Institutions," bk. ii. tit. viii.

and are still calculable when they are traced; but the right to them is lost by disuse for forty years, while the right to parsonage or rectorial teinds is not lost by desuetude. Whales were teinded among vicarage tithes, and certain salmon-fishings have been held to be subject to valuation.[1]

Berwickshire fish teinds were commuted by the Act 27 & 28 Vict. c. 23, and a similar claim as regards Leith by 55 & 56 Vict. c. 177.[2] Vicarage teinds seem to have been generally, if not always, local; so that the canon rule *decimæ debentur parocho* applied more really than in the case of the parsonage teinds. While teinds were defined by the canonists to be of three classes—*personal*, as of profits of personal industry; *prædial*, as of the natural fruits of the ground or water; and *mixed*, the industrial fruits of the ground only—we have noted *supra* that personal teinds are very rarely mentioned in Scottish records. Stair says: "Our custom alloweth of no personal teinds" ("Institutions," bk. ii. tit. viii. 6).

In concluding this account of teinds, it will be noticed that had the valuations introduced by Charles I. been carried out all over the kingdom, the position of parties would have been very different from what it now is. At the present day there may be in one parish: (1) lands not liable in payment of teinds, as held under titles *cum decimis inclusis*; (2) lands of which the teinds were valued in the reign of Charles I., and then purchased, and lands of which the teinds were valued at any time from 1627, but have not been purchased; (3) lands of which the teinds were, say, last year valued and purchased on calculations based on a very different rental; (4) lands of which the teinds have never been valued. It is highly desirable that the valuation of all teinds should be completed as speedily as possible, whether they are purchased or not. Until such a valuation is made, it is quite impossible to say what the value of the teinds of Scotland is. It is, perhaps, little surprising that there should be much popular misconception as to when tithes are payable. They are not universal over Scotland in the sense that all lands are in the same position as regards tithe-paying. They are not of fixed or equal proportions relatively to the rental of lands or their productiveness. In some

[1] Elliot, "Teind Court Procedure," p. 76.

[2] As to fish teind, see *Juridical Review*, 1892, vol. iv. p. 63.

parishes the teinds are exhausted, in others they are not. There is, in short, no possibility of laying down any general proposition relative to teinds which will be at once adequate and easily intelligible. When we look at the payment of tithes as conceived by the Early Christian Church, on the one hand, and on the other the complicated machinery which in Scotland to-day is supposed to work out results similar, as regards the maintenance of clergy, to those sought to be obtained by that primitive Church, something little short of despair seizes the mind of any one who attempts to explain the historical relationship of the one to the other. Without historical inquiry the modern law of teinds is incomprehensible, and even with the aid of history it requires patience and some study to arrive at an explanation of the curious anomalies with which that law presents us.[1]

[1] The following books will be found useful by those who desire to pursue the study of teinds further. The editions named are those which have been used by the author :—

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APPENDIX.

APPENDIX.

I.

An Act to facilitate the letting on Lease, feuing, or selling Glebe Lands in Scotland.—[6th August, 1866.] 29 & 30 Vict. c. 71.

WHEREAS it is expedient that power should be given to grant leases or feus of glebe lands, or portions thereof, in Scotland, or to sell the same, in manner after-mentioned:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows, viz.:—

1. This Act may be cited as "The Glebe Lands (Scotland) Act, 1866." Short title

2. In this Act, unless there be something in the subject or context repugnant to such construction— Interpretation of terms.

The word "minister" shall mean the minister of any parish in Scotland for the time who shall be in possession of a glebe:

The word "Presbytery" shall mean the Presbytery within the bounds of which such parish is situated:

The word "heritor" shall mean the proprietor of any lands within such parish to the extent of at least one hundred pounds of real rent from land yearly appearing in the valuation roll of the county within which such parish is situated:

The word "glebe" shall mean the lands appropriated to the minister as his glebe, and any additional lands settled in

perpetuity on the minister for the time being, and enjoyed by him along with his glebe:

The word "Court" shall mean the Court of Session, as Commissioners for the plantation of kirks and valuation of teinds.

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3. A minister may, with consent and approval of the heritors and the Presbytery, grant a lease or leases of his glebe, or any part or parts thereof, reserving for the use of the minister not less than five imperial acres nearest and most convenient to the manse, which shall be marked out by the heritors and the Presbytery for any term not exceeding eleven years, for such yearly rent or rents, and upon such condition or conditions, as shall be approved of by the heritors and the Presbytery, but without any foregift or grassum, and under the special condition, if the said reserved five acres be included in the said lease, that such lease, in so far as they are concerned, shall cease and determine at the first term of Martinmas, six months after the death, deprivation, resignation, or translation of the minister of the parish; such consent and approval of the heritors and the Presbytery to be signified by a certificate written on the lease or leases, and signed by the clerk to the heritors and by the moderator and clerk of such Presbytery; and the rent or rents payable under such lease or leases shall be paid and belong to the minister.

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4. A minister may, with consent of the Presbytery and heritors, sell or dispose of, for such fixed annual payment in grain or in money as may be agreed on, any servitude or right of pasturage over any lands, which servitude or right of pasturage is possessed by him as minister of the parish: Provided always, that if the proprietor of the lands over which such servitude or right of pasturage exists elect to purchase it absolutely, the purchase money shall be invested at the sight of the heritors and Presbytery on such securities and in such manner as the Court of Teinds shall direct, and the interests and proceeds only shall be paid to the minister.

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5. Subject to the provisions of this Act, the minister may from time to time, with the consent of the Presbytery and of the heritors, as hereinafter provided, make application to the Court by summary petition for authority to feu his glebe, or any part thereof, or to grant building leases thereon for any term not exceeding ninety-nine years.

6. Previous to making any such application the minister shall intimate his intention so to do to the Presbytery by a letter addressed to the moderator, and shall transmit therewith a copy of the proposed application, which intimation and application shall be laid by the moderator before the Presbytery at their first meeting after receiving the same; and if the Presbytery are of opinion that it would be for the interests of the benefice that the glebe should be feued or let on building leases, they shall signify their consent to such application, subject to such conditions, if any, as they think necessary or advisable, by a certificate to that effect written on a copy of the proposed application, and signed by the moderator and clerk. Consent of Presbytery be obtained before application made

7. Upon such certificate being granted, the minister shall call a meeting of heritors, such meeting to be summoned by intimation from the pulpit in the usual manner, and by notices, with a copy of the proposed application enclosed therein delivered or sent by post to each heritor or his known agent, at least thirty days previous to the day on which such meeting is to take place within the parish, such meeting to be held on a day and at an hour and at a place to be specified in such citation and notices, and at such meeting every heritor may vote by proxy or by letter under his hand. also consent heritors.

8. At that meeting a copy of the proposed application to the Court shall be submitted to such meeting; and if approved of by two-thirds in value of the heritors of such parish, the clerk to the heritors shall grant a certificate to that effect under his hand to the mintster. Consent of heritors how to be determined and proved.

9. Every such petition shall state the date of the petitioner's induction to the parish, the amount of the stipend and other sources of emolument attached to the living, the extent of the parish, the population according to the immediately preceding census, the nature and extent of the glebe, the purpose of the proposed feuing or granting building leases, the expected rate of feu-duty or rent, and the grounds on which the petitioner submits that benefit will arise to the minister and his successors in office by authority to feu or lease being granted; and there shall be produced therewith the certificate of the Presbytery and heritors, and the form of feu-charter or building lease proposed to be adopted. Particulars be stated in application

10. The Court shall appoint the petition to be intimated in the minute-book and on the walls in common form, and to be served upon all proprietors of lands and heritages conterminous with the Intimation be made of application

lands proposed to be feued or leased for building; and shall also appoint notice of the petition to be inserted once in the *Edinburgh Gazette*, and once a-week for three successive weeks in such local newspaper or newspapers as the Court may think proper.

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11. It shall be in the power of any proprietor of lands or heritages conterminous with the lands proposed to be feued or leased for building to appear and object to the application being granted, on the ground of injury to the value or amenity of his said lands or heritages, and it shall be in the power of the Court, on considering such objections, to give effect thereto by refusing the application in whole or in part.

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12. After intimation and advertisement aforesaid, the Court, on considering the petition, with or without answers from any party interested, may remit to such person or persons as they shall appoint to inquire into the facts stated in the petition, and to report his or their opinion or opinions thereon, and as to any conditions or restrictions subject to which the prayer of the petition should be granted.

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13. The Court may, by order or interlocutor, and subject to any conditions or restrictions they may deem expedient, grant such authority, and shall in such order or interlocutor fix the minimum rate at which the glebe or any portion thereof shall be feued or leased for building, and shall authorise and empower the petitioner and his successors in office at the sight of the heritors and the Presbytery, subject to the provisions of this Act, to grant and dispose of the glebe, or any part or parts thereof, in feu-farm, fee, and heritage, for the highest feu-duties, or in building leases for the highest rent in grain or in money, that can be got for the same, not being less than the said minimum, and that either by public auction or private contract.

t may prise ruction reets, &c.

14. The Court may also, on such application, authorise the minister to make and construct such streets, roads, passages, sewers, or drains in and through the glebe or any part thereof as the Court on inquiry may find reasonable or expedient, with the view of the more advantageous feuing or leasing thereof.

whom feu- es, &c., e made ble.

15. The said feu-duties and rents, and the interest of any monies arising from any sale or sales in fee-simple of any part or parts of the glebe invested as hereinafter provided, shall be taken payable to the

minister and his successors in office serving the cure of the parish for the time, in all time thereafter, and be recoverable by him or them: Provided that on the death of any minister, his widow, heirs, or executors shall have right to, and shall be entitled to receive and discharge, the said feu-duties and rents in the same manner and for the same length of time as is provided by the thirteenth Act of the third session of the second Parliament of Charles the Second, passed at Edinburgh the twenty-third day of August, One thousand six hundred and seventy-two, intituled Act for the Ann. due to the Executors of Bishops and Ministers, with regard to the Stipend of the Parish as Ann.; and provided further, that in the event of any circumstance causing a vacancy to be prolonged beyond the term during which such widow, heirs, or executors have a right to the said feu-duties and rents, it shall be lawful for the heritors of the parish and Presbytery of the bounds to uplift and to apply the said feu-duties and rents to the provision of spiritual superintendence and the supply of religious ordinances in the parish during the vacancy.

Further provisions as to feu duties.

16. Subject to the provisions of this Act, the feu duties which shall become payable under any contracts, dispositions, or charters of feu, or writs by progress, and the rents under any building leases, to be granted in virtue of this Act, shall in all time thereafter belong to the minister, and shall be held and enjoyed by him in lieu and place of the natural possession of such glebe, or the rents, mails, duties, and profits of the same, and subject always to the burden of payment of interest on the permanent burden after referred to, so long as it subsists: Provided that after feuing out or letting on building lease or selling the said subjects or any part thereof, in virtue of this Act, it shall not be competent for the minister or his successors in office, to make any demand upon the heritors, for providing him in a glebe or in any portion of land in lieu of the glebe land so feued, leased, or sold: Provided always, that nothing herein contained shall preclude or prejudice any claim which the minister may have to any additional glebe that might have been competent to him if this Act had not passed.

Right of pre-emption by proprietors whose lands are conterminous with the glebe.

17. When the Court shall have made an order or interlocutor granting authority to feu or let on building lease, and fixing the minimum feu-duty or rent, any proprietor whose lands are conterminous with the glebe mentioned in such order or interlocutor, may, within thirty days of the date of such order or interlocutor, intimate his willingness to feu or lease or to purchase so much of the

said glebe at such a rate of feu duty, or rent, or price as the Court may on a consideration of the whole circumstances of the case, and after directing such inquiry as they may consider necessary, determine; and if to feu or lease, undertaking to grant security over the whole or such part of his estate, in addition to the said glebe itself, as to the Court shall seem necessary for the regular and punctual payment of the feu duty or rent fixed by the Court; and on such intimation, and after such rate of feu duty and security therefor, or price, shall have been so fixed, the Court shall, in case of feuing or leasing, interpone its authority to the bond or other writ in security, and decern accordingly, and in case of sale shall pronounce a decree of sale thereof in favour of such heritor, on which he shall be entitled to obtain a charter from the Crown for payment of a blench duty of a penny Scots, and interpone their authority accordingly: Provided always, that such heritor shall not be entitled to obtain an extract of the said decree of sale until the price shall be consigned in one of the chartered banks in Scotland for behoof of the minister; and in every case of such sale the price, after deduction of all expenses connected with the application to the Court, shall be invested at sight of the heritors and Presbytery on such securities and in such manner as the Court of Teinds shall direct, and the interest or proceeds only shall be paid to the minister: and it is provided further, that it shall be lawful for any heir of entail in Scotland to burden the lands and estate of which he or she is in possession as heir of entail lying contiguous to such glebe for the amount of such price, or to give security over the same for the annual payment out of the clear yearly rents and profits of the said lands and estate, the interest of such sum calculated at four and one-half per centum, or the amount of such annual payment, not exceeding three pounds per centum of such clear yearly rents and profits after deducting all prior burdens and provisions, as the same shall be ascertained by an average of the five years immediately preceding the date of creation of such burden or security.

rovisions s to cost f appli- ation to ourt.

18. The Court, on the granting of any such order or interlocutor, or at any time thereafter, on the summary application of the minister on whose application the interlocutor or order was granted, or his heirs, executors, administrators, or assignees, shall inquire into and ascertain the sums which shall have been paid as the costs, charges, and expenses of applying for and obtaining such order or interlocutor and incidental thereto, and of making and constructing streets, roads, passages, sewers, or drains in or through the glebe or any part thereof,

and shall decern the amount thereof a permanent burden upon the glebe; and the interest thereof, until extinguished, as after provided or otherwise, shall form a first charge on the whole produce and revenue of the said glebe.

Casualties to be applied to extinction of costs, and provision as to payment of costs.

19. As long as any such burden shall remain unpaid, the casualties of superiority which shall become payable under any contracts, dispositions, or charters of feu, or writs by progress for entering heirs or successors to be granted as aforesaid, as well as any payments which may be received from the grantees thereof in respect of the construction of roads, sewers, or drains, shall be invested, at the sight of the heritors and Presbytery, on such securities and in such manner as the Court of Teinds shall approve, as a sinking fund to meet the said burden, and the interest of the said fund shall be paid to the minister for the time being; and as soon as the said fund shall amount to a sum sufficient to pay the said burden, the same shall be paid off; and thereupon the casualties of superiority thereafter to become due shall form part of the income of the minister for the time being, and be payable to him.

Title, how to be granted.

20. The minister, with the consent of the heritors and the Presbytery, as certified by the clerk to the heritors and by the moderator and clerk of the Presbytery, shall grant, subscribe, and deliver to the feuar or feuars, purchaser or purchasers, lessee or lessees, all contracts, feu charters, dispositions in feu, writs of confirmation, resignation, *clare constat*, or acknowledgment, dispositions, conveyances, or other deeds or writs, containing all usual and necessary clauses for feudally conveying and vesting the subjects so feued, sold, or leased in the parties taking the same on feu or building lease, or purchasing the same, and the heirs or similar successors who shall thereafter acquire right to the same; and the said contracts and other deeds or writs so to be granted shall be deemed and held to be as legal and valid titles of property in feu and heritage, or fee simple, or lease (as the case may be), of the properties so feued or conveyed to the several persons in whose favour respectively the same shall be granted, and their heirs and disponees, as if granted by a proprietor or superior with a completed feudal title holding immediately of the Crown, and the subjects so feued or conveyed or leased under the authority of this Act shall be subject to payment of poor rates, any law or custom to the contrary notwithstanding; and the said contracts and other deeds shall be recorded in the books of the heritors.

Full value to be stipulated to be paid without taking money by way of fine, &c.

