her damage, at least so much as the Lords shall think reasonable at their modification.

ALLEGED,---She had no inclination, after her husband's death, to live in that country, but choosed to dwell in burgh-towns; and so no action can be sustained at the assignee's instance, unless it can be proven that she required her husband's heir to repair it: and, on their delay or refusal, she should have pursued a visitation, and cognition of the condition of the house, and what expense the necessary reparations would require; which never having been done in thirty-one years' space, and now twenty years after her death, it is more than prescribed. And it is impossible now, *post tanti temporis intervallum*, that the damage of not repairing that mansion-house can either be known or liquidated: neither were they *in mora* till required, which was never sought: and she had several transactions with the heir after her husband's death; but not the least insinuation that she intended to dwell there.

ANSWERED,---The obligement is clear and positive; and acknowledges the house was not then habitable; and there was no necessity of requisition, but they were bound to repair it. What if he had obliged himself and his heirs to build her a house on her jointure lands? They behoved to pay her house-rent so long as she wanted it, aye till performance,—*damnum et interesse* succeeding *loco rei;* and the case is the same here, unless they say the house was made habitable and repaired.

The Lords found the libel not relevant after so long a time; there having been no requisition used; and refused to sustain action now.

It was ALLEGED, indeed, That the Lady had raised a process for it in her own lifetime; which showed her plain design to crave it. But the Lords did not regard it, because it was not produced. *Vol. II. Page* 423.

1708. *January* 31. The REVEREND MICHAEL POTTER *against* the HERITORS of KIPPEN.

MR Michael Potter being admitted minister at Kippen, in Stirlingshire, in 1700, and the manse being very ruinous, there is a visitation made by the presbytery of Dumblane, who gave it as their opinion, that the minister ought to have sixty pounds Scots yearly for a house-maill, aye till he be provided by the heritors in a sufficient habitable manse; and that he ought to have L.20 yearly as the value of grass for two kine and a horse, conform to the 20th Act, 1663, till he get as much grass allocated to him; and recommended to the civil magistrate and judges to interpose their authority thereto. Upon this act Mr Potter raises an action against his whole heritors; and obtains a decreet before the Lords for the said L.60 Scots of house-rent aye till the manse be rebuilt, and the L.20 for the grass aye till he be furnished and allocated. And having charged Stirling of Cairden, Graham of Bucklyvie, and others, for payment, they SUSPEND on thir reasons: 1*mo*, The decreet was in absence, and was a while under submission, and yet extracted before up-giving of the communing. 2*do*, The presbytery's act is null; for, though they be empowered by Acts of Parliament, in relation to the building and repairing of manses, yet not for modifying da-

mages for want of one. *3tio*, The manse was not so ruinous; for, at his admission in 1700, the heritors and ministers dined in it; and he, by deserting it, has made it to decay more than otherwise it would have done; and the heritors have stented themselves in L.100 sterling for repairing it, that it may be declared a free manse. Likeas, there are vacant stipends in the parish that ought to be applied, *primo loco*, to this end. *4to*, For his L.20 of grass-maill, that is only due by law out of the kirk-lands in the parish; and so cannot be settled till they be condescended upon. *5to*, *Esto* they were liable for his house-rent till he get his manse, yet he can demand no more than what he really pays for the house he presently hires, which is only L.40 Scots; and he can seek only one cow's grass, because they offer to prove he has grass for one cow already; and so can burden the parish with nothing but grass to the other. *6to*, They being charged in general, without expressing their several proportions of the L.60 for the house-rent, and L.20 for the grass, it is impossible they can give any obedience thereto.

