Thursday, July 6.

FIRST DIVISION.

[Lord Shand, Ordinary.

MITCHELL AND OTHERS *v.* THE HERITORS OF PITSLIGO.

Church—Manse—Presbytery—Heritors—Expenses—Act 31 *and* 32 *Vict. cap.* 96 (*Ecclesiastical Buildings and Glebes Act*).

On a petition by a minister for repair of his manse being presented to the presbytery, they employed a man of skill to report. The heritors objected to the report, which recommended alterations, and under the Act 31 and 32 Vict. cap. 96, appealed the case to the Sheriff and afterwards to the Court of Session, when a remit was made to a second man of skill. His report, which did not materially differ from the first, was acted upon. In an action by the presbytery against the heritors for the expenses of the first report—*held* that the latter were liable, and the defence that such expenses could only be recovered in the former process, repelled.

Observed that these expenses did not form part of the expenses of the former process, to which the presbytery could not be parties, being excluded by statute, but were expenses due in respect of the presbytery having been under the necessity, in the exercise of a public duty, of employing a man of skill.

This was an action at the instance of the Rev. John Mitchell, clerk to the Presbytery of Deer, and as representing the Presbytery, with consent of David Rhind, architect, Edinburgh, against the heritors of the parish of Pitsligo, Aberdeenshire, or their representatives, four in number. The conclusion of the summons was for payment of a sum of £62, 4s. 8d., found due and decerned for by the Presbytery of Deer, under the following circumstances:—

On 28th November 1871 the Rev. Walter Gregor, minister of the parish of Pitsligo, presented a petition to the Presbytery of Deer, setting forth *inter alia* that the manse was without sufficient drainage, so as to be injurious to health, and praying that the Presbytery would visit it after the usual intimation, and would direct the attendance of qualified tradesmen, who might, if necessary, report. After several meetings the Presbytery, on 19th December, resolved to meet at the manse on 9th January 1872, to secure the attendance of Mr David Rhind, architect, Edinburgh, and to appoint him to inspect. At that meeting parties were present on behalf of three of the heritors, and Mr Gregor appeared for himself. Mr Rhind was also present, and after the meeting he proceeded, as the pursuers averred, "along with the Presbytery and representatives of heritors present to inspect the premises, the whole of the representatives of the heritors taking an active part in pointing out what they considered necessary for Mr Rhind's information and guidance, and giving their views as to the best means of removing defects." Shortly thereafter Mr Rhind issued a report pointing out defects in the manse and the remedies he proposed. Thereafter, on 23d January 1872, the Presbytery again met, when the report was read, all parties heard upon it, and in respect Mr Rhind had caused certain operations to be performed on the manse, the Presbytery resolved to request him to supplement the report as to the effect they produced. Mr Gregor and the heritors acquiesced in this. Accordingly, a supplementary report was given in, and on 7th March there was another meeting of the Presbytery, when Mr Charles Duncan, advocate, Aberdeen, appeared for the heritors, and it was found, in terms of Mr Rhind's supplementary report, that the defects had not been remedied and that certain further operations would have to be carried out. Thereafter the heritors appealed to the Sheriff against this judgment, and the case was afterwards removed to the Court of Session, and came to depend before the Lord Ordinary on Teinds (Lord Shand), who, after remitting to and getting several reports from Mr Kinnear, architect, found that the manse required substantial repairs and alterations to make it habitable, and ordered them to be carried out. This was done.

Mr Rhind having rendered his account, amounting to £50, 12s. 4d., to the Presbytery shortly thereafter, the Presbytery met and found that the sum of £62, 4s. 8d., the whole sum incurred in regard to the manse, was a reasonable and necessary charge upon the heritors of the parish, and decree was given against them accordingly and a scheme of division of the sum amongst the individual heritors prepared.

The heritors refused to pay, and the present action was therefore brought. Their defence was that they had been no parties to the employment of Mr Rhind, and that they had attended the Presbytery meetings merely to state their case, and that none of them had acquiesced in the proceedings. They had further objected to Mr Rhind's report being sustained at all, and on that account had appealed against the decision of the Presbytery. Eventually, on the case being decided in the Court of Session, the recommendations in Mr Rhind's report had not been carried out, nor the findings of the Presbytery sustained. The heritors had paid the expenses to which they were found liable in the process, and the cause being thus exhausted, no further liability could attach to them in connection with it.

They pleaded *inter alia*—"(4) Under the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 it was incompetent for the Presbytery to take any steps in connection with the process regarding the repair of Pitsligo Manse, or to pronounce any decerniture thereanent after the cause had been appealed to the Sheriff; and the findings and decrees of the Presbytery founded on by the pursuer are inept. (5) The process regarding the repair of Pitsligo Manse having been finally disposed of in the Court of Session, and the defenders having paid the whole expenses for which they were found liable in said process, no further liability can attach to them for expenses alleged to have been incurred in said process."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 11th January* 1876.—Having considered the cause in respect of the defenders' fourth plea in law, supersedes consideration of the cause *in hoc statu*, to allow the pursuers an opportunity of appearing in the process of appea

mentioned on record, to the effect of claiming the expenses now sued for.