21. In all and each of the said contracts and other deeds or writs the full value of the ground thereby feued or leased shall be stipulated to be paid in perpetual annual feu duties, or rents for the endurance of such building leases, in grain or in money, payable half-yearly, without taking any sum or sums of money, or other matter or thing whatsoever, by way of fine, foregift, or grassum; and all casualties of superiority accruing on the renewal of the title to heirs or singular successors shall be taxed at a duplicate of the annual feu duty; and all feu duties, casualties, or rents shall be properly and legally secured upon the ground for which the same are payable, and on the buildings that may be erected thereon, under the usual penalties and forfeitures according to the law and practice of Scotland in feu holdings.

Minister to enjoy same privilege as other superiors.

22. After any such contracts and other deeds or writs shall hav been executed, the minister shall have and enjoy all the same remedies for enforcing payment of the said feu duties and casualties of superiority thereby stipulated and agreed to be paid, and generally all other rights and privileges, which by the law and practice of Scotland belong and are competent to other superiors in feu holdings; and the parties taking any lands in feu under the provisions of this Act, and their heirs and successors, shall have and enjoy all the rights and privileges which by the law and practice of Scotland belong and are competent to vassals in feu holdings, in the same manner and to the same effect as if they held the said lands of and under the minister as a superior holding immediately of the Crown.

Court to pass Acts of Sederunt.

23. The Court shall pass such Acts of Sederunt as they may consider necessary to regulate the form of procedure to be adopted under this Act for effectually carrying out the purposes thereof.

Saving existing Acts authorizing the feuing of Glebes.

24. This Act shall not affect any Act of Parliament now in existence affecting the feuing of Glebes in Scotland, or anything done or contracted to be done thereunder.

II.

An Act to amend the Procedure in regard to Ecclesiastical Buildings and Glebes in Scotland.—[31st July 1868.] 31 & 32 Vict. c. 96.

Whereas it is expedient to amend the procedure in regard to ecclesiastical buildings and glebes in Scotland: Be it enacted by

the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Interpretation of terms.

1. Where not inconsistent with the context, the following expressions shall in this Act have the meanings herein-after assigned to them:

The expression "church" shall include all necessary fencing of the site whereon the church is built, in so far as the heritors are now by law bound to provide the same:

The expression "manse" shall include all necessary and usual offices, garden, and garden walls which the heritors are now by law bound to provide:

The expression "parish" shall include united parishes:

The expression "glebe" shall include grass glebe or minister's grass:

The expression "lands and heritages" shall have the meaning assigned to it in the Act seventeenth and eighteenth Victoria, chapter ninety-one, intituled An Act for the Valuation of Lands and Heritages in Scotland:

The expression "the Lord Ordinary" shall mean the Lord Ordinary in teind causes in the Court of Session:

The expression "Sheriff" shall include Sheriff-Substitute:

The expression "heritor" shall mean any proprietor of lands and heritages at present liable in the assessments which may be imposed according to the real or valued rents thereof, as the case may be, for the purposes set forth in the third section hereof:

The expression "valued rent" shall in the county and lordship of Zetland mean and include "number of merks land."

Short title.

2. This Act may be cited as the "Ecclesiastical Buildings and Glebes (Scotland) Act."

Heritors dissatisfied with determinations of Presbyteries

3. From and after the passing of this Act, if, in the course of any proceedings before any Presbytery of the Church of Scotland relating to the building, rebuilding, repairing, adding to, or other alteration of churches or manses, or to the designing or excambing of sites therefor,

regard to urches, anses, ebes, &c., ay remove roceedings appeal to heriff.

or to the designing or excambing of glebes or additions to glebes, or to the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof (including the building or repairing of churchyard walls), any heritor or the minister of the parish shall be dissatisfied with any order, finding, judgment, interlocutor, or decree pronounced by such Presbytery, it shall be competent for such heritor or minister, within twenty days of the date of such order, finding, judgment, interlocutor, or decree, to stay such proceedings by appealing the whole cause as hereinafter provided; and such appeal, on being duly intimated to the clerk of the said Presbytery, shall have the effect of staying the Presbytery from taking any further steps in connection with said proceedings: Provided always, that if no such appeal is taken and duly intimated within the period foresaid, every such order, finding, judgment, interlocutor, or decree not appealed from as aforesaid shall be final and not subject to review: Provided also, that if the heritor or minister taking any appeal as aforesaid shall unduly delay to follow forth the same, it shall be competent for any other heritor, or for the minister of the parish, or for the clerk of the Presbytery of the bounds by the authority of the said Presbytery, or for the clerk of the heritors by the authority of the heritors, to sist himself as a party to said appeal, and to follow forth the same as the original appellant could have done.

ppeal, how be taken.

4. An appeal under this Act shall be taken by the appellant or his agent presenting a summary petition to the Sheriff of the county in which the parish concerned is situated, praying him to stay the proceedings before the Presbytery, and to dispose of the same himself: Provided, that where the parish is situated within more than one county the petition may be presented to the Sheriff of either county; and the Sheriff to whom the first application is made shall have the same power, authority, and jurisdiction as if the whole of the parish were situated within his county.

timation of peals.

5. All appeals under this Act shall, within ten days of their presentation, be intimated by circular, transmitted by the appellant or his agent through the Post Office, addressed to each heritor or his known factor or agent, to the clerk of the heritors, if there be such clerk, to the minister of the parish (if the benefice is full at the time), and to the clerk of the Presbytery of the bounds: Provided always, that where the number of heritors of the parish exceeds forty, it shall not be necessary to address a circular to each heritor or his factor or agent, but it shall be sufficient if a copy of the petition of appeal is

affixed to the most patent door of the church for two successive Sundays next following the presentation of the petition, and if notice of the presentation of the petition is inserted in a newspaper circulating in the county during each of two successive weeks.

No written pleadings unless specially ordered.

6. Upon any petition of appeal under this Act being considered by the Sheriff he shall satisfy himself that the intimation before mentioned has been made, and, if not duly made, he shall order such intimation as he shall consider necessary, and thereafter he shall inquire into the circumstances, and hear the parties, by themselves or their agents, without any written pleadings, unless the same shall be specially ordered by him; but he shall take a note of the proceedings and of any evidence which may be led before him, and shall dispose of the petition as shall be just.

Proceedings for rebuilding of church or manse.

7. In any proceedings for the rebuilding of a church or manse the Sheriff shall, unless the matter has been decided by the Presbytery by a judgment or finding final under the third section hereof, *primo loco*, consider whether, in accordance with the law as at present existing, a new edifice should be erected, or whether the existing buildings should be repaired, and for that purpose he may take such evidence and make such remits to architects or other professional persons as he shall think right, and he shall pronounce a finding accordingly: Provided always, that, if the Sheriff see cause, he may dismiss the petition.

Proceedings for rebuilding or repairing of church or manse.

8. In any proceedings for the building or repairing of a church or manse the Sheriff shall inquire, with such assistance of architects or other professional persons as he shall think proper, into the truth of the allegations contained in the petition; and if he shall be satisfied that, in accordance with the law as at present existing, a church or manse should be built, or that repairs are necessary, he shall pronounce a finding accordingly: Provided always, that, if he see cause, the Sheriff may dismiss the petition.

Where parties differ or delay as to erecting or repairing, Sheriff to cause buildings or repairs to be executed.

9. Where the Sheriff shall find that, in accordance with the law as at present existing, a church or manse must be built, rebuilt, or repaired, but the heritors shall delay or refuse to give effect to it, he shall remit to an architect or other professional person to prepare plans and specifications for such building, rebuilding, or repairs, and after hearing any objections thereto he shall approve of or modify the

same, and ordain the same to be executed, and, if need be, he shall remit to an architect or other professional person to receive tenders for the execution of said plans and specifications, to accept of such tenders as shall seem best, and to superintend their execution; and the Sheriff shall find the heritors who are now liable in the expense of such building, rebuilding, or repairs, and shall assess and allocate the same, together with a sufficient sum to cover the expenses of collection upon them, according to their respective real rents, as these shall appear on the valuation roll or rolls in force at the date of such assessment and allocation, or according to their valued rents, as the case may be, and shall grant decree for payment thereof in such instalments and under such conditions as he shall direct.

roceedings building repairing urchyard lls.

10. In any proceedings for building or repairing churchyard walls the Sheriff shall inquire as to the truth of the petitioner's allegations, and if he shall find that the walls should be built or repaired, but the heritors shall refuse or delay to give effect to such finding, he shall remit to some person to prepare the necessary specifications (on which, if required, he shall hear parties), and he shall approve of or modify the same, and, if need be, remit to some person to take and accept tenders, and superintend the execution thereof, and he shall assess, allocate, and decern for the expenses thereof, as in the case of building, rebuilding, or repairing a church or manse.

roceedings designing excambing ebes, &c.

11. In any proceedings for designing a glebe or churchyard, or the site of a church or manse, or additions to any of the same, or for excambing a glebe, churchyard, site of a church or manse, or any portions thereof, the Sheriff shall inquire into the truth of the petitioner's allegations, and for that purpose may take such evidence, and make such remits to land valuators, surveyors, or other persons of skill, as shall seem necessary, and shall dispose of the petition in accordance with the law as at present existing, and shall assess and allocate the expense of acquiring land (including any buildings thereon) for such glebe or churchyard, or for the site of such church or manse, or for additions to any of the same, and decern therefor, as in the case of building, rebuilding, or repairing a church or manse: Provided always, that the Sheriff's decree of designation or excambion shall have the same force and effect as a decree of designation or excambion pronounced by a Presbytery before the passing of this Act, except as herein-after provided: Provided also, that it shall not be competent for the Sheriff to pronounce any decree of excambion, unless it shall appear, under the hand of the clerk of the Presbytery

of the bounds, that the Presbytery have given their consent to such excambion.

Mode of declaring a "Free Manse."

12. After the completion of the works ordered in the course of any proceedings for the building, rebuilding, or repairing of any manse, it shall be competent for any heritor of the parish to move the Sheriff to declare it a "Free Manse;" and if the Sheriff shall be satisfied that the manse is in a state of thorough repair, he shall find and declare accordingly, and his decree shall have the same force and effect as a decree in similar terms pronounced by a Presbytery before the passing of this Act would have had: Provided always, that such decree shall have effect only till the expiration of fifteen years from its date, or until the appointment of a new minister to the parish, whichever event shall first happen.

Sheriff, if required, personally inspect premises or locality.

13. In any proceedings for the building, rebuilding, or repairing of any church or manse, or for the designation of any glebe, churchyard, site of any church or manse, or of any additions thereto, or for the excambion of any glebe, churchyard, site of any church or manse, or of any portions thereof, it shall be competent for the parties, or any of them, to require the Sheriff to make a personal inspection of the premises or locality, as the case may be; and the Sheriff shall comply with such requisition.

Decrees, & of Sheriff be final.

14. All orders, findings, judgments, interlocutors, or decrees pronounced by any Sheriff under the authority of this Act shall be final and conclusive, and not subject to review by any Court whatsoever, unless an appeal shall be taken to the Lord Ordinary against the same in manner herein-after mentioned.

Sheriff or Lord Ordinary may dispose of questions expenses.

15. The Lord Ordinary or the Sheriff, as the case may be, shall be entitled to dispose of all questions of expenses, and to grant decree therefor.

Form of n of appeal.

16. An appeal to the Lord Ordinary under this Act may, when otherwise competent, be taken by a note of appeal written at the end or on the margin of the order, finding, judgment, interlocutor, or decree appealed from, or by a separate note of appeal lodged with the Sheriff-Clerk; and such note of appeal may be in the following or similar terms:

"The petitioner [*or* respondent] appeals to the Lord Ordinary in Teinds Causes:"

And the said note shall be signed by the appellant or his agent, and shall bear the date on which it is signed.

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17. It shall not be competent to take or sign any note of appeal after the expiration of twenty days from the date of the order, finding, judgment, interlocutor, or decree complained of in any proceedings before the Sheriff under this Act, and during such period of twenty days extract shall not be competent; but on the expiration of the foresaid period, if no appeal shall have been taken, the Clerk of Court may give out the extract.

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18. Such appeal shall be effectual to submit to the review of the Lord Ordinary the whole orders, findings, interlocutors, judgments, or decrees pronounced by the Sheriff in the cause in so far as not final as herein-before provided, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Lord Ordinary to do complete justice without the necessity of any counter appeal; and an appellant shall not be at liberty to withdraw or abandon an appeal without leave of the Lord Ordinary; and an appeal may be insisted in by any party in the cause other than the appellant, in the same manner and to the like effect as if it had been taken by himself.

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19. The Sheriff-Clerk shall, within two days after the date of any appeal being taken, send written notice of such appeal to the respondent or his agent: Provided that the failure to give such notice shall not invalidate the appeal; but the Lord Ordinary may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper.

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20. Within two days after the appeal shall have been taken the Sheriff-Clerk shall transmit the process to the Depute-Clerk of Session attached to the Bar of the Lord Ordinary, who shall subjoin to the appeal a note of the day on which it is received; and it shall be lawful for either the appellant or the respondent at any time after the expiry of eight days from the date of such note to enrol the appeal; and when the appeal is called in the roll, it shall be competent for the Lord Ordinary to order the note of appeal and any other papers or productions to be printed, or the Lord Ordinary may dispense with the printing of the same; and in case the papers ordered to be printed shall not be printed by the appellant, or in case he shall not move in the appeal, it shall be lawful for the Lord Ordinary, on a

motion by any other party in the cause, to grant an order authorizing the party moving to print the papers aforesaid, and to insist in the appeal as if it had been taken by himself: Provided always, that when any appeal is taken to the Lord Ordinary, he shall have the whole powers which are herein-before conferred on the Sheriff: Provided also, that all orders, findings, interlocutors, judgments, or decrees pronounced by the Lord Ordinary shall be final and not subject to review.

Certain pro visions of 8 9 Vict. c. 1 and 23 & 24 Vict. c. 106 incorporated with this A

21. The provisions of the "Lands Clauses Consolidation (Scotland) Act, 1845," and the "Lands Clauses Consolidation Acts Amendment Act, 1860," with respect to the purchase and taking of lands by agreement, or otherwise than by agreement, shall be incorporated with this Act; and for the purposes of this Act the expression "the promoters of the undertaking" wherever used in the said Acts shall mean the heritors of any parish under this Act: Provided always, that the provisions in the said Acts "with respect to the purchase and taking of lands otherwise than by agreement" shall have effect only in respect of such lands as the Sheriff of the county shall have designated as above provided for: Provided farther, that the provisions in the said Acts with respect to lands acquired "by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof," shall not be restricted in operation to any fixed period after the purchase of such lands.

Mode of cal ing meetings of heritors.

22. Notwithstanding any law, statute, or usage to the contrary, meetings of heritors for any purpose whatsoever may be called in the following manner; that is to say, on the requisition of the clerk of the heritors, or of any heritor or heritors possessed of lands yielding one fourth part of the total real rental of the parish as the same shall appear on the valuation roll or rolls then in force, or valued at one fourth part of the total valued rent of such parish, as the case may be, or, when he shall himself think such meeting expedient or necessary, the minister of the parish shall cause an intimation of the meeting to be given immediately after divine service in the forenoon, and circular letters containing a similar intimation to be sent to all heritors of the parish at least twenty-one free days before such meeting shall take place; provided that where in any parish the number of heritors exceeds forty, it shall not be necessary to send circular letters as before provided, but in lieu thereof intimation of the meeting shall be given by the minister by advertisement in a newspaper

circulating in the county once during each of two successive weeks between the intimation from the pulpit before mentioned and the day for which the meeting has been called.

All parochial assessments to be imposed according to the real or valued rent.

23. All assessments for the purpose of defraying expenses connected with the building, rebuilding, or repairing of churches or manses, or the designing or excambing of sites therefor, or the designing or excambing of glebes or additions to glebes, or the designing or excambing of sites for additions to churchyards, and the suitable maintenance thereof (including the building, rebuilding, or repairing of churchyard walls), in any parish, shall be imposed in manner after mentioned upon all lands and heritages within such parish according to the yearly value thereof as the same shall appear on the valuation roll or rolls in force in such parish at the time when such assessments are made, or according to the valued rent of such lands and heritages, as the case may be; and such assessments shall be imposed and recovered according to the present law and practice: Provided always, that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, all assessments for the repair thereof shall be imposed on such heritors according to such valued rent.

