1802.

HARLOW, &c. *v.* GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL, &c.

in the heirs whatsoever, under the dispositive clause, which is inconsistent and untenable.

"When I last stated my sentiments to your Lordships on this cause, it appeared to me that the procuratory had granted a larger estate in these premises to the two Maxwells than they were entitled to claim under the dispositive clause, which limited the estate of Dinwoodie to them and the heirs male of their bodies, and that the procuratory gave it to them and their heirs male general; but, upon a more accurate inspection, I observe that the procuratory gives it to them and their heirs male *in manner above expressed*, which are words of reference to the limitation in the dispositive clause, which gives it to them and the heirs male of their body.

"All the other parts and clauses of the deed are consistent with the procuratory, and meanings and intentions of the dispositive clause, as thus explained; and, from a due consideration of the general tenor and contents of the whole deed, the doubts that formerly occurred to my mind are now entirely removed; and I am of opinion the interlocutors of the Court of Session are right, and ought to be affirmed."

It was accordingly

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Ad. Gillies*, *Chas. Moore.*

For the Respondents, *Edw. Law*, *Wm. Adam*, *Ad. Rolland.*

NOTE.—Unreported in the Court of Session.

JOHN HARLOW and Others, Feuars in the Barony burgh of Peterhead, - } *Appellants;*

GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL of the City of Edinburgh, GEORGE EARL OF ABERDEEN, and Others, Heritors of the Parish of Peterhead; and the Rev. DR. MOIR, Minister of Peterhead, - } *Respondents.*

House of Lords, 24th June 1802.

BUILDING NEW CHURCH—WHO LIABLE—PROPORTION IN WHICH LIABLE.—In the building of a new church in the parish of Peterhead, which is part landward and part burghal, two questions

arose, 1st. Whether the church should be repaired or rebuilt? and, 2d. Whether the expense of rebuilding should fall on the heritors of the landward part wholly, or on them and the feuars of the town proportionally? The Presbytery and the Court of Session ordered a new church to be built; and held that the expense was to be borne by the landholders and feuars of the town, according to certain proportions set forth. Reversed in the House of Lords only so far as to find that there was no custom to regulate the proportions in which the heritors were to contribute; but declaring that such charge was a parochial duty, and that it ought to be defrayed by *all* the OWNERS of *lands* and *houses*, in proportion to their real rents, and remit to the Court of Session to proceed accordingly; and interlocutors *quo ad ultra* affirmed.

The parish of Peterhead, in the county of Aberdeen, is part landward and part burghal, consisting of the burgh of barony of Peterhead, or town or village thereof, together with a landward district. Its extent is 7000 acres. The valued rent at the time was £4500 Scots; and the real rent £3000 Sterling. The population 3800, of which 2500 resided in and about the town, a very considerable proportion of which belonged to the English church.

Some thirty years previously a parish church had been built, capable of accommodating 1200 persons; but the fabric having fallen into disrepair, some steps had been taken to have it repaired and enlarged *at* the estimated cost of £536. This idea was afterwards abandoned, and an application made to the presbytery by the Governors of the Merchant Maiden Hospital, who are superiors of the whole place, and who possess a considerable estate in the landward district, setting forth that the church was in a ruinous condition, and unfit to be repaired. Whereupon the presbytery and assessors being met, and having considered the whole matter, pronounced this decree: " Find the church of July 16, 1800.
" Peterhead in a ruinous condition, and unfit to be repaired,
" and therefore decree that a new church ought to be built,
" sufficient to accommodate the town and parish of Peterhead.
" The presbytery therefore resumed the consideration of the
" state of the population of the said town and parish, and
" finding that the former church contained only about 1000
" people, but on account of the increased population of the
" parish, particularly of the town of *Peterhead*, since the
" late church was built, they appoint the new church to be
" built sufficient to contain 1800 persons, allowing eighteen
" inches for each, the expense of which to be defrayed, viz.

1802.

HARLOW, &c. *v.* GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL, &c.

" 2341 of 3205 parts, to be paid by the feuars of the town of " Peterhead, and the remaining 864 of the 3205 parts, by the " heritors of the landward part of the parish; and they de- " cree accordingly; And they appoint the minister, heritors, " and feuars, to produce plans and estimates of a church as " above, to be laid before the presbytery at their next meet- " ing on Wednesday the 20th day of August next; and ap- " point the heritors, and all others concerned, against that " time, to fix upon a proper site for the new church."

To this decree the feuars of the town present entered their dissent and protest, against liability for the expense of building the new church; and brought the present suspension; which, coming before Lord Glenlee, Ordinary, his Lordship passed the bill to try the question; and, deeming it of importance, ordered the parties to state the cause in informations to be given in to the whole Court.

Informations having been given in accordingly, the question came to be, Who were by law liable in the burden of erecting or supporting parish churches? or, Whether such burden had been laid upon persons of the appellants' condition, who were mere feuars, by any adequate authority since the Reformation?