ANSWERED to the *first*,---Though the decreet was in absence, yet that is no good reason where you are personally apprehended and contumacious. And it is great confidence to found on the communing, for that was in the 1705, on the heritors' promise to concert it among themselves, for which he gave them three months; instead whereof he forebore extracting his decreet for two years, till he saw they would do nothing. To the *second*, If the presbytery may determine in the repairing and building of manses, it is a consequence, *a majore ad minus*, that they may determine the quota of a habitable manse, or the house-rent to be paid in the interim until he get possession of a habitable manse: and every heritor needs not be cited by messengers to this effect; but an edictal citation from the pulpit, warning them of the diet of attendance, is sufficient; though here more caution was used, by sending circular letters to every one of them. To the *third*, The instance is very impertinent, that, in a fair summer day, the ministers took a little refreshment in that manse: for it is known, that, in the winter following, one of its gables fell to the ground; and, though workmen were entered to it, yet they deserted, because sundry of the heritors were backward in paying up their proportions. So, to this hour, the manse is neither water-tight nor wind-tight; and it is known tradesmen will not work except either paid, or that some responsal persons give their engagement for it. To the *fourth*, The minister's grass affects the kirk-lands *primo loco*; and that is a good defence amongst the heritors themselves; and, when they are agreed, he shall accept of it; but, in the meantime, he must have the L.20 the Act of Parliament has liquidated in the place of it. To the *fifth*, It is true he has hired a house from Glentirren, for L.40 Scots; yet it is at such an inconvenient distance from his church and glebe, that, in leading out his muck, and other inconveniences, he is at great expenses: and, *esto* he had it *gratis*, which is not so, that can never exoner the other heritors, seeing he stands *debitor beneficii*. And he is at charges in repairing and upholding it, besides what expenses he paid in citing them, and extracting this long decreet, which far exceed this sixty pounds of house-rent acclaimed. And, for his cow's grass, it is a sophism; for he is obliged to cast part of his glebe (which is not four acres, as it ought to be,) into grass, else he could neither maintain horse nor cow; so this is a most frivolous, unjust, calumnious pretence, to have his glebe to serve for grass and all. To the *sixth*, The minister did all that was incumbent on him. He extracted their valuations out of the cess-books of the shire, and gave in a cast. If they had objected that

they were overvalued or wronged in their quota, they would have been heard; but they have said no such thing. And whenever they put the manse in a habitable condition, and agree on his grass, then this rent will cease, and the heritors will be free of the demand.

The Lords refused the bill, and repelled the reasons of suspension, in respect of the foresaid answers. *Vol. II. Page* 424.

1708. *February* 3. HELEN HAMILTON and THOMAS MUTTER *against* JAMES ALSTON.

JAMES Alston, merchant, being debtor to Helen Hamilton in 700 merks by bond, and she, and Thomas Mutter her husband, having charged him, he suspends, that he had obtained a *cessio bonorum* in 1662, as not able to pay his debt, by some losses and misfortunes; in which decreet this woman is expressly called.

ANSWERED,—That being an extraordinary remedy, founded on commiseration and mercy to our human nature, so long as his indigent difficulties lasted they were not to grudge; but now his circumstances being altered, and he having enjoyed a lucrative and beneficial place, as clerk to the kirk-session of Edinburgh, these nine or ten years bygone,—he ought not to protect and screen himself under his *bonorum;* for law says,—If such a debtor come *ad pinguiorem fortunam,* and grow richer, then he is convenable, though not *in solidum,* yet *in quantum facere potest;* he enjoying *beneficium competentiæ:* as appears from Sueidewin, *ad sect. ult. Instit. De Act.*

REPLIED,—The office he enjoys from the Town of Edinburgh is precarious, and may be recalled at their pleasure; and its emoluments and perquisites are no more than a precise aliment to him and his family: likeas, when he obtained his *cessio,* he gave a general disposition to his creditors of all his effects, whereof this charger may reap the benefit if she pleases.

DUPLIED,—If he will produce his count-books of his income by the place he now enjoys, it will evidently appear that he has a considerable excresce above a suitable aliment and subsistence; and the chargers crave only a part of that, conform to the Lords' modification, *first,* what may fairly serve him as an aliment; and *2dly,* what share they shall get of the superplus. And it were iniquitous to suffer him, by such artificial methods, to cover his so gainful acquisitions from his creditors, that being too thin a veil to palliate so transparent machinations to defraud creditors. And this is no new practice; for, in the case of *Beg and Davidson, 9th July* 1688, Beg having arrested Davidson, preceptor in Heriot's Hospital, his salary and fee; and it being alleged, That it was alimentary, and so not arrestable, and that he had a decreet of *bonorum;* yet the Lords found, in so far as it exceeded a just and rational aliment, the same was affectable by his creditors, notwithstanding of his *bonorum.*

The Lords resolved to hear the case more fully, before they should determine its relevancy *in jure.* *Vol. II. Page* 426.