Act not to increase existing burdens.

24. Nothing herein contained shall have the effect of extending or increasing the burdens which now by law rest upon the minister or heritors of any parish in respect of any of the matters above set forth. Nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment.

Repeal of statutes, &c., so far as inconsistent with this Act.

25. All laws, statutes, and usages shall be and the same are hereby repealed, in so far as they are at variance or inconsistent with the provisions of this Act: Provided always, that the same shall continue in force in all other respects.

III.

An Act to amend the Law regarding Ecclesiastical Assessments in Scotland.—[30th July, 1900.] 63 & 64 Vict. c. 20.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and

Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

When assessment to be on valued rent.

1. Where in any parish it shall be necessary to impose an ecclesiastical assessment which, according to previous use and wont in the parish, would fall to be imposed according to the valued rent, but which it would be competent to impose according to the real rent, it shall be lawful for any valued rent heritor to request the clerk to the heritors to summon a meeting of valued rent heritors in the manner prescribed by section twenty-two of the Ecclesiastical Buildings and Glebes (Scotland) Act; and if at such meeting it is resolved by a majority of not less than two-thirds in value of valued-rent heritors, voting personally or by proxy, that the amount shall be imposed according to the valued rent, then such assessment shall be imposed according to the valued rent, any law to the contrary notwithstanding.

31 & 32 Vict. c. 96.

Inspection, &c., of scheme of assessment on real rent.

2. When it has been resolved to levy an assessment in any parish according to the real rent, intimation of such resolution shall be made to the presbytery of the bounds and to the kirk-session of such parish, and thereafter a scheme showing the heritors proposed to be assessed and the amount of their respective assessments shall be made up, and shall be open, free of charge, to inspection by any heritor or other party interested for a period of at least thirty days at some convenient place in the parish, and intimation of the place where, and the period for which, the scheme is to be open to inspection, and the amount proposed to be levied on the heritor to whom it is sent shall be made by circular-letter sent by their clerk to all the heritors prior to the commencement of such period.

Exemptions from assessment on real rent.

3. From and after the commencement of this Act, whenever any ecclesiastical assessment is imposed upon lands and heritages in any parish in Scotland according to the real rent thereof—

(1.) No part of such assessment shall be imposed or levied upon lands and heritages occupied solely as the church and accessory buildings or burying-ground attached of any religious body in Scotland, or as the dwelling-house with offices, or garden or glebe land attached, of the minister of such church; and

(2.) The rental on which each heritor shall be assessed shall be his total rental within such parish as appearing in the valuation roll (whether such rental consists of one or more subjects),

but subject to deduction of the sum of fifty pounds when the amount of the deficiency which would be created in the total amount of the assessment by allowing such deduction to every heritor has been paid to the collector of the assessment by the kirk-session:

Provided always that no heritor, who by reason of any exemption or deduction allowed by this section is relieved altogether from assessment in respect of the execution of any work, shall be entitled at any meeting of heritors to take part in the discussion of, or to vote upon, any question concerning any plans for or the execution of the said work, or the defraying of the expenses of the same.

Definitions. 31 & 32 Vict. c. 96.

4. In this Act, except where inconsistent with the context, expressions have the meaning attached to them in the Ecclesiastical Buildings and Glebes (Scotland) Act. The expression "ecclesiastical assessment" means an assessment for any of the purposes mentioned in section twenty-three of the said Act. The expression "valued-rent heritor" means a heritor liable to contribute to ecclesiastical assessments where the same are imposed according to the valued rent. The expression "real-rent heritor" means a heritor liable to contribute to ecclesiastical assessments where the same are imposed according to the real rent.

Short title and commencement of Act.

5. This Act may be cited as the Ecclesiastical Assessments (Scotland) Act, 1900, and shall commence to have effect from and after the first day of January one thousand nine hundred and one.

IV.

INTERLOCUTORS by SHERIFF STRACHAN, Sheriff-Substitute of Lanarkshire, *in causa* THE HERITORS OF THE PARISH OF SHETTLESTON against THE PARISH MINISTER, &c.

Glasgow, 12*th August*, 1897.—Having heard parties' procurators, and considered the proof and productions, and personally visited the premises, Finds that in accordance with the law as at present existing it is inexpedient to repair the Parish Church of Shettleston, and that a new edifice must be erected, and appoints parties to be heard on the 7th day of October next, at 3 P.M., as to the further procedure in the cause, reserving in the meantime all question of expenses.

Note :—This case comes before me on an appeal by the Heritors of the Parish of Shettleston against a judgment or decree by the Presbytery of Glasgow by which they have found that the Church of the Parish of Shettleston is in a ruinous and dangerous condition, and have decreed and ordained it to be taken down, and a new church erected.

The church in question was built about the year 1751. The parish was then only a *quoad sacra*, and it continued to be so until the year 1847 when it was erected into a parish *quoad omnia* (except as regards poor law administration) and the church then became a Parish Church. It is admitted that it is now decayed and dilapidated and unfit for its purpose; and the question I have to determine is whether it is to be repaired or an entirely new church erected in its stead.

I was of opinion, when the case first came before me (involving as it did a matter of some public interest and importance), that the facts bearing on the condition of the church, and on the expediency of repairing or rebuilding it, could be ascertained better by a proof, than by a remit to a practical person, seeing that his opinion could not be tested by any cross-examination, and that by accepting it I would be compelled to base my judgment on somewhat narrow and restricted *data*. I cannot, of course, say what the result would have been had I followed the latter course; but I have no hesitation in stating, that nothing could be more unsatisfactory than the voluminous evidence that has now been piled up in this case. I have never known a more striking instance of the unreliability of expert evidence. It would be very surprising if it were not so common, to see the extent to which men of high character and ability can, when acting as experts, entertain and express the most conflicting and irreconcilable opinions regarding matters with which they must be familiar in their own every day experience.

Before dealing with the facts of the case, one or two questions of a legal character must be determined; and as regards these, I think it only necessary to refer to the case of *Bertram* v. *the Presbytery of Lanark* (*Carnwath* case), 20th July, 1864, 2 M'Pherson 1406—which is the latest and in my opinion, the most authoritative decision on the subject.

The first question that arises for decision is this. Is there any legal standard or criterion for determining whether a church is to be repaired or rebuilt? In regard to this matter it is held in the case referred to that, although no definite arithmetical rule can be laid down on the subject, yet it may be considered as settled, that if the

expense of repairing a church will only be about one half the cost of building a new one, in that case a new church, generally speaking, cannot be asked for; but on the other hand, if the repairs will cost three fourths of the expense of a new church, then a new church may be asked for. If the expense, however, should fall in the large debateable land within these limits, the Court will be influenced one way or the other by special circumstances. And further it may be held to be settled that the two things to be compared are not the expense of repairing the old church and the cost of building a new one with adequate accommodation, but the expense of rebuilding the old church, and the cost of building a new one with the same accommodation as the old.

The second point to be determined is the meaning to be attached to the word "repairs" when used in connection with the question. Now I think it clear that it is not to be understood in the narrow or restricted sense of merely mending, refitting or restoring to a good or sound state something which has become decayed, or been destroyed or injured. It embraces alterations and additions usually falling under the term "reconstruction" where those are necessary for putting the church into a proper and efficient condition. Thus, in the case of *Bertram* above referred to, a large portion of the expense taken into account by the Court in determining whether or not the church should be repaired, consisted of the estimated cost of removing the gallery stair from the inside to the outside of the church.

The third point is this: What is the criterion or standard by which the sufficiency of the repairs is to be determined. The heritors' contention on this question is that their duty is discharged if they put the church in as good a condition as it was at the time of its erection in 1751. The case, they say, is entirely different from that of a rich city congregation. The members of that congregation are spending their own money, and can do with it what they please, while the heritors being burdened with the cost of a church which the great majority of them do not attend, and in which they have no interest, are bound to do nothing more than provide a building in which the congregation can worship without any risk of injury to their health. In fact they regard their obligation very much in the same light as the obligation to make provision for the poor, which is considered to be discharged by supplying them with the plainest food and the cheapest clothing. This is, in my opinion, an entirely mistaken view on their part. There are, unquestionably very great differences of opinion as to the justice or expediency of providing a church for a particular congregation at the expense of the owners of

property in the parish; but there can be no doubt that so long as that is the law of the country, it must be administered in a fair, reasonable and equitable manner. What the law requires on the part of the heritors is that they provide and maintain in the parish "a suitable and comfortable place of worship." There can, of course, be no formal standard by which the sufficiency of these equipments can be tested; that must be left to the Court to determine in each particular case. I do not think that I should go far astray were I to hold that the standard in the present case may be taken to be the condition into which a modern congregation, possessing the requisite means, would desire to put their own church.

The respondent in this case, who is the minister of the parish, maintains that if the church is to be repaired, the following operations will require to be carried out:—

1st. *The present roof to be entirely removed and a new one put in its place.*—The necessity of this operation is one of the very few points in the case about which the parties are agreed. The one thing here upon which they differ is as to the placing of felt beneath the slates on the roof. The heritors regard this as unnecessary, the minister being of different opinion.

2nd. *The whole or at least the greater part of the back wall to be taken down and rebuilt.*—Both parties were apparently at first agreed as to only a partial rebuilding varying from thirty-six to forty-four feet being required, but latterly the minister took up the position that it is necessary to have the whole wall taken down and rebuilt. I am of opinion that a rebuilding to the extent originally proposed by the minister would be sufficient.

3rd. *That the present flooring, consisting one half of wood and the other half of asphalt, will require to be removed, and entirely replaced by a new wooden floor.*—The parties differ as to the manner in which this should be carried out. The heritors propose that a bed of asphalt should be laid over the present floor area, and the joists of the floor laid thereon; while the minister considers that the space should first be excavated, and that on the asphalt floor there should be an erection of brick piers, on which the joists should be laid, thus providing a means of ventilation underneath the flooring. In order, however, to have a proper air space between the piers there would require to be gratings and other appliances on the outside for the air getting through, but there can be no doubt that the level of the ground does not admit of this, and the proposal must be dismissed as impracticable.

4th. *Entirely new seats to be provided in the area of the church.*—

According to the minister's evidence the present pews (which are of the old-fashioned type with high backs and narrow seats) are very uncomfortable, and quite out of keeping with modern ideas, and the floor of the church being affected with dry rot it would be dangerous to replace the old pews, which have been in contact with the floor and the rot, or to make any use of the old wood (which is also considerably decayed) in connection with the new seats. The heritors on the other hand say that the existence of dry rot in the church is purely imaginary, that the pews are at present quite suitable and comfortable, and that so far from the wood being decayed, it consists of a superior class of pine which cannot now be obtained, and is in an admirable state of preservation. The controversy on this head which has been carried on so warmly between the parties is by no means edifying or creditable to them. The witnesses on both sides profess to be perfectly familiar with dry rot, and to be constantly meeting with it in the course of their business—some of them even having been obliged to have experience of it in their own houses, and yet when shown a piece of rotten wood, the experts on the minister's side emphatically declare that it is affected by dry rot, while those on the heritors' side with no less confidence maintain that it is nothing of the kind, that it is simply ordinary damp rotting. It is very curious that notwithstanding their professed familiarity with it, none of the witnesses are able to lay down a common rule by which dry rot can be recognised. Both kinds of rot, dry and damp, admittedly produce a fungus, but what is the distinction between them none of the experts is able to state. Viewing it as a mere matter of evidence, I have no hesitation in holding that the dry rot theory has not been substantiated. The present state of the wood is, in my opinion, sufficiently accounted for by ordinary decay or damp, and I see no reason whatever to attribute it to any other cause. Besides, notwithstanding all the time wasted over this point, it is really not of the slightest importance. The present flooring is to be entirely removed, a bed of concrete laid down, and a new flooring placed above it. To say that after this is done the dry rot—if there be dry rot—can be communicated to the pews (which are admittedly at present quite free from it) while placed on the new floor, appears to me to be extravagant in the extreme. I am clearly of opinion that the present pews are "unsuitable and uncomfortable," and ought to be replaced by pews of a different size and construction, and that there is nothing to prevent the old wood being used so far as found to be suitable for the purpose.

5th. *The entire gallery to be taken down and replaced by a new one.*—

This gallery, according to the evidence from the minister, is in a most dilapidated and unsafe condition. The back wall has bulged out to such an extent that it has actually fallen away from the joists which rest on it, and it has been ascertained that the joists in the other walls have only a rest varying from three quarters to three inches, while the ends which come in contact with the wall are entirely rotten, and so also are the ends of the struts which have been put in to support the joists—the beam on the inner row of pillars, and on which the gallery joists rest, being greatly worm-eaten, and in an advanced state of decay; there is an open space under the seats which cannot be reached—there being no floor there—and in which there is an accumulation of the dirt and dust of years; the wooden lining along the walls is rotten; the seats are most defective in construction and arrangement, while the wood-work of these seats and of the passages is very much decayed. According to the evidence for the heritors all this is pure imagination. The ends of the joists are no doubt rotten, but this, they say, is of no consequence. They propose to put in new joists, in addition to the old ones, and these are to rest on a beam running along the walls and supported by corbels fastened into them. The gallery beams on which the joists rest are no doubt somewhat worm-eaten, but that is confined to the surface—the heart being perfectly sound; and with regard to the seats, they are as comfortable as any to be found in the majority of churches, and the wood-work of the seats and passages, though somewhat worm-eaten, is sound. I am clearly of opinion that the minister's evidence accurately represents the condition of the gallery, and that it requires to be entirely taken down with the exception, perhaps, of the front portion of it, resting on the beams, which appears to be sound, and suitably enough arranged. The gallery seems to have been badly constructed, and presents a very dilapidated appearance. The arrangement of the seats is nearly as bad as it could well be, and the construction is of the most primitive character. Their breadth is about eight or nine inches, while their backs are very high and perpendicular, affording the minimum of comfort with the maximum of inconvenience. The wood-work of the seats and passages which was very rough and coarse to begin with, is, beyond question, in an advanced stage of decay. As to the support by corbels—that I consider is neither repair nor reconstruction. It falls within the category of patching or cobbling, and is entirely inadmissible.

6th. *There must be a damp course inserted both in the back wall when restored, and also in the other three walls if allowed to remain.*—I cannot understand why such undue prominence was given to this

proposal in the course of the proof, and so much time wasted over it. The suggestion is that the old walls, which are over three feet in thickness, should be cut through at their base to admit of a course of Caithness pavement being inserted into them, and that this is to be done at an expense of £136. This proposal appears to me to be simply preposterous, and I am satisfied it would not for a moment be entertained by any practical man, except for the purpose of giving evidence. The damp course is a modern idea, and there is no such thing in any city church in Glasgow. While properly enough put into new churches, to insert it in an old structure like this, is I think out of the question. Besides, the evidence of Dr. Wilson, the Medical Officer of Health, who was examined on the part of the minister, shows clearly that even if put in, it would be of no practical use, and the object in view can be equally well attained by simply lathing and plastering the walls. "I am not prepared to say" (Dr. Wilson states), "that if it is lathed and strapped the inner surface would still be damp if it had not a damp course."

7th. *All the walls to be lathed and plastered.*—This has never been done; and while the heritors propose to lath and plaster the new back wall, they maintain that it is quite unnecessary to do so as regards the other walls. Now whatever may be thought of lathing and plaster in general, I have no hesitation in saying that dealing with such damp walls as those of this church, lathing and plastering are an absolute necessity.

8th. *The vestry will require to be repaired.*—The vestry is a small building standing in a corner of the churchyard, at a short distance from the church. Not one of the witnesses for the heritors ever looked at it, and it is not considered by them to be part of the church, or a structure which they are bound to maintain. This, I think, is a mistake on their part. The vestry is, in my opinion, a part or adjunct of the church. It was taken over by the heritors when the Parish was erected in 1847, and has since been maintained by them, and will require to be so. As to its present condition it is simply scandalous. I have scarcely ever seen a more dilapidated, depressing and uncomfortable looking place.