"*Note.*—It must be assumed at this stage that the pursuers have a claim to be relieved of the expenses incurred by them to Mr Rhind in the application at the instance of the minister against the heritors of Pitsligo in connection with the repair of the manse of that parish. The application was appealed to the Sheriff, who ordered a proof, and was thereafter removed by appeal to the Lord Ordinary in Teind causes, all under the Statute 31 and 32 Victoria, chapter 96, and after a litigation between the minister and the heritors certain operations recommended by Mr Kinnear, architect, were ordered and executed, and the manse declared to be free. The minister was found entitled to certain expenses, and a remit was made to the Auditor.

"The defenders maintain that the present proceeding by a separate action in the Court of Session for expenses incurred by the Presbytery in the original application to them is incompetent, and that the course which the pursuers ought to adopt is to compear in the process of appeal. It appears to me this view is sound. The statute, section 3, provides that an appeal 'shall have the effect of staying the Presbytery from taking any further steps in connection with said proceedings,' *i.e.*, *inter alia*, the proceedings before any Presbytery relating to the repair of a manse. This provision, and the whole scope of the statute, seem to shew that it was the purpose of the Legislature that after an appeal is taken all further orders or decrees should be granted in the process of appeal only.

"In the argument the defenders have not maintained that all remedy is excluded, but only that they should not be exposed to the expense of a second process in the Supreme Court. The clerk of the Presbytery was cited as a respondent in the original appeal, but did not appear, apparently because the question at issue was really between the minister and the heritors. But if the Presbytery, acting within their functions, competently employed Mr Rhind, and are entitled to relief, they were entitled to appear, and seem to me to be still entitled to appear, in the process of appeal to be heard on their claim for the expenses incurred. I have thought it better merely to supersede consideration of the cause in the meantime, and not to dismiss it until it shall be seen whether the other mode of procedure is held competent, or conceded to be open to the pursuers in the proper process."

On leave being granted them the pursuers reclaimed.

Authorities—Connell on Parishes, 252; *Leslie* v. *Storie*, Dec. 18, 1869, 8 Macph. 363; Cook's Styles and Procedure, 171; Erskine's Inst. ii. 10, 58 and 59, and note 306; *Carmichael* v. *M'Lean*, May 25, 1837, 15 S. 1020, 8 Scot. Jur. 382, and 9 Scot. Jur. 458.

At advising—

Lord President—This action is raised for the recovery of certain expenses incurred by the Presbytery of Deer in regard to an application by the minister of Pitsligo for repairs upon his manse. It appears that the minister's petition was presented upon 28th November 1871, and thereupon the Presbytery, having met on 19th December, resolved to meet on a later day for the purpose of visiting and inspecting the manse, and directed intimation of the application and of the intended visit to be made. They further resolved to secure the attendance of Mr Rhind, architect, "to assist them in their inspection, and to appoint him to inspect said manse with a view of determining whether it was in a sufficient state of repair, and whether its structural condition was in all respects such as to render it a suitable manse for the parish." Accordingly the Presbytery did visit the manse and inspect it, and Mr Rhind made a report, upon which, along with a supplementary one afterwards issued, the Presbytery were proceeding when the matter was appealed, and they were prevented from taking further steps, by the heritors under the 3d section of the recent Ecclesiastical Buildings Act (31 and 32 Vict. cap. 96). Now if this had not taken place, and the case had remained with the Presbytery, or if it had occurred before the passing of the recent statute, there cannot be a doubt that the expenses incurred by the Presbytery in employing an architect would have been expenses which they were entitled to charge against the heritors, and for which they could have proceeded to give decree in the proportions in which the several heritors were liable.

The relations of the heritors and the Presbytery in matters of this kind are very peculiar. The heritors are liable to maintain the buildings in the parish; the Presbytery are the conservators of the benefice, and their duty is to see that everyone connected with it does his duty. They are charged with a general superintendence, and can make an order against any minister or church-officer or other official who neglects his duties, and they have control over the heritors as regards the ecclesiastical buildings. So, when a complaint is made to the Presbytery that any ecclesiastical building is out of repair, it is the part of the Presbytery to inform their minds upon that subject, and if they cannot do so without incurring expense, they are not only entitled but bound by immemorial usage to incur it, and it is defrayed by the heritors. If the parties had come to terms upon Mr Rhind's report the case would have gone no further, and the expenses would have been paid. Because the minister and the heritors differed upon the terms of that report, is it to be said that they are not liable for the cost incurred in procuring it?