9th. *A new mode of heating the church must be adopted.*—At present the heating apparatus consists of what is termed a Gill's Stove, that is a stove built into the back wall, and intended to force heated air into the church through an opening in the wall. It is represented by the heritors to be quite sufficient for the purpose, and they propose no change. This, in my opinion, is most unreasonable. It would be difficult to imagine anything more primitive than this system of

heating, or anything more useless for the purpose it is intended to serve. It could only be termed a heating system on the *lucus a non lucendo* principle. According to the evidence it does force some heated air into the church, but it does so to the extent only of a few pews in the immediate vicinity of the opening of the wall—these favoured places being made uncomfortably hot, while all beyond is left out in the cold. The minister proposes to abolish this system altogether, and substitute in its place the low pressure hot-water system now in common use in most churches; and I have no doubt whatever as to the necessity of this being done.

10th. *A proper system of ventilation to be adopted.*—At present there is no attempt whatever at ventilation beyond the primitive method of opening the windows. The heritors propose to adopt what is known as the Hopper system, consisting of openings in the panes of glass in the windows. The effect of this system according to the evidence would be the passage of a constant current of cold air within a foot or so of the heads of the people sitting in the pews. The minister proposes to have ventilators, ventilating shafting and fret panels, and in my opinion that system, or something like it, would require to be adopted.

11th. *A system of drainage would require to be adopted from the church to the public sewer in the adjoining street.*—This the heritors represent to be totally unnecessary. There is at present, they say, a rubble drain passing along the front of the church, with which the conductor from the front part of the roof communicates, and all that is required is to form a communication between this drain and the conductors from the porches and the back part of the roof. This I must regard as somewhat extravagant. There is great doubt as to the existence of the rubble drain referred to, and certainly no one knows where it leads to, or where is its outlet if it has any. There really appears to be no drainage of any kind at present in connection with the church, and the rain and surface water have in consequence, no doubt, found their way into the foundations, and done much to produce the extreme dampness with which the church is affected. It may be that the system of spigot and faucit glazed pipes with Buchan's taps, proposed by the minister, is too elaborate and costly, but something of the kind suggested is an absolute necessity.

12th. *New plumber work and gas fittings to be supplied.*—The heritors as usual maintain that nothing of the kind is necessary. Not one person, they say, has been adduced in the course of the proof who has stated that the present fittings are not perfectly suitable and sufficient. That may be so, but they forget that if the church were

to be reconstructed the old fittings, which are all of a very primitive character, would be quite obsolete, and new ones would require to be provided, suitable to and in harmony with the altered surroundings.

It will thus be seen that, speaking generally, I am of opinion that if the church is to be repaired all the operations proposed by the minister, with the exception of the damp course, will require to be carried out. I am not, however, prepared to say that this must be done in the manner and to the extent proposed by him; or that the estimate made up by his skilled witnesses is to be held conclusive as to the cost. There is a great deal of evidence on the other side to the effect that this estimate is considerably exaggerated, and that the necessary work could be done at a much smaller expense. It must certainly be kept in view that the estimate is not the work of a neutral or disinterested person, such a judicial reporter would be, but has been prepared by expert witnesses, acting in the interest of one party to the cause. According to this estimate the expense of repairing the church would be £2224 0 0

From this there falls to be deducted, in my opinion—

1st, The estimated cost of the damp course	£136 10 0	
2nd, A reasonable allowance for excess of over-statement in the estimate .	200 0 0	
		336 10 0
Making the total cost of the repairs . .		£1887 10 0

Now I think that for the purposes of this case the estimated cost of building a new church of the same size and accommodation may be taken, as given by Mr. Z., at £2916. Three-fourths of this sum is £2187, so that the cost of repairing is within the limit which, according to *Bertram's* case, would necessarily involve the erection of a new church. It falls within what is termed the "debateable land" almost midway between the limits by which the repairing or rebuilding is determined. The question then comes to be whether in these circumstances the Court should order the church to be repaired or rebuilt; and there are certain considerations which lead me to the conclusion that the latter course must be followed.

If the cost of putting the present church into a proper state of repair would be nearly £1900, while a new church could be constructed for £2916, and the choice lay between these two schemes, the latter would no doubt be regarded as the most reasonable and

prudent course. But that is not the case. The cost of the erection of a new church is set up for the sole purpose of comparison. The choice lies between repairing the old church and erecting another of an entirely different character and at an expense which may be four or five times more than the amount with which the cost of repairs is compared. If the erection of a new church be ordered it must be a church capable of accommodating two-thirds of the examinable persons in the parish—that is, persons not under twelve years of age, and an idea may be formed of what that means when it is taken into account that the resident population of the parish is over 15,000 persons. I must do the heritors the justice to say that I believe it is not against the erection of a church which would cost £3000 they are fighting so keenly; it is against the unknown but necessarily large cost of erecting a greatly enlarged church in conformity with modern tastes and ideas. If I were satisfied that by repairing the present Church at a cost of £1887, 10s., it would be put into a suitable and comfortable state I would willingly order that to be done. But I am unable to satisfy myself that that would be the result. It will be kept in view that were the repairs carried out which I have held to be necessary, the result would be that the entire structure would be taken down, with the exception of the front and two side walls. Now, it does seem incongruous to pull down a building a hundred and fifty years old, with the exception of three bare walls, and then proceed to restore it in the same style as before. Would any prudent man act in this way in dealing with his own property? But I am by no means satisfied with the condition of the walls which it is proposed to leave standing. The front wall does not appear to me to be much better that the back one. According to the evidence this wall is off the plumb to the extent of $\frac{7}{8}$ inch; near the west end there is a settlement over the window where the key-stone has fallen down, and the crack has extended to the wall headsken. Is this a wall which should be allowed to remain standing if the building is to be restored? Then I am satisfied that the whole of the three walls are from some cause or other thoroughly saturated with damp. The proof of this is that all the wood that has been in contact with these walls, the ends of the joists, of the struts, and the wooden lining, is thoroughly rotten. I do not think that a church with walls in this condition could be said to be in a "safe and comfortable condition."

Then it has been proved that it would not be possible to put the repaired or restored church into a satisfactory sanitary condition according to modern ideas on that subject. The air-space in the present church is $81\frac{1}{6}$th cubic feet for each sitter, while, according

to the authorities on sanitary matters, it should not be less than at least 200 or 300 cubic feet. And of course, if the church is merely to be repaired, it would not be possible to effect any improvement in this respect. Besides this defect is aggravated in this case by two circumstances which tend to cause stagnation of the air—namely, that the gallery covers nearly three-fourths of the area, which is a much larger proportion than is usual in churches, and that the gallery ceiling is unusually low. There is a strong body of evidence to the effect that from these causes the present church is unhealthy, and would continue to be so even if the proposed repairs were carried out.

Further, it is proved that were the proposed improvements carried out, and the church reseated, the result would be materially diminished. The present sitting accommodation is 750 seats—430 in the area, and 320 in the gallery—while if the reconstruction were carried out, that accommodation would be reduced to about 680. It apears to me to be a formidable if not fatal objection to the reconstruction, that it would reduce to such a serious extent the already extremely limited accommodation in the parish church.

On the whole matter I have no difficulty in coming to the conclusion that it is inexpedient to repair the church, and that a new edifice must be erected.

Glasgow, 17th November, 1897. — Having heard parties' prors., and resumed consideration of the case, on the motion of the respondents certifies the following persons as skilled witnesses in terms of the Act of Sederunt—namely, O., P., Q., and R.: Finds that the new church to be erected in the parish must be capable of affording sitting accommodation for at least 1200 persons. Remits to B., architect, Glasgow, to examine and report on the suitability of the present site of the church as a site for a new church of the aforesaid capacity; and also to examine and report on any other ground in the neighbourhood which in his opinion is suitable and convenient for the site of the new church, the said reporter to hear parties with reference to the matters hereby remitted, and to report *quam primum*: Finds the respondent entitled to expenses from the date of the presentation of the appeal, 24th February, 1896, to the present date, and remits the account thereof to the auditor to tax and report.

Note.—The following subjects were very fully discussed before me at the hearing, namely:—(1) The certification of skilled witnesses;

(2) the site of the new church; (3) the accommodation to be provided therein; and (4) the question of expenses.

(1.) *The certification of skilled witnesses.* — The appellants contended that the motion for certification had not been timeously made under the Act of Sederunt, and could not now be entertained. It required to be made, they say, within eight days after the proof (that is, the examination of the witnesses), and had not, in point of fact, been made till long after the expiry of that period. The respondents, on the other hand, maintained that the time ran from the date of the judgment if the Court was in session, and if not, the motion could be timeously made within eight days of the commencement of the session. It appears from reliable evidence submitted to me that the rule in the Court of Session is eight days from the date of the judgment, and I have accordingly held the motion to have been timeously made (*vide Scott* v. *Lanarkshire Railway Company*, *Scots Law Times*, 13th November, 1897).

As to the number of witnesses to be certified, it was contended by the respondent that in a case of such importance as this, and where all the witnesses except one had to make preliminary investigations to enable them to give evidence, he was entitled to have them all certified as skilled witnesses. The appellants, on the other hand, maintained that the number of witnesses adduced by the respondent in this case was simply scandalous. The case, they say, was at least of as much importance to them as it was to the respondent, and while they examined only five witnesses—two architects, two builders, and one measurer—the respondent examined fifteen witnesses, including four architects, four builders, one clerk of works, two measurers, two officers of health, and one accountant. Now, the respondent was entitled to examine as many witnesses as he pleased, but it is an entirely different thing having them all certified as skilled witnesses. This certificate is dealt with very stringently by the Court of Session, and in very few cases are more than two certified as skilled witnesses. I think I am dealing very liberally with the respondent when in this case I certify for two architects, two builders, two measurers, and one sanitary officer, which is two more than the total number of witnesses examined by the appellants.

(2) *Site of the new church.*—It was maintained by the respondent that he had proved that a new site must be selected for the church, because, as he said, he had proved that the old site was unsuitable, in respect (1) that the space was too limited, (2) that it was damp and extended above old coal workings, and (3) that it must encroach on ground in which interments had recently been made. The appellants,

on the other hand, contended that the church must be built on the old site for two reasons. In the first place, they say that the point has been finally decided by the Presbytery, who had ordered the old church to be taken down and rebuilt, which necessarily implies the reconstruction on the old site, and that order, not having been appealed against by the respondent, was now final. The contention is clearly untenable. The effect of the appeal was to sweep away altogether the proceedings before the Presbytery, and it would certainly be anomalous to hold that the site of the new church had been finally fixed by the Presbytery long before it was judicially determined whether the old church was to be repaired or a new one erected. In the second place, it was maintained that in his answers to the note of appeal the minister had averred that the present site was unsuitable for the reasons therein stated, and that while a proof was allowed to the parties of their respective averments, no evidence was adduced by him as to the unsuitability of the present site, and as a necessary consequence it must now be held that he had failed to prove his averment. It is certainly the case that the respondent failed to adduce any evidence as to the unsuitability of the present site, although his attention was directed to the matter more than once in the course of the proof. He probably thought, however, that it was time enough to consider as to the site after it had been finally determined that a new church was to be erected, and I cannot say that he was in error in acting on this footing. Moreover, the failure to prove without any evidence would, to say the least of it, be a very unsatisfactory ground for fixing the site of a parish church. My opinion is that on the one hand the respondent cannot contend that he has proved the present site to be unsuitable, and just as little can the appellants contend that it is finally settled that the old site must be retained. I think the question is quite open, and must now be determined under the 11th section of the Act of 1868.

(3.) *The accommodation to be provided in the new church.*—Besides fixing the site, it is also necessary that the accommodation to be provided in the new church should be fixed by the Court, but for some reason or other this subject was entirely ignored by the respondent while leading his evidence. The excuse given for this at the hearing was the desire on his part not to overload the case with evidence, but it is difficult to understand why such reticence should be observed in regard to such an important subject, while so much time was wasted on such irrelevant matters as a damp course and the dry rot. The law on the subject undoubtedly is that the parish church should be capable of accommodating two-thirds of the

examinable persons in the parish, that is persons not under twelve years of age. This rule, however, was formulated at the end of last century, when the population of the parishes in Scotland was very small, and dissent comparatively unknown. Were it to be observed in this case, the heritors would require to provide a church capable of accommodating more than 7000; but the minister, of course, makes no such extravagant demand. He says that there are at present 1000 members in connection with the church, and what he asks is that the new church should be capable of accommodating 1200 persons. The heritors, on the other hand, maintain that, as there are only 750 sittings in the present church, the addition of 200 in the new church is, in the circumstances, all that can be reasonably demanded. The materials for forming an opinion on this subject, for the reason I have already stated, are very scanty; but, looking at the state of the law on the subject, the present population of the parish, and the present number of communicants, I must say that the proposal that the new church should be capable of sitting 1200 persons appears to me to be reasonable and moderate, and I have accordingly given effect to it.

(4.) *The question of expenses.*—The appellants maintain that, as the question of expenses was reserved in the last interlocutor, it is incompetent to deal with it until the final issue of the case. I regard this view as clearly untenable. My reason for reserving the question when I pronounced the last judgment, was that the parties might have an opportunity of being heard on it, no reference having been made to it at the discussion of the proof. Having now further heard parties on the subject, I am of opinion that the respondent should now be found entitled to expenses. Not only the most important, but, in reality, the only judicial part of the case, has been finally terminated, and I see no reason why the successful party should not now be awarded expenses.

It was maintained by the respondent that he was entitled to expenses not only in this Court, but also to those which had been incurred by him in the proceedings before the Presbytery in which the appeal originated. The ground on which this contention is based is that the Presbytery was to be regarded as an inferior court, and that the ordinary rule should be followed of giving the successful party the expenses in both Courts. The argument I regard as being entirely fallacious. The Presbytery has no doubt important judicial functions, but the power to award expenses is certainly not one of these. Neither by statute nor by common law has it such a power, and, as far as I am aware, it has never exercised it. Nor was the respondent able to point to a single instance where, in an appeal

against the judgment of a Presbytery, the expenses awarded to the successful party included those which had been incurred in the proceedings before the Presbytery. I must therefore decline to sanction a course for which there is no precedent or authority of any kind.

Excerpt from Note to Interlocutor, 9th March, 1898.—I am satisfied that the auditor has dealt with the fees to the witnesses in a very judicious manner, and in strict conformity with the Table of Fees. It cannot, I think, be said with any degree of fairness that a sum of £160 is not a sufficient allowance for witnesses —all of whom reside in Glasgow, and especially in a case which could competently have been disposed of (and I believe as satisfactorily) by a remit to a man of skill. It is maintained by the respondent "that a party is entitled to choose as witnesses men of high standing such as are usually selected in similar cases, and to pay them whatever remuneration their ability and professional position justify." Nothing could possibly be more fallacious than to suppose that any such doctrine could be given effect to by the Auditor of Court in the taxation of an account as between party and party. It is quite open, of course, to a person to select what witnesses he pleases and to pay them what he may think proper, or they may demand; but it is equally clear that in a question with the opposite party their remuneration must be fixed in accordance with the Table of Fees, and not either by their ability or professional standing. Whatever these may be, a witness is only entitled to £2, 2s. a day for giving his evidence—however long he may be detained, and his fees for preparing for his examination (which is all that is covered by being certified as a skilled witness) must be regarded very much by the same standard. The Table of Fees deals with all skilled witnesses as being on an equal footing, and makes no allowance, either for ability or eminence. These are matters which affect the employers only, and with which the opposite party have no concern. The case of *Parnell* v. *Walter* (17 Rettie, 552), on which the respondent's contention is apparently based, has no reference whatever to the present case. There the question was raised with regard to the remuneration to eminent English counsel who were brought to Edinburgh for the purpose of giving evidence as to questions of English law. It was admitted that neither the Act of Sederunt nor the Table of Fees applied to such a case. In his report to the Court the auditor said:— "It is out of the question to deal with these witnesses as witnesses to fact, and, on the other hand, they were not certified, and could not be certified as skilled witnesses who required to make investigations

to qualify them to give evidence." How then were they to be dealt with? All that the Court could do was to fix what they thought was the fair and reasonable expense of obtaining the evidence of such witnesses, and of course their professional eminence was a very important element to be considered in determining the question. The witnesses in the present case are in a very different position. They are ordinary skilled witnesses, and their remuneration must be regulated in accordance with the table of fees. The objection that it would be difficult to get witnesses of the standing of those certified in this case unless they get a higher rate of remuneration is very well dealt with by the auditor. If a litigant desires to have witnesses of high standing and eminent ability, it is only fair and reasonable that he should himself bear the extra expense thereby incurred. The unfortunate party who loses his case generally finds the ordinary expenses a sufficiently heavy burden. Besides, if he desires the luxury of such witnesses without unduly burdening himself, he has only to moderate its indulgence. All that he requires to do is to restrict their number, and, as a rule, that can be done without endangering or even prejudicing the case. What is the use of eminent position or ability if it requires to be backed up like the evidence of ordinary witnesses. I do not believe that the continuous repetition of a fact or opinion by a number of professional witnesses either increases its credibility or enhances its importance.

Glasgow, 14th February, 1899.—Having heard parties' prors., and considered the Reports by Mr. B.: Finds that the ground referred to in the said Reports as site No. 4 is the most suitable and convenient in the neighbourhood as a site for the new church. Therefore approves of the site, and Finds that the said church must be erected thereon: Further ordains the heritors to procure the necessary plans and specifications for a church to be erected on the said site, capable of affording comfortable accommodation for 1200 sitters, and having all the usual and necessary equipments of a modern church in connection with which there is a large congregation, and to lodge the same with the Clerk of Court within six weeks from this date: And also to procure and lodge within the same period a ground-plan, showing the exact ground and boundaries thereof required for said church and approachments thereto, with a detailed description of the boundaries of such ground.

Note.—It was very strongly maintained by the heritors that the selection of the site for the new church lay with them, and that the

Court had no power to interfere in the matter. This contention is, in my opinion, erroneous. In Cook's "Styles," 5th edition, p. 187, will be found the form of a petition to the Presbytery in a case like the present, where a church is to be taken down and rebuilt, praying that body to "assign and set apart a piece of ground in a convenient situation and of proper dimensions and quality as a site for the church." That was the course followed prior to the passing of the Ecclesiastical Buildings Act, the effect of which is "that the Sheriff proceeds to the final settlement of the question, the appeal taking it out of the hands of the Presbytery, not merely as to the judgment which was appealed from, but as to all subsequent proceedings" (Cook, p. 211). Then the 11th section of the Ecclesiastical Buildings Act prescribes the proceedings to be adopted in an application to the Court for the purpose of fixing a site for a new church. In any case, the heritors are clearly barred from now objecting to the site of the new church being fixed by the Court. They not only acquiesced in the Interlocutor of 17th November, 1897, remitting to Mr. B. to examine and report on the most convenient site, and allowed it to become final under the 14th section of the Act, but they took an active part in everything that has been done since then in connection with the fixing of the site.

The heritors contended further that in any view the site of the present church should be selected as the most suitable and convenient one. They say that the only objection stated by Mr. B. to this site is that the church may interfere with and cover over some of the graves in the churchyard, but that it has been decided by the Court that this is no valid objection to the site being used for a new church. Mr. B., however, goes a great deal further than this. His report is to the effect that there is "nothing like sufficient convenient space without such interference with the graves as might be insanitary in its effect in spite of even elaborate precautions being taken to prevent that." Another objection stated by him to this site is that "it is likely to be liable to unequal settlement owing to old underground working." It was proved in the course of the evidence in this case that the present site is so damp that the walls of the old church were perfectly saturated with wet, and that from a settlement of the old workings the walls were cracked and had gone off the plumb, and the keystone of one of the windows had fallen down. I am clearly of opinion that instead of being a suitable and convenient site for the new church the present site is in many respects one of the most objectionable that can be found in the parish.

In the event of the present site not being approved of, the heritors

contend that the site No. 3 in Mr. B.'s report should be selected. They represent that while Mr. B. expresses a preference for No. 4 he considers No. 3 to be both suitable and convenient—the only objection to it being that there are some cottages and walls on the ground which require to be removed, and that whatever differences of opinion there may be among the heritors as to other matters they are practically unanimous in the choice of No. 3. The cause of this unanimity has not been disclosed, and I am somewhat surprised at this, seeing that it is stated in Mr. B.'s report that the cost of No. 3 would be more than double that of No. 4. But assuming it to be the case, it does not appear to me to be a sufficient reason for not giving effect to Mr. B.'s report. There are others besides the heritors I am bound to consider. Dealing with the matter from an entirely independent point of view, and apart altogether from all personal views and considerations, Mr. B. reports that in his opinion No. 4 is the most suitable in the neighbourhood. I do not see what possible interest the heritors can have in depriving the parishioners of the most convenient site. I must be guided in this matter by the opinion of the judicial reporter, in whose judgment I have every confidence, rather than that of the heritors, and I have no difficulty therefore in holding that No. 4 is the most convenient and suitable site and must therefore be selected as the site for the new church.

The further course of proceedings in the case is another important point which now must be determined. It was anxiously urged by the minister (who in this matter represents the congregation) that the course now to be followed should be to remit to an architect in terms of § 9 of the Act to prepare plans and specifications for the new church. His argument on the subject was that, having regard to the great delay that had arisen in proceeding with the new Church in consequence of the keen opposition of the heritors and to the difference of opinion existing between the parties as to the character of the church to be provided by the heritors, the most effective way of obtaining the erection of a suitable church within a reasonable time is for the Court to remit to an architect to have the plans prepared under judicial authority. I am inclined to sympathise to some extent with the view, and would certainly have given effect to it were it in my power to do so, but I am obliged to hold that it is not. The ninth section provides "that where the Sheriff shall find that in accordance with the law as present existing a church or manse must be rebuilt or repaired, but the heritors shall delay or refuse to give effect to it, he shall remit to an architect or other professional person to prepare plans and specifications, &c." The meaning of this is that it is only

when the heritors delay or refuse to give effect to the Sheriff's findings that a remit to an architect for the preparation of plans can be made by him. I do not see any other way in which the clause can be construed. The law on the subject before the Ecclesiastical Buildings Act was "The heritors are entitled to take charge of procuring plans, contracts, &c., for rebuilding or repairing churches, failing whom the Presbytery may do so, and may assess the heritors for the expense" (Cook, p. 177). The effect of § 9 therefore is simply to substitute the Sheriff in place of the Presbytery, and to give him power to make a remit for the preparation of plans in the event of there being any failure or delay on the part of the heritors. Has there then been any delay or failure on their part to warrant the interference of the Court and deprive them of their right to order the preparation of the plans? There clearly has not. They could not possibly do anything until the site had been fixed and that has only now been done. I have no power, therefore, to do anything except pronounce an order on the heritors for the production of the necessary plans.

Glasgow, 12th August, 1899.—Having heard parties' prors. and considered the objections to the plans, the answers thereto, and Mr. B.'s report thereon, ordains the heritors to lodge revised plans on or before 1st October next, giving effect to the following alterations as suggested in the Report by Mr. B.—(1) The site to measure not less than from 130 feet by 200 feet, in place of 100 feet by 170 as shown on plan; (2) At least 21 inches by 32 inches to be allowed in the pews for each sitter in all parts of the church; (3) The passages shown in plan to be five feet wide in place of four, and the doors in connection therewith proportionally increased; (4) The side pews to be arranged for not more than seven sitters in each; (5) The vestibule to be at least three feet wider than shown at ends for staircases, for comfort in centre two feet wider; (6) A window to be introduced at back of pulpit, high enough to clear back buildings; (7) Sufficient space to be provided for an organ, either behind or at the side of the choir; (8) The accommodation for the choir to be at least double the space shown on the plan; (9) The Session-house to be of sufficient size to accommodate comfortably at least twenty persons; (10) Lavatory accommodation to be provided in the closets, and the size of the latter to be increased for that purpose: *Quoad ultra*, repels the objections to the plans stated by the respondent, reserving consideration of the drainage and specification until the plans have been adjusted and approved of.

Note.—The heritors have conceded everything suggested by Mr. B. in respect to the internal arrangements of the church, but they decline to provide a hall or to make any alterations on the belfry shewn on the plans. In my opinion it is not within my power to ordain them to do either of those things.

This is the first time, so far as I am aware, that a demand has been made for a church hall being provided by the heritors, and there is therefore no authority on the subject. As matter of principle the heritors are, I think, under no obligation to do so. What they are bound to do under the statutes and the practice following thereon is to provide and maintain a church suitable for "the dispensing of religious ordinances." Mr. B. says in his report, "If Sunday-school work is essential to the conduct of public worship on Sunday, the church is not suitable for such work, and there is no other accommodation provided for it in the plans." Now there is, I think, no doubt that Sunday-school work, though very important in itself, cannot be regarded either as a religious ordinance or essential to the conduct of public worship. In my interlocutor of 14th February, 1899, I stated that the church was to have "all the usual and necessary equipments of a modern church in connection with which there is a large congregation," and it was maintained by the respondent that according to modern ideas, a hall is a necessary requisite of a church of that character, and therefore fell to be provided by the heritors. This contention is not well founded. It is no doubt the case, that no church of importance is now built without a hall, but that is for congregational purposes only, and not for any purpose directly connected with the administration of religious ordinances. My interlocutor had reference exclusively to the accommodation and internal arrangements of the church, and not in any way to a hall, which is in every sense of the word outside the church. Whether the hall, therefore, be regarded as suitable or even necessary for Sunday-school work or any other congregational purpose, is in my opinion immaterial. In neither case are the heritors under any obligation to provide it.

With regard to the belfry, Mr. B. says, "If a bell is considered necessary, it should be housed in a suitable tower, not in the miserable belfry shewn in the plan." Now the heritors are undoubtedly under an obligation to provide a bell for the church (*M'Carthy* v. *Lady Royst*, M. 7194) and some sort of a belfry, but not a steeple (*Hope* v. *Marchmont*, 5 Brown's Supplement, 588), and I should say much less a tower as suggested by Mr. B. It is not said that the belfry shown on the plan is not suitable for hanging a

bell, which is the purpose it is intended to serve. The objection to it is, that it is bad in design, and would be a disfigurement to the church. That this is the case cannot, I think, be doubted. But that in my opinion is a matter with which I have no power to deal. It was held in the case of M'Neil (6 S. 642) that Presbyteries (now superseded by the Sheriff) had nothing to do with the manner and style in which a church was to be built, provided it afforded proper accommodation, and the same rule must of course apply to every part of it. I have nothing to do, therefore, with the style or character of the erection in which the bell is to be "housed." It is to be hoped, however, that for their own sakes as well as for the credit of the architect, the heritors will direct or permit him to provide something better than what he terms the "miserable belfry shown on the plan." It can afford them no satisfaction to see the parish church permanently disfigured by such erection.

Glasgow, 15*th November*, 1899.—Having heard parties' procurators, Approves of the plans, No. of Process, as the plans for the erection of the new church: Ordains the heritors within six weeks from this date to lodge specifications, including all the details usual and necessary in specifications connected with the erection of churches: Further ordains the heritors within the same period to lodge a ground plan of the site and relative approaches required for the church along with a detailed description thereof: Refuses *in hoc statu* the respondent's motion for expenses.

Note.—The only objection which has been stated to the plans now lodged is that they do not give accommodation for 1200 sitters in addition to the choir. The choir it is said must be regarded as acting in an official capacity and not included among the ordinary sitters for whom accommodation is required to be provided. I do not think that this contention is well founded. The choir are sitters in the church as much as the ordinary members or adherents, and whether they are accommodated in the choir seats or the body of the church is quite immaterial.

The heritors strongly objected to their being ordained to lodge specifications for the erection of the church. This they maintained is a matter entirely to be dealt with by them and with which the minister has no right to interfere. This objection, however, comes too late. By the interlocutor of 14th February, 1899, the heritors were ordained to lodge plans and specifications, and not only was this interlocutor allowed to become final but was duly implemented. It is

only the alteration of the plans that has rendered new specifications necessary. But it is a mistake to suppose that the minister has no right to ask the Court to order the production of specifications. These are the necessary adjuncts of the plans, and the minister has just as much interest in the one as in the other. Under the old system the specifications were always dealt with and approved of by the Presbytery, and the Court as coming in its place exercises the same powers or functions. The minister proposed that I should order the specifications to embrace details of the proposed drawings, strapping, ventilation, and painting. I think this unnecessary as I have no reason to suppose that the specifications ordered will not contain all the details usual and necessary in specifications connected with the erection of churches.

The heritors also objected to any order being pronounced ordering them to produce a ground plan and description of the site and necessary approaches required for the church. This was also contended to be a matter with which the minister had no right to interfere. The site, it was said, could not be designed in this application, and if the heritors found it to be necessary they could afterwards present a special application to the Court to have that done. This contention is also very clearly erroneous. The designation of the site is one of the matters specially embraced in the original application by the minister on which the present proceedings are founded, and the time has now come when effect must be given to that portion of the application.

Glasgow, 8th February, 1900.—Having heard parties' procurators, approves of the specification, No. of Process, designs and sets apart the following piece of ground as a site for the erection of the new church, viz.:—All and Whole . . . all as delineated on the ground plan made out by W. F., Architect, Glasgow, and lodged in this Court on 28th December, 1899, together with free ish and entry by the said intended street and from the main road from Glasgow to Shettleston, and ordains the said heritors to make all necessary arrangements with the superior of the ground for having the street duly made and formed within the like period as is hereby fixed for the completion of the said church: Further ordains the heritors to proceed forthwith with the erection of the church and offices on the said ground, in conformity with the plans and specifications as now approved of by the Court, and to have the same completed and the church ready to be open for public worship on or before the first day of June, 1901.

Note.—The heritors have lodged a Minute in which, in view of a report by Mr. M., Mining Engineer, produced therewith, they suggest that a site for the church other than that which has been selected should now be chosen. The effect of the report referred to is that the condition of the mineral workings under the proposed site is such that under certain contingencies there might be a subsidence of the ground which would crack the walls of the church.

The selection of the site was a matter which occupied a good deal of time and attention on 17th November, 1897. I remitted to Mr. B., Architect, to report on the suitability of the site of the present church and also "to examine and report on any other ground in the neighbourhood which in his opinion was suitable for the site of the new church." Two reports on the subject were lodged by Mr. B., in which various sites in the neighbourhood were reported on after meetings with the parties and very careful examination of the localities and enquiries in regard thereto. The state of the mineral workings in the neighbourhood was one of the subjects to which Mr. B. directed his attention, and in regard to which he very properly consulted Mr. M. The result is thus stated in Mr. B.'s report: "I have also ascertained from the Engineer that owing to the position and state of the workings under the site it would be much firmer and less liable to damage through subsidence than the others would be." After giving the parties every opportunity of making enquiries with regard to the reports, and several hearings on the subject, I pronounced an interlocutor on 14th February, 1899, finding that the ground referred to in Mr. B.'s report as site No. 4 was the most suitable and convenient in the neighbourhood, and therefore approving of that site, and finding that the new church must be erected thereon. The heritors entered an appeal to the Court of Session against this interlocutor, but it was afterwards withdrawn. So far as I am concerned, therefore, the selection of the site is *res judicata*, and I have therefore no other alternative than to design it in the usual way; and that I have accordingly done.