Is there anything in what has occurred since matters were before the Presbytery to prevent the recovery of the sum claimed? The heritors applied under the 3d and 4th sections of the recent statute (31 and 32 Vict. cap. 96) to stay the proceedings before the Presbytery by appealing the whole cause. That has the effect of transferring the case from the Presbytery to the Sheriff, and of arming the latter with jurisdiction in place of the former. The important thing to observe is, that the Presbytery could do nothing more, and therefore when they went on to allocate the cost of the report and give decree against the individual heritors they were taking steps which they had no right to take, and the decree goes for nothing, because it was pronounced after the case was removed from their jurisdiction. There was a further appeal to the Lord Ordinary on Teinds, and the minister and heritors, who were the two parties litigating, maintained their respective views of what should be done, and a

judgment was finally given which was not in favour of either out and out. The Lord Ordinary dealt with the question of expenses in accordance with his judgment on the merits, and the matter was arranged between the parties by the heritors paying modified expenses.

It must be observed that during the whole process the Presbytery were not only not parties, but could not be so. The statute shut them out.

That being so, the question comes to be, whether the Presbytery are to be prevented from recovering from the heritors expenses which they would have been entitled to get had the matter remained before themselves. The difficulty has been suggested that Mr Rhind's report is part of the expenses of process. It is no doubt quite established in law that if you cannot recover expenses in a process itself you cannot recover them by a separate action, and I should be sorry to throw any doubt upon that point. But here the expenses in question are not the expenses of any process whatever, but are due in respect of the Presbytery having been under the necessity, in the exercise of a public duty, of employing a man of skill to report. I am of opinion that these expenses were fairly and properly incurred, and that there is no good ground why the Presbytery should not recover them from the heritors.

Lord Deas—I do not know that the ultimate result of this case affects very much the particular question which we are now called upon to decide. The circumstances were these:—The minister of the parish of Pitsligo presented a petition to the Presbytery setting forth that the drainage of his manse was in a very unhealthy state, in addition to other defects which needed remedy. The Presbytery required an inspection by a skilled architect and a report by him, and no one doubts that Mr Rhind, who was employed, was a thoroughly competent person. He reported that these defects existed, and recommended that certain limited measures should be taken to remove them, the expense of which would have been comparatively small. But the heritors were not satisfied that they should incur any expense, and they appealed to the Sheriff and then to the Lord Ordinary, who appointed another architect to report upon the building. He advised the same course as Mr Rhind had proposed, but thought the cost would be greater than what that gentleman had stated; so that the application of the minister was successful, and more than successful.

The whole objection by the heritors to pay the cost of Mr Rhind's report comes to be that the Presbytery missed their time by not appearing and getting decree in the first action. But I agree with your Lordship that the Presbytery were no parties to that suit, and were not called upon to appear in that appeal and get judgment there. I do not know whether Mr Rhind could have appeared; but he was no party either—he might have found out about it, but he had no knowledge of it. He had a perfect right to recover payment at common law, and no obstacle must be placed in the way of that right, unless decree might have been already obtained in the previous process, which, as I have already said, could not be expected.

Lord Ardmillan—I am of the same opinion. There is no doubt that expenses incurred in a process cannot be recovered in another process. But this account is not correctly described as expenses of the previous process. It is the duty of the Presbytery in the discharge of its duties to see to the interests of the benefice, and to protect it for future ministers. In this instance ultimately a considerable sum was expended. Whoever is liable for it the Presbytery is not, for they were acting in a sense judicially. The result of my consideration of the cause is, that I think that but for the recent statute the Presbytery could have given decree without doubt against the heritors, and no argument has been adduced to us why their claim against the heritors is not now good. The only argument used is that the Presbytery could have become parties to the appeal to the Sheriff and Lord Ordinary, and could have pressed their claim there. I doubt that; and I do not think that by refraining from appearing there they are debarred from getting decree in this action.

Lord Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the Rev. John Mitchell and others against Lord Shand's interlocutors of 11th January 1876 and 28th January 1876, and on the whole cause, Recal the said interlocutors: Repel the defences, and decern against the defenders for payment to the pursuer the Rev. John Mitchell, as representing the Presbytery of Deer, of the sum of £62, 4s. 8d., and that in the proportions mentioned in the conclusions of the summons: Find the defenders liable in expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for Pursuers (Reclaimers)—Asher—Darling. Agent—Alexander Morrison, S.S.C.

Counsel for Defenders (Respondents)—Dean of Faculty (Watson)—Jameson. Agents—Stuart & Cheyne, W.S.

Friday, July 7.

SECOND DIVISION.

[Sheriff of Fifeshire.

HENDERSON *v.* SOMERS.

Filiation—Proof.

Defender assoilzied in an action of filiation, in which it was admitted on both sides that the last occasion on which intercourse had taken place was 311 days before the birth of the child.

This was an action of affiliation and aliment at the instance of Jane Henderson against John Somers, in which the pursuer alleged that the defender was the father of her child, born 311 days after what was on both sides admitted to have been the last occasion on which the pursuer and defender had connection. It was maintained by the pursuer that this was a case of protracted