The heritors objected to their being ordained to erect the new church in conformity with the plans and specifications as now approved of. They contended that all that the Court had to do was to see that the necessary comfort and accommodation were provided for in the church, and that beyond this it had no concern with the plans or specifications. If this were so, it would be extremely difficult to see why the duty of approving of the plans and specifications should be imposed on the Court. The practice of the Presbytery always was to ordain the church to be erected in terms of the plans and

specifications, and legislative authority has been given to this course by § 9 of the Act 31 & 32 Vict. c. 96. It was said that it was impossible that this or any other church could be erected without material deviations from the plans. Of course deviations of the usual kind which are found to be necessary in practically carrying out the work are quite within the discretionary power of the architect, but it is equally clear that there can be no material deviations without the previous sanction of the Court.

The heritors also objected to any time being specified within which the work is to be completed. The ground of the objection was that the progress of the work entirely depended on circumstances, and it was impossible to foresee what the effect of these might be within a given time. It is perfectly well known what is the usual time occupied in erecting a building of the kind in question, and there is no reason to suppose that any circumstances will arise which will delay the progress of erection in this case. The practice always has been to fix a time limit, and I must say that the heritors have not displayed such a zeal for the erection of a new church as to make this case an exception to the ordinary rule and to obtain for them a free hand in the matter.

Glasgow, 16th March, 1900.—Having heard parties' procurators, Finds the pursuers and appellants liable to the respondent, the Rev. J. W., in the expenses incurred by him from and after the 17th November, 1897, to the date hereof, subject to modification to the extent of one-third, and remits the account to the auditor of the Court to tax and report: Finds the said pursuers and appellants liable in the expenses of and connected with the various remits to Mr. B. and the various reports by him: Ordains an account thereof to be lodged, and remits the same to the auditor for taxation.

Note.—The heritors objected to any further expenses being found due to the minister on the ground that all the proceedings since the date to which the expenses were previously awarded were of an administrative character, and that as no expenses could have been awarded had these proceedings taken place before the Presbytery, none should be allowed in this Court.

If the latter contention were well founded, no expenses could be awarded in this Court in any case under the Ecclesiastical Buildings Act, as the Presbytery who had the same powers as are now exercised by the Court had no power to award expenses in any case

or in any circumstances. But the power to award expenses was specially conferred on the Court when the jurisdiction of the Presbytery was transferred to it. The fourteenth section of the Act confers this power in the following terms: "The Lord Ordinary or the Sheriff, as the case may be, shall be entitled to dispose of all questions of expenses and to grant decree therefor." It is clearly, therefore, no objection to the awarding of expenses that this could not have been done by the Presbytery. . . . Having regard to the general nature of the proceedings and the extent to which the minister was successful I see no reason why he should not be found entitled to expenses, but for the reasons I have stated I think these should be modified to the extent of one-third.

V.

INTERLOCUTOR by Sheriff Fyfe, Sheriff-Substitute of Lanarkshire, *in causa* The Minister of the Parish of Biggar *v.* The Heritors of Biggar.

Lanark, 2nd April, 1896.—Having heard the agent for the appellant, the Rev. A., and counsel for the respondents, the heritors of the parish of Biggar, and considered the whole cause with the proof and productions: Finds that in its present condition the manse of Biggar is not a safe, suitable, and commodious residence for the minister, and that in the circumstances of the case the present dwelling-house ought to be taken down and a new one built: Therefore ordains the present dwelling-house to be taken down and a new one to be erected at the site and to the satisfaction of an architect to be afterwards agreed upon, or nominated by the Court: Finds the respondents (other than the disclaimers who sign the minute No. 16 of Process) liable to the appellant in expenses modified to two-thirds: Reserving to pronounce further, meantime grants leave to appeal.

Note.—The complaints in regard to the Biggar manse and the differences of opinion between the minister and the heritors, are of old standing, and appear to have engendered a good deal of feeling in the parish. The present process is an appeal taken in virtue of the Ecclesiastical Buildings Act, 1868, from the judgment of the Presbytery. I do not think I am required to consider, and I have doubts whether I am entitled to consider, the past history of the dispute between the minister and the heritors; but it may be convenient to shortly review the proceedings which have culminated in the present appeal.

The Rev. A. was inducted in 1884. From the first he appears to have complained of the state of the manse, and in September, 1884, he officially notified the heritors that the manse was not habitable, and that he had gone into lodgings. This complaint was considered at a meeting of heritors on 28th October, 1884, when Mr. B., an architect in Glasgow, was asked to report "as to the sum he would consider necessary to put the manse and offices into a proper state of repair, having especially in view the bedroom accommodation."

At an adjourned meeting on 18th November, the architect submitted plans to carry out certain proposed "alterations, additions, and repairs," the cost of which he estimated at £890. The heritors, however, did not accept his suggestions, and again remitted to him to procure a detailed estimate for repairs required "to make the manse habitable, and the offices suitable for their purpose."

At an adjourned meeting on 25th November, the architect reported that to carry out "the repairs referred to at the meeting on 18th" would cost £266, 4s. 4d., and the heritors resolved that the architect's report be approved of generally "so far as it refers to repairs." They also sanctioned the erection of a coach-house. A committee was appointed to see the resolution carried into effect, and a list of the work to be done was handed to Mr. A., but it is not said that he accepted this as sufficient. Indeed it appears that he did not do so, and proposed to bring the matter before the Presbytery, for we find in the next heritors' minute, on 10th December, 1884, that a letter was read from Mr. A. to the effect that to avoid the unpleasantness, and while not giving up the idea, of appealing to the Presbytery, he would meet the committee. Ultimately the heritors agreed, in addition to what they had sanctioned on 25th November, to make some structural alterations inside the house, and to make a carriage drive outside. Mr. B., the architect, was again requisitioned, estimates were taken, the lowest offer was accepted, and the work proceeded and was finished on 28th August, 1885, the minister having been out of the manse for over a year. The accounts were passed at a meeting on 9th September, 1885, amounting to £507, 15s. 7d., and the minister received as manse maill £32, 18s., bringing up the total expenditure at this time to £540, 13s. 7d.

For some time after this there is no record of complaint, but the discontent was only smouldering, not extinguished, and I think it is much to be regretted that at this time the heritors instead of spending over £500 on this old manse (which had cost them over £300 in 1876) did not pull it down and erect a new fabric.

Although there is no official record of complaint, the minister says he continued to complain. In 1891 a way out of the difficulty occurred to him, for in that year, with the consent of the Presbytery and the heritors, he excambed a portion of the glebe for a field outside upon which he thought of erecting a house for himself. But finding the estimated cost of this to be more than he expected, this idea was abandoned. Matters remained as they were for some three years more, during which I expect the building was becoming worse.

Early in 1894 complaint was made by the sanitary inspector of the state of the drainage arrangements, and to obviate this the heritors proposed to do certain work, but Mr. A. said it was not convenient to have this work done. This is very strongly pressed against him, but to my mind the explanation which he made at the heritors' meeting on 6th November, and which he repeats in his evidence, is a not unreasonable one. He was preparing his case for an application for an extensive overhaul, if not a new manse, and the particular matter to which the inspector called attention was only one small portion of a general scheme the minister was about to propose. As he himself puts it, "I would not take part, because I wanted the whole."

Having fortified his position by getting a report from an architect and a medical officer of health, the minister convened a meeting of the heritors to hear and consider a statement relative "to the disrepair and inadequate accommodation of the manse." This meeting was held on 6th November, 1894, and the clerk has engrossed in the minute book the whole proceedings in detail. Mr. A. stated his complaint to the effect that the manse was insanitary and behind the age, and he produced his skilled men's reports in support of his contention that the work required was of such a magnitude that it would be preferable to build a new manse. The meeting resolved "that an architect be employed to estimate in the first place the cost of putting the manse as it now is into a sufficient state of repair; and secondly, to estimate the cost of such repairs, with the addition of two or three bedrooms (by adding a storey to the old building or otherwise), and also a storeroom or pantry." A Committee was appointed to select an architect. This they did. Messrs. C. & D., of Glasgow, being the architects. They went over the manse, and on 30th November they reported to a heritors' meeting. Mr. C., the architect, was present, and his report is in the minute. The architect proposed to make the manse as it was, quite comfortable at a cost (exclusive of professional fees) of £170, if the roof would stand the repairs; if the roof required renewal the cost would be £220. The

architect also submitted alternative plans for additions of a ground floor pantry and two bedrooms, the probable cost being £280. The minute of this meeting bears that the chairman asked the architect if this proposed work would make the manse a sufficient residence for a gentleman, to which he replied in the affirmative. It is also recorded that a heritor asked Mr. A. if the repairs and additions suggested by the architect would be accepted by him as sufficient, to which Mr. A., through his solicitor, replied in the negative. The upshot of this meeting was that the heritors adopted the first part only of the architects' report, and resolved to carry out the repairs.

The minister next presented a petition to the Presbytery, asking them to find, *inter alia*, that the manse and offices were defective in sanitation, comfort and accommodation, and incapable of repair, also that the site was unsuitable. This is the petition upon which the present appeal is taken. The Presbytery delayed its consideration again and again, expecting that the minister and the heritors would come to an arrangement. Ultimately a full meeting of Presbytery was held on 25th March, 1895, for its disposal. But a meeting of heritors was to be held next day, and the Presbytery again postponed the petition.

The meeting of heritors was held on 26th March, and a proposal by the minister was submitted and minuted that a new manse be built —the cost to the heritors not to exceed £1000, and Mr. A. himself to pay the balance, the existing manse to be conveyed to Mr. A. It does not appear in the minute expressly, but it was a condition that the new manse be upon a new site, and that not more than £2200 be expended without the minister's consent. This offer is repeated on record. At this meeting of 26th April a motion in favour of this scheme and one against it were made, but superseded by a motion for adjournment that the proposal might be put into the form of a draft agreement.

The adjourned meeting was held on 10th May, when the draft agreement was submitted, and a motion made for its adoption. An amendment was moved that the proposal be declined, and that the resolution of 30th November, 1894, be confirmed; but that the Committee be empowered to do further work to an extent not exceeding in all £300. The vote was a very close one, and a scrutiny was demanded. Ultimately the amendment was found to be carried by a narrow majority, and on 17th May this was minuted as the finding of the heritors. So that the final decision of the heritors was that they would not spend more than £300.

The Presbytery then took up the matter. They employed an

architect (Mr. E.), who estimated the cost of the necessary work at £780, besides professional fees and manse maill. The Presbytery ordered the work specified in this report, with some trifling exceptions, to be done, and ordained the heritors to proceed with it.

Against the finding of the Presbytery four heritors entered an appeal to the Sheriff under the Ecclesiastical Buildings Act, 1868.

The whole proceedings having been reported to the heritors at a meeting on 2nd September, a motion was carried that, provided the appeal is withdrawn, the heritors agree to carry out the repairs and alterations sanctioned by the Presbytery.

The four heritor-appellants then proposed to withdraw their appeal to the Sheriff, and they lodged a minute of withdrawal on 16th September, 1895. The minister, however (who was then the nominal respondent), objected to the appeal being dropped, and craved leave to sist himself as appellant, and on 16th September the Sheriff-Substitute then sitting (Sheriff Mair) sisted the minister as appellant.

The case then proceeded as between the minister-appellant, and the heritors-respondents, and by order of the Court the proceedings were reported to the heritors, who met on 27th September, and resolved to oppose the appeal. They also resolved that, if the minister persists in his demand for a new manse, the resolution of 2nd September (*i.e.*, to do the work ordered by the Presbytery) be cancelled.

The case as between the minister and the body of heritors has proceeded, and a record has been made up, and a proof led. But on 28th January, 1896, a minute of disclaimer was put in for the minority of seven heritors who, at the meeting, opposed the resolution to fight the minister in the Civil Court.

A perusal of the heritors' minute book cannot but impress the reader with the idea that this prolonged contest, nominally between the minister and his heritors, is really taken part in by very few of them, and the resolutions are mostly carried by mandate votes, not a few of the heritors granting the mandates being, as appears by the roll in process, non-resident in the parish. It is to be observed, also, that of those who did take part in the contest, the minority in number who were against litigation are almost all heritors with large rentals, upon whom the bulk of the assessments will fall; while the majority is composed, with a very few exceptions, of a large number of small heritors, whose individual proportion of an assessment will be trifling in the extreme. In considering the question of what is best for the interest of the parish, it seems to me that these circumstances are not without their significance. Although the

majority who decided to litigate numbered forty-eight, their aggregate rental is only a little over £2000, while, although the minority only number seven individuals, their aggregate rental is over £3700. The total rental of the parish is £14,146, 13s., so that much less than half the body have interested themselves in the matter at all. It seems unfortunate for this parish that the voting at heritors' meetings should be taken by counting of heads, irrespective of rental, as this deprives those who really pay the piper of their privilege of calling the tune.

Notwithstanding the prolonged nature of the proceedings, and the voluminous evidence, the questions at issue are only those two :—(1) Is the site of this manse healthy and suitable? and (2) As against an admittedly large disbursement for repairs, is it more prudent to build a new manse?

It was pressed upon me that the minister's petition is for a new manse on a new site, and for nothing else, and that the minister in the witness-box stuck to that, and that, unless I am of opinion that the present site should be discarded, I must dismiss the appeal. I cannot accept this view. I think the present process is something more than a mere litigation between an individual minister (who might leave the parish to-morrow) and a body of heritors (whose personality is constantly changing); upon the authorities, as well as upon the express terms of the Act of 1868, I hold that the case once brought before the Court, the Court not only has the right to consider, but has the duty laid upon it to consider, and to decide what, in the whole circumstances of the case, is best for the interests of the parish and of all concerned, and what is best calculated to avoid in the future a renewal of the conflict between minister and heritors.

The minister's case, as stated on record, is that the manse and offices are defective in sanitation, in comfort, and in accommodation; that the buildings are old and irrepairable, and the site unsuitable. So far as the offices are concerned, there is little or nothing in the way of specific complaint. The evidence led has been directed mainly to the dwelling-house. The word "manse," by the Act of 1868 includes offices, &c., but I am dealing only with the actual dwelling-house.

The original manse appears to be about 100 years old, and is not, of course, to be expected to come up to present-day ideas; but it would be a serious thing to say that every house 100 years old is uninhabitable, and this house is not to be condemned merely because it is old—although its age is, of course, an important factor in determining whether it ought to be repaired or rebuilt.

As regards its situation, the manse stands within a walled enclosure

on the main street of Biggar. There is a wall along the side of the street, with gates at either end, and a carriage drive to the front entrance to the house. Immediately behind, and very close to the house, there is a high embankment, the top of which is about level with the ceiling of the ground floor rooms at the back of the manse. This embankment is bounded by a stone wall. Beyond that is a public road. Beyond the road is the manse garden, and immediately beyond and adjoining the garden, is the churchyard; and beyond that again, the church. The ground slopes in a considerable declivity from the church down to the manse, and thence down to Biggar Burn, which is the natural outlet for the ground water.

There are a number of minor objections stated to the situation, such as the outlook from the manse windows, its proximity to the street, to the school, and to the hotel. This sort of objection, in my view, only requires to be mentioned to be dismissed, and I pass on to consider the site and the state of the building in relation to each other.

Upon the question of the suitability of the present site there is a large body of scientific evidence, and I was referred to a large number of writers on hygiene and public health, all of whose views I have perused with much interest. However much these skilled witnesses and learned authors differ, it is fortunate that they all agree upon one fact, which in a great measure renders their theories, however interesting in themselves, of no great moment in this individual case. It is agreed by all that, for a building site, what is to be selected is a pure, dry, and porous soil, and that there is no better sort than sand and gravel. It is conclusively established that this manse stands upon soil of this nature. So far, therefore, as the soil is concerned, so far from being unhealthy, it is the builder's ideal. But it is said for the minister that, be the soil the best possible, there are still three dangers which beset this manse, any one of which explains its admitted dampness, and two of which would not be protected against even although the extensive work sanctioned by the Presbytery was done. Stripped of their technical garb, those dangers are—(1) That the surface-water from the high ground behind the house soaks into the walls and keeps the house damp; (2) that as there is no impermeable layer between the house and the bare ground, there is evaporation into the area of the house from the ground-water, which is sucked up by the warm air of the house; and (3) that there escapes into the house the ground-air, which is always present, and which as it rises into the house carries with it any impurities which may be present in the soil.

As regards the surface water, all the skilled witnesses are agreed that the high ground behind the house is too near the building. The heritors say that this surface water is the whole cause of the dampness, and they offer to excavate the bank to a greater distance back from the house, and to pave the space between with concrete. But while all the witnesses agree that this would be a good thing to do, they do not agree that the dampness would by this alone be removed.

Assuming, however, that the danger from surface water could be so averted, there still remain the other two sources of danger, and with these Mr. E.'s report (on which the Presbytery made their finding) does not deal.

It is admitted by all the scientific witnesses that buildings, as now erected, are properly protected from these dangers by concrete along the site, and that damp rising in the walls is provided against by the insertion of damp-proof courses. These precautions, however, were unknown when this manse was built, and it has no foundations in the sense in which the term is understood at the present time. If, therefore, it is the case that the moisture from the ground water, or that the ground air, reaches the surface of the ground, there is nothing to intercept their entrance into the house.

Now, as I understand it, the theory as regards ground water upon which the minister relies is this,—Under every soil, however porous, there is at some depth an impermeable layer beyond which the water does not percolate, and there the water remains in a body, moving slowly down the slope towards the natural outlet. The moisture from this ground water meantime evaporates, and rises through the layers of porous soil above it till it reaches the surface, and so escapes into the unprotected house, its upward action being helped by the capillary attraction of the walls of the house. It is said that in this way to a greater or less extent, according to weather conditions, but always to some extent, the soil between the level of the ground water and the surface of the ground is moist, and in the absence of the impermeable layer the moisture must get into the house and cause damp.

As regards ground air, the theory is that as the ground water is not stationary but its level rises and falls, as it rises it forces out the air which fills the interstices of the porous soil, and as it falls it sucks the air back into the vacated space; in short, that the upper layers of the soil act like a lung, always taking in and always expelling air, and as this ground air is generally moist it tends to cause dampness, especially when drawn in large quantities into the more heated atmosphere and into the limited area of the house.

As against all this, it is said on the other side that, as regards the ground water, although some evaporation does take place, and even assuming that this is aided by the aspiratory action of the warm house above, it does not at the most rise more than 18 inches or 2 feet above the ground-water level, and that, as the normal ground-water level at Biggar is at least 10 feet from the surface of the ground (as evidenced by the depth of a well within the manse grounds), moisture can never escape from the ground water into this house.

As regards the ground air, it is answered that in itself ground air is harmless, in no way differing from air above ground, and that air, whether atmosphere or ground air, is only dangerous if it carries with it microbic material, and that in that case the soil through which the air comes being sand and gravel, does not contain any microbic material which would contaminate the air.

On either side, there are minor or side issues raised by the skilled witnesses, as, for instance, it is said for the minister that, even assuming that in ordinary circumstances the ground air would be pure in such a soil, the presence of the graveyard on the slope, and just above the manse, is a source of contamination; to which it is answered that it is an exploded theory that the proximity of a graveyard, especially in such a soil as that of Biggar, can be a source of danger.

Again, there are interesting theories and much difference of opinion upon the subject of the capillary attraction of the house walls.

Into these and such like questions I do not think it is necessary to enter in detail. We have the well-established fact that this house is very damp, which infers some serious defect in its construction somewhere. It is not, in my view, by any means proved that the surface water is alone accountable for the presence of damp; on the contrary, I think the balance of opinion is in favour of the view that this is only one amongst several possible causes, and the very fact that eminent skilled witnesses who have devoted special attention to hygiene and sanitary science can entertain divergent views, suggests that their theories are after all only theories, liable to be upset as sanitary science advances, and that their application in this particular case is of doubtful accuracy. What is wanted is to make sure that dampness will not show itself, and to ensure this, not only must the incursion of surface water be protected against, but there should be an impermeable layer of concrete or similar material interposed between the surface of the ground and the level of the flooring, and in any case the walls should be protected by damp-proof courses.

This leads me to consider whether this security against damp is possible in the present condition of this building; and here again we have a large body of skilled evidence, but the eminent architects, like the sanitary officials, take diverged views. I do not attempt to reconcile their differences, but after careful study of the whole evidence I come to the conclusion that, while the necessary works if carefully gone about might possibly be successful, the likelihood is that they would fail. It is clear that a large amount of underpinning would be involved, and with a building of the age of this manse, and having regard to the exceptional and peculiar character of its foundations, this would be a very risky operation. The work would be very much of the nature of an experiment, and one of the risks is the collapse of the whole fabric. One thing only about it is certain, and that is that, assuming it could be successfully done, this work would entail very considerable expense, the amount of which at present can be but vaguely estimated.

As regards the accommodation, it is not seriously disputed that the present rooms, besides being too few in number, are objectionable as regards their size, height, and otherwise, and all the architects include in their rival schemes the reconstruction of the internal arrangement of the house. In my view the house should contain a dining room, drawing room, parlour or nursery and study, and at least five good-sized bedrooms, with proper bathroom, servants' accommodation, stores and pantries, and the heritors recognise that this extent of accommodotion is not an unreasonable demand. The heritors will no doubt see it their interest to avoid future disputes by now taking a liberal view of the accommodation requisite.

The next consideration is the probable expense of repairs and additions as against a new manse. Upon this we have in evidence such widely divergent views as to suggest grave doubt as to whether any of the estimates have been sufficiently worked out in detail. Take first Mr. E.'s report, which is the basis of the Presbytery's finding. His scheme is one for extensive repair and a great deal of structural alteration of the present fabric, and his estimate of cost is £780. But he admits that to this must be added professional fees, so that the estimate should be at least £850. Then Mr. E. pins his faith to the theory that the damp in this house is entirely due to the surface water, and he does not propose to do anything to guard against the other possible sources of damp. He says, however, that he would put a damp course in a new building or "where it was possible in repairing an old one." In the view I take, this expense must be incurred, and I think then Mr. E.'s figure would not be

overstated at £1000. There are other things which might have to be done. In an old house like this defects not reckoned with would no doubt disclose themselves as the work proceeded. The rafters for instance may or may not be sound at the core. All we presently know about them is that they are rotten on the outside. It is to be regretted that the assistant in whose examination Mr. E. relied was not examined. I am inclined to think that before he got to the end of the work Mr. E. would not find himself far, if any, short of Mr. F.'s figure, at least £1200.

As regards the expense of a new house on the present site, Mr. E. puts it at £2200, Mr. D. puts it at £1900, Mr. F. puts it at £1300, and so does Mr. G. All these architects I take to be giving an estimate for a new building of a new material, and so I think are Mr. H. and Mr. I. But if the old house is demolished a great deal of the material could no doubt be utilised, and I think the opinion of Mr. J., a practical builder from Biggar, is probably nearest the mark. He puts it at from £1500 to £1600 at the highest. This figure is about the average of those of the architects.

Upon the whole evidence, I think it is established (1) that while repair of any fabric may be tried, and in this sense the manse may possibly be said to be repairable, (2) the attempt to bring this building into harmony with present day ideas of sanitary and residential requirements would be attended with risk and might prove a failure, and (3) even assuming it could be done, the difference between the cost of such efficient repair and alteration and addition as is necessary and is proposed by the heritors, and the cost of pulling it down and erecting an entirely new fabric, would not be more than about £500 to £600. The heritors could never hope to get the old fabric declared a free manse, and taking a common-sense and reasonable view of the whole matter I am satisfied that it is not in the interest of the parish to attempt a reconstruction of the present manse; that it is not a building on which a reasonable and prudent man would spend the large amount of money indicated; and that it is within the ordinary rules of prudence and good management that the heritors should pull down the dwelling-house and build another.

If I am right in this, then it is manifestly in the interests of the pockets of the heritors to fall in with the minister's proposal, whereby the expense to the heritors would be restricted to £1000. As it is a condition of this proposal that the new manse be upon a new site, and as I have not found that the present site is unsuitable, I am not called upon to express any opinion upon this proposal. It may be

that the minister and the heritors may now bury the hatchet and revert to some such arrangement. I would only remark that, as it is proposed that the new manse should first be built and then the old one conveyed to the minister, and as the new manse will take a considerable time to build, both parties would probably do well first to make sure that they are legally entitled to make such a compact in regard to property which the present body of heritors hold as trustees for the successive incumbents. I do not doubt, however, that, if the proposal is, as in the face of it it appears to be, an eminently reasonable one, judicial authority would be obtained for making such an arrangement.

As regards expenses, the minister having failed in his attack upon the site has not been wholly successful and is not entitled to an award therefore of his full expenses. In allowing him two-thirds, I have I think fairly apportioned the costs to the measure of success.

VI.

INTERLOCUTORS by Sheriff Grahame, Sheriff-Substitute of Perthshire, *in causa* The Heritors of Glendevon *v.* The Presbytery of Auchterarder.

At Perth the 18th day of December, 1896.

In presence of John Grahame, Esquire, Advocate, Sheriff-Substitute of the County of Perth.

Compeared Mr. X. for the pursuer, who produced certificate of intimation having been given in terms of the statute founded on.

Also compeared Mr. Y., agent for the respondents, who tendered written answers on their behalf.

The Sheriff-Substitute, in respect this is a case in which written answers are necessary, allows the same to be received: Further, appoints the 29th day of December current as a day for the personal inspection of the manse and offices in question, in presence of the parties or their agents.

Perth, 25th March, 1897.—Having personally inspected the manse of Glendevon, and having heard parties on the whole case, and relative reports, before further procedure remits to Mr. Z., architect, of new to inspect the manse of Glendevon, and to

report to the Court what repairs are in his opinion necessary to be executed to put said manse in a habitable condition, as compared with the alterations and additions required under the Presbytery's decree; and to give an estimate of the respective costs of executing such repairs upon the present manse, and the making of the alterations and additions required under the orders and decree of the Presbytery; and, further, to state whether in the event of the present building being merely repaired, as proposed, this would have the effect of securing a permanent or a merely temporary habitable condition of the manse; and, also, whether the alterations and additions as required by the Presbytery could be diminished or modified so as to lessen the cost of their execution without materially affecting the convenience and suitability of the manse, said report to be lodged *quam primum.*

Note.—This case is brought into this Court by an appeal taken under the provisions of the 3rd section of the Ecclesiastical Buildings (Scotland) Act, 1868, against certain orders and decree pronounced by the Presbytery of Auchterarder, of date 4th November, 1896. The Presbytery's decree proceeds upon a petition to the Presbytery by the Rev. A., minister of the parish of Glendevon, of date 28th September, 1895, to the Presbytery of Auchterarder, asking for certain repairs and additions to his manse, and upon certain conferences following thereon between said Presbytery and the heritors of said parish. The Presbytery's decree, after referring to an offer which had been made on 23rd May, 1896, by the heritors, and to certain additions made thereto by the Presbytery themselves, of date 10th June, 1896, orders certain repairs and additions to said manse, and ordains "the heritors, failing whom, the petitioner" (that is, the Rev. A.) "to procure the necessary plans, specifications, and estimates for carrying out the above orders, and lay them before the Presbytery on Wednesday, 2nd December, at twelve o'clock noon, with certification." The heritors, in terms of the 3rd section of the Ecclesiastical Buildings (Scotland) Act, have appealed against the Presbytery's decree, and crave this Court to stay the proceedings of the Presbytery under their said decree, and to dispose of the same in terms of the provisions of said Act. The section of the Act specially applicable to the question at issue is the 8th section, which provides "that in any proceedings for the building or repairing of a church or manse, the Sheriff shall inquire, with such assistance of architects or other professional persons as he shall think proper, into the truth of the allegations contained in

the petition, and if he shall be satisfied that, in accordance with the law as at present existing, a church or manse should be built, or that repairs are necessary, he shall pronounce a finding accordingly; provided always that if he sees cause the Sheriff may dismiss the petition." The position which the heritors take under their appeal is that they admit their liability to put the manse and offices of Glendevon in good order, and express their willingness to fulfil all their legal obligations in this respect, but deny that any obligation rests upon them to execute such repairs and additions to the manse as are asked for in Mr. A.'s petition, and decerned for by the Presbytery; and they state that they have entered the present appeal with the view of having their legal obligations in the matter determined. It appears from the minutes of meetings of Presbytery and of heritors, which are in process relative to Mr. A.'s petition, that the heritors had agreed to the execution not only of the necessary repairs of the present manse, but to the carrying out of the alterations and additions asked, and that in view of the heritors' offer, plans and estimates had, on the instructions of the Presbytery and heritors, been obtained by them respectively from Messrs. C. & D., architects, Glasgow, and Mr. Z., architect, Fossoway, and that it was only after objections had been taken and insisted in by the Burgh of Dunfermline, the largest heritor in the parish, to the carrying out of the offer originally made by the heritors, that their offer was withdrawn by them and they objected to the execution of any of the required repairs, alterations, and additions further than was necessary to put the present building in a good habitable condition, and argued that as this could be done by repairs alone, the question as to whether the accommodation provided by the present manse was defective or not is one which cannot be considered, and that therefore the heritors cannot be required to give effect to the claim which the minister makes for additions to his manse. The question therefore now brought for the determination of this Court under the heritors' appeal, is whether the present condition of the Glendevon manse is such as to require the execution by the heritors not only of such repairs as shall put the present building in a good habitable state, but also whether the manse is at present in such a condition of decay as to prevent the old building from fulfilling the legal requirements of a parish manse without the execution of the additions asked for. The general rule of law appears to be, that although repairs of a small or inconsiderable nature may be necessary, such necessity will not make way for remodelling or adding to the house so as to render it in all respects

a suitable manse, but that when the manse requires very extensive and expensive repairs to render it habitable, the question of not only repairing the manse, but of the additions required to make it suitable for the accommodation of the minister and his family, may be competently considered; and that thus in exceptional cases where the necessary repairs are of very considerable extent, or involve structural alterations in the original buildings, or where the extent and expense of the repairs, even though they do not involve structural alterations, are very large and approach the cost necessary to convert the manse by additions and alterations into a suitable residence, the Court may be required to authorise the carrying out of such alterations and additions. The reports of both of the architects to whom it was remitted to consider the conditions of Glendevon manse, and my own personal inspection of the building, have satisfied me that the present manse if merely repaired and put in order will not afford such convenient and sanitary accommodation as to make the old building a suitable residence for the minister and his family, such as he would have been entitled to require had the question been one as to the building of a new manse. The present manse was originally built in the year 1812, and received some additions in the year 1840, and even though it may be capable of being repaired and put in order so as to be sufficient for the requirements of an unmarried clergyman, it cannot without considerable alterations and additions be regarded as supplying a satisfactory residence for a married minister and his family. In these circumstances the question now before the Court appears to be one which cannot be satisfactorily determined without further information than has been yet afforded by the reports of the professional gentlemen employed by the Presbytery and heritors. I have therefore thought it right, before deciding finally on what the heritors may be required to do, to remit again to Mr. Z., the architect employed by the heritors, and in whom it was stated at the hearing of the case that the Presbytery also have full confidence, of new to report on the condition of the present manse, and to furnish distinct and separate statements as to what are the repairs necessary to make it habitable, as compared with those required to make it not only habitable but suitable, and what he estimates will be the cost in either case. This seems a proper course of procedure in the present case, where it is brought out in Mr. Z.'s own report to the heritors that the condition of the present roof of the manse renders it necessary to be entirely renewed, a repair which, though strictly speaking not of the character of a structural alteration, is one which in the present case has an important bearing on the question of the propriety

and expediency of authorising the proposed additions, inasmuch as the removal of this old roof will give an opportunity which otherwise would not have occurred for the formation in the manse of such attic rooms as will provide the additional accommodation which is asked for in Mr. A.'s petition, and which the Presbytery have ordained as required to make the manse a suitable residence. In the whole circumstances, and the question raised being in its present aspect one of some difficulty, I have thought it right before giving my final decision in the case to obtain further assistance from an architect in whom both Presbytery and heritors appear to have confidence.

Perth, 27*th July*, 1897.—Having resumed consideration of the case, and having heard parties thereon with special reference to the report, No. 20 of Process, of Mr. Z., architect, lodged by him on 8th July, 1897, in terms of the Interlocutor of date 25th March, 1897, Finds that, as instructed by said report, the manse of Glendevon and the offices and buildings connected therewith are in such a state of disrepair as in their present condition not to afford a suitable residence for the minister of the parish, and that in order to make the existing buildings comfortably habitable, very extensive repairs, including the rebuilding of the manse roof and various alterations, are necessary, and that these cannot be carried out without interfering with and diminishing the amount of accommodation which the existing buildings provide, reducing the number of bedrooms to only two; That, taking these circumstances into consideration, and specially the circumstance that the present roof is in such a state of decay as to make its removal necessary, and thus to afford a special opportunity for the providing of the attic rooms proposed by the reporter, Finds that, if the repairs, alterations, and additions recommended by the reporter are carried out, the rights of the petitioners and the legal obligations of the heritors in regard to said manse and buildings will be satisfied: Therefore approves of said report, and, with the above findings and approval, appoints the case to be put to the roll of 30th July curt. that parties may be heard as to the course now to be taken in giving effect to said findings and approval.

Note.—The above findings proceed on the lines indicated in the note to my interlocutor of 25th March last, as marking the course to be followed in determining the rights of parish ministers and the legal obligations of the heritors in such proceedings as the present. Questions in reference to the rebuilding and repairing of manses have

been sources of considerable litigation in the Courts, and while it may not be possible completely to reconcile the principle on which each of these decisions has been given, the principle of decision ultimately arrived at in the later decisions of the Supreme Court appears to be that when, as in the present case, not merely repairs but additions to the existing buildings are asked to be executed, the execution of such additions can be authorised, but only in cases where the condition of the manse buildings is such that, in order to make them habitable, either structural alterations or very extensive repairs are required. In the older cases the principle given effect to seems to have been that if the buildings were in such a state that by means of repairs they could be put into a habitable condition the legal obligations of the heritors would be satisfied by the execution of these repairs, even though the building, so repaired, could not be held to afford a suitable residence for the minister. In more recent cases, however (and reference is made to the cases of the *Heritors of Kingoldrum* v. *Haldane*, 24th January, 1863, 1 Mac. 235 and the *Heritors of Insch* v. *Story*, 18th December, 1869, 8 Mac. 363), it has been held that the principle above referred to is not to be held as absolutely binding, and that if the repairs required to satisfy the bare condition of making the buildings habitable were either so important as to necessitate structural alterations or so extensive as to make it a question whether or not, in the interests of all parties, it would not be advisable to erect an entirely new manse instead of repairing the old one, that the Court might then, in the exercise of its discretion, authorise the making of such additions as would remedy the existing deficiency or inconvenient condition of the old building, and convert it into a dwelling-house suitable to the *status* and requirements of the minister of the parish. The present condition of the old manse of Glendevon, as described in Mr. Z.'s report, and as observed by myself on the occasion of its inspection on 29th December last, must be held to be such that, while the execution of the repairs proposed would render it technically habitable, they could not have the effect of making it a suitable dwelling for the minister of the parish. The accommodation with which he would, in the event of the execution of the proposed repairs, be provided, would evidently be quite inadequate even for a minister who had no family. Even on the improbable assumption that the minister of Glendevon hereafter will always be an unmarried man, he is entitled to be provided with such accommodation as would enable him to offer hospitality to his relatives or friends, and as I think a convenient opportunity has now occurred for making the old manse a suitable as well as a habitable

residence, without any undue burden being thereby imposed on the heritors, the Court has, and I think ought to exercise, the power of authorising the opportunity to be taken advantage of. The necessity for removing the old roof of Glendevon manse, of which I understand the heritors were not aware at the institution of this action, furnishes an opportune occasion for making the addition of the attic bedrooms as proposed by the reporter, and without which, or some similar addition, it is evident that the manse, though repaired as to be habitable, would still be an inadequate and unsuitable dwelling. Apart from the question of the proposed additional attic rooms, the reporter's suggestions appear to be judicious and proper, and I have therefore thought it right to approve of Mr. Z.'s report and pronounce such findings as will, I trust, lead to the proposals being, without delay, carried out in their entirety.

Perth, 6th August, 1897.—Having resumed consideration of the cause, and heard parties as to the course now to be taken in giving effect to the findings and approval in interlocutor of date 27th July, 1897, of consent ordains the repairs, alterations, and additions recommended by Mr. Z., architect, in his report, No. 20 of Process, to be executed according to his plan, No. 24 of Process, and relative specification: Remits to Mr. Z. to receive tenders for the execution of the work, to accept of such tenders as seem best, and to superintend their execution, and to report to the Court when such repairs, alterations, and additions have been duly executed: *Quoad ultra*, continues the cause *sine die*.

VII.

INTERLOCUTOR by Sheriff Russell Bell, Sheriff-Substitute of Stirling, Dumbarton, and Clackmannan, *in causa* Heritors of the Parish of Slamannan *v.* The Parish Minister.

Falkirk, 31st May, 1898.—The Sheriff-Substitute, having considered the cause, finds that the manse of the parish of Slamannan is deficient in safety, comfort, and accommodation for the use of the minister of said parish, and that, in order to remedy said deficiency, it is necessary that the repairs, alterations, and additions specified in the report, No. 13 of Process, by Mr. Z., architect, Stirling, be carried out; therefore ordains the heritors of said parish forthwith to carry out the said repairs, alterations, and additions, at the sight and to the satis-

faction of the said Z.: Appoints the cause to be put to the roll for hearing parties on the question of expenses.

Note.—In September of last year the minister of Slamannan presented a petition to the Presbytery of Linlithgow for certain repairs and structural alterations and additions to the manse. The Presbytery obtained the report, No. 5 of Process, by Mr. Y., architect, after he had visited the manse, along with a committee of the Presbytery, and approved thereof, and ordered the repairs and others therein recommended to be forthwith carried out by the heritors. Some history of proceedings previous to this is given on record, but I don't think it is necessary to go back beyond Mr. Y.'s report, except to notice that during the last seven or eight years a sum of between £60 and £70 has been expended on the upkeep of the manse—one item in No. 12 of Process having reference to the glebe, not to the manse. The present case is an appeal from the Presbytery's order by twelve heritors of small estates, representing an assessable value of nearly £400. Condescendence and answers having been lodged, I made a remit to Mr. Z., architect, which has resulted in the report No. 13 of Process. Previous to this, the appellants had lodged a minute, in which they agreed to all the repairs, &c., ordered by the Presbytery, with certain important exceptions therein set forth—slightly modified in their condescendence. Mr. Y. did not set down an estimate of expense in his report, but we have now Mr. Z.'s estimate of Mr. Y.'s, as well as of his own recommendations, the difference between the two amounts being £70 in favour of the appellants in Mr. Z.'s report. The respondent is now content to accept the repairs, &c., recommended by Mr. Z., *plus* the introduction of a hot-water supply, while the appellants still adhere to their objections in so far as any of the items included in them have been recommended by Mr. Z.

The question in such cases are, as the Lord President observed in that of the *Heritors of Insch* (8 M. 369), often of great difficulty and nicety, with no very clear rule of law for guide. Each case must be judged on its own circumstances, with as much guidance as can be got from general observations and parallel circumstances in previous cases, in the Court of Session, prior to the passing of the Ecclesiastical Buildings Act, 1868, which allowed appeal from the Presbytery to the Sheriff. There is no question here of straitness of accommodation either in the manse or offices, that, except in the item of the washing-house, being admittedly ample; the question is one of repair and structural rearrangement of accommodation for suitability of habitation. If all the items objected to by the appellants—as in Mr. Y.'s report—were

struck off, the expense of Mr. Z.'s recommendations would be considerably reduced. Of Mr. Y.'s recommendations, he has considerably modified in the appellant's favour the items enumerated in Nos. 2, 4, 5, and 6 of their minutes.

The *Insch* case is both the most recent and the most instructive authority on the subject. It has established that structural alterations and additions required to keep a manse in proper condition are within the power of Presbyteries to order. Though this was the principle of decision in the *Kingoldrum* case, six years earlier, it seems to have been practically departed from in the *Kirkton* case, which came between these two. The *Insch* judgment contains the frequently quoted observation of Lord Kinloch, that a minister's manse should be a gentleman's house. The whole passage is as follows:—"It is of great importance that the residence of the minister of the parish should be suitable to his position and comfortable for his family, not merely as a tribute due to a most valuable and useful class of men, but with reference also to those moral influences which are very closely connected with suitable and comfortable dwellings. The manse of the minister should be the dwelling-house of a gentleman." This is the only general dictum covering the whole question which I know, and it is eminently open to interpretation, for it is clear that the estimate of what is the dwelling of a gentleman is something that will vary with the changing state of civilisation, and which is, according to present progressive tendencies—when sanitation, cleanliness, and comfort have been recently making ever increased demands—becoming every day more liberal. Between the refusal of the Court in 1778 to give the minister of Creich a slated roof to his manse, as long as the thatch could be repaired, and present ideas of what a minister's dwelling should be, there is a great gulf fixed; and a continual progress is shown in the liberality of the Court. I will take the items objected to by the heritors in detail. The first is the washing-house. Both reporters are distinct on the want of proper accommodation in having the scullery and washing-house combined in one apartment, and that inconveniently small, at least for the latter purpose. To my own inspection it appeared that when washing was going on there, and cooking of meals in the kitchen—even though the latter were reduced to the usual minimum of washing day—the entering of steam into the latter apartment from the washing of soiled linen would be, if not absolutely insanitary, certainly then on the verge of it. Personally I should call it disgusting. The appellants propose ventilation. Mr. Z. is of opinion that this would mitigate the evil. A washing-

house has been sanctioned in former cases, and both it and a scullery —separate and not combined—may be safely said to be parts of the dwelling of a gentleman.

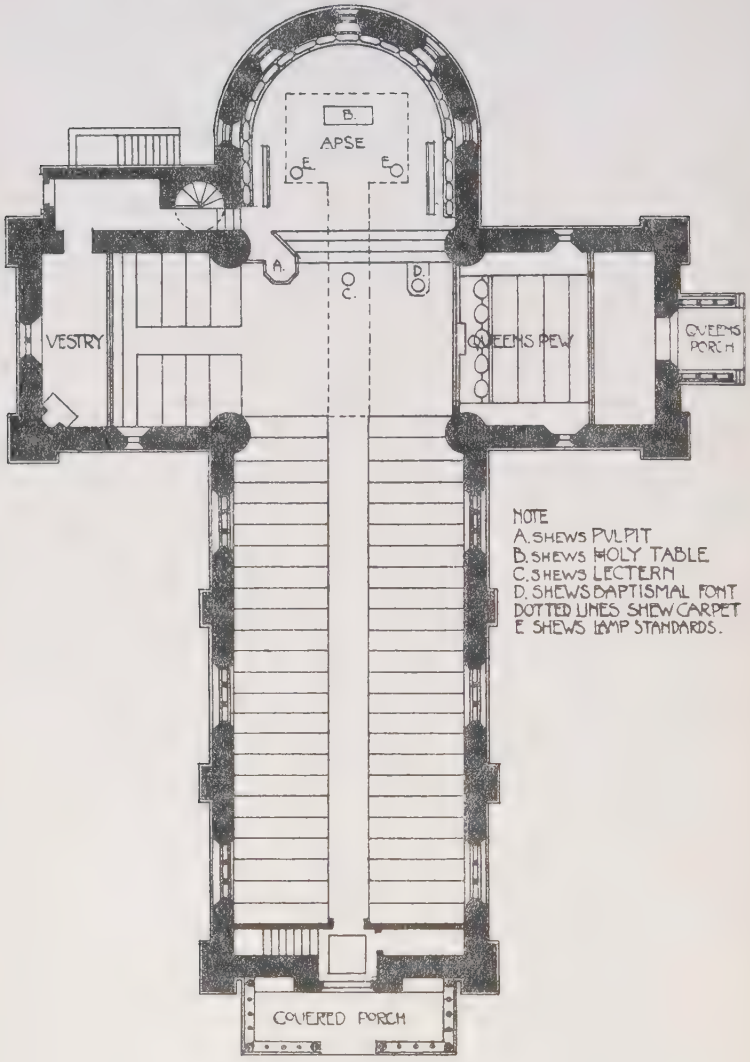
With regard to the next item, the bathroom. Mr. Z. adopts Mr. Y.'s suggestion so far as the site and construction of a new one are concerned, but differs from him on the important point of not recommending, or in fact of deprecating, for reasons given by him, and which had not been lost sight of by Mr. Y., the introduction of a hot-water supply. Mr. Z. bases his objection on the nature of the water supply, which Mr. Y. thinks might be obtained. Granting a sufficient supply of water, it may not unreasonably be maintained that the filling of the boiler is a matter which concerns the occupant of the house; if the objections were merely to his failing to do so, no county house with a private water supply raised by manual labour could have the benefit of hot water. And it is a hard saying that, in days when every flat of houses now erected in towns occupied by workmen of the better class is furnished with hot water, such is not the necessary adjunct of the house of a parish minister. But the objection here is one founded on the situation of the manse—in a locality not furnished by a general water supply—and is an inconvenience resulting from the situation. No doubt every new manse built in these days would be provided with a hot-water supply, but as yet there is no precedent for its introduction into a manse where it did not formerly exist. So, with reluctance, I find myself compelled to conclude that the heritors cannot be required to furnish it. I don't think anything requires to be said on Articles 3 (papering and painting) and 4 (the kitchen range), since the appellants have practically left the former to the reporter, and the latter falls out altogether, since they are now only asked to do what they were willing to do—repair the existing range.

The same is the case with the third head of Article 8 (the widening of the gateway [of the stable yard]). The benefit thereof will not enure to the minister alone, since the heritors, who use it for their vehicles on Sunday, will share it.

The final article is also considerably modified in the appellant's favour by Mr. Z.'s not considering it necessary to deal with the courtyard and the stable and byre floors, as recommended by Mr. Y. On the question of the garden wall, it was decided in the *Half Morton* case (40 Inv. 13) that the minister is entitled to have a wall round his garden where none exists; but here there is a wall, and there is no precedent for compelling heritors to improve the protection by heightening an existing wall which may be low of structure.

The appellants have still another objection to Mr. Z.'s report, not directly included in their minute—namely, the proposal to turn two cellars into a hen-house. A hen-house may surely be regarded as a necessary adjunct of a country manse, since it is so of every country and farm house. The reporter does not propose to erect a new building, but merely to modify an existing one in what seems a reasonable way.

Parish Church of Crathie.



GROUND PLAN.



VIII.

PARISH CHURCH OF CRATHIE.

Mr. A. Marshall Mackenzie, A.R.S.A., has allowed me to reproduce plan of the Parish Church of Crathie, and the Rev. S. J. Ramsay Sibbald, parish minister, has been good enough to mark upon it the situation of the *ornamenta*. The Holy Table is of heavy oak, with three panels, and without any open work. As erected its dimensions were—length five feet, depth three feet, breadth two feet; it is intended, however, to increase its length to six feet. The pulpit of stone is on the north side of the entrance to the chancel. The font is placed just below the chancel steps, at the junction of the chancel and south transept. There is a brass lectern below the centre of the chancel steps. The organ is in an organ-loft at the west end of the church, in which the choir also is accommodated. The dimensions of the pews for the general congregation are about, depth three feet, breadth $2\frac{3}{4}$ feet. They accommodate about five persons. It is desirable to have wider pews which permit of the people kneeling. The plan is inserted to indicate to the reader's eye the general arrangement of ornamenta in a Presbyterian church suitable to practically any architectural design.

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