The appellants contended, that although by the more ancient statutes, 12th Sept. 1563, and statute 54, 3d Parliament James VI., the burden is laid on the *parishioners* without distinction, yet this expression was always construed to mean heritors, or landholders. This view was supported by Erskine, who says, " that by long custom, those " burdens, at least that of repairing churches, and church " yard walls, are transferred from the parishioners and par- " son, to the landholders, who must bear the expense of re- " pairing, and even rebuilding the parish church, according " *to the valuation of their several lands.*" Besides, by the act 1690, c. 23, and 1693, c. 25, the teinds of every parish, not heritably disposed of, were vested in the patron, with the burden of " the minister's stipend, tacks of teinds already " granted, and of such augmentation of stipend, future pro- " rogations and *erections* of *new kirks*, as shall be just and " expedient." These statutes threw the burden on those who had right to the tithes—on the patrons,—and virtually repealed the former statute 1572, which obliged the parson and whole body of parishioners to contribute to the repair and building of the churches. In support of this view, that

Inst. 2, 10, 63.

it is the heritors of the parish only who are by law liable in the expense of building and maintaining churches, according to the extent of their valued rent, the several commissions, and acts of Parliament, might be referred to, from 1617 downwards, respecting the plantation of kirks and valuation of teinds. The late act of 1707, c. 9, regulates the "erecting and building of new kirks, *being always with con-* "*sent of the heritors* of three parts of four at least of the "valuation of the parish whereof the kirk is craved." Nothing is said here about the liability of feuars; and all the authorities concur in declaring that the burden of erecting churches is payable from the tithes of the parish, which are burdens on the heritors, in the same manner as minister's stipend, or manse, is. The cases of Crieff, 20th Nov. 1781, (Mor. 7924,) and Forfar, 16th May 1793, (Mor. 7929,) founded on by the respondents, are different from the circumstances of the present. They laid down no general rule settling the question of law as to all the parishes. On the contrary, the judgment in the Crieff case proceeds "on the circum- "stances of this case." And accordingly the Court, or the practice of the country, has never looked on that decision in any other light. The Court of Session, in all subsequent cases, have regarded the custom in each parish in deciding such questions. But, independently of the general point of law, and looking to the fact, that the feuars held their tenements originally of the Earl Marischall, before his attainder, with freedom from certain burdens therein enumerated, or "other burdens, accidents, perils, and inconveniences what- "soever, as well public as private, named as not named;" and that they have had possession on this tenure for nearly two hundred years, this was sufficient to exempt the feuars from all such liability. Besides, even assuming their liability, it was wrong to resolve on building a new church when reports were actually in the hands of the heritors, declaring that the church could be repaired and enlarged for a smaller sum.

The Court, of this date, found, The "Lords, on the Jan. 19, 1802.
"report of Lord Glenlee, and having advised the infor-
"mations, find, in terms of the decree of the presbytery,
"that the present church of Peterhead is ruinous, and
"that a new church ought to be built, sufficient to
"accommodate the town and parish of Peterhead: Find
"that the expense of building as much of the said church
"as shall be necessary for accommodating the landward

1802.

HARLOW, &c. *v.* GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL, &c.

" part of the parish, shall be defrayed by the heritors, " according to their respective valued rents, and divided " among them in the same proportion; and that the ex- " pense of the remaining part shall be defrayed by the " feuars and proprietors of houses in the town of Peterhead, " in proportion to their real rents, and divided among " them in the same proportion: Reserving entire to the " feuars and proprietors of houses in Peterhead all claim " of relief competent to them against their superiors on the " warrandice in Earl Marischall's feu contract, or otherwise, " and to them their defences against the same, as accords. " And remit to the Lord Ordinary to hear parties with re- " gard to the materials of the present church, and the value " thereof, whether the same belong exclusively to the land- " ward heritors, or must be applied towards the common " expense of building the new church."

The minister put in a petition against this interlocutor, complaining that it was not enough to find that the new church should be built " sufficient to accommodate the " town and parish of Peterhead," but that the interlocutor should have expressly found that the said church should be built so as to contain " 1800 persons," and prayed the Court to do so, and to authorize the presbytery immediately to proceed; whereupon the Court pronounced this interlocutor, " Having heard this petition, and parties, grant the first " prayer, and remit the second to the Lord Ordinary to " hear parties farther, and to proceed therein, and in the " other points of the cause, as he shall find just."

Feb. 10, 1802.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Where a parish consists partly of a landward district, and partly of a burgh of barony, there is no statute, and no law, for holding the feuars and proprietors of houses and tenements in the burgh liable, along with the heritors of the parish, in the expense of building or repairing the parish church. And all the institutional writers are agreed in laying down the doctrine, that such burden lies on the heritors alone. The decree, therefore, is manifestly erroneous, even were the principle of liability founded on population (which it evidently is not), because, in this last case, it ought to be an assessment upon the inhabitants at large, and not confined to the proprietors of houses, or feuars within burgh. For, on the principle of population, householders, or lessees of houses,

would be equally liable with them. If this rule be derived from the obsolete statute 1572, all the parishioners should contribute, according to their substance; but the interlocutor does not make *all* the parishioners *liable*, but only the heritors and feuars, and the proportion in which they are made liable is according to their *real* rents. The decisions in the case of Crieff and Forfar are inapplicable, and are so recent, and depending so much on their own circumstances, as that they cannot be considered as settling the law. But even if good and unquestionable, still, the custom of the parish is the rule that governs; and the custom of this parish having been, to hold the heritors liable in such expense, the interlocutors and decree are at variance with that custom.

Pleaded for the Respondents.—From the reports of the tradesmen employed to inspect the old church, it appears that the north and south walls of the church must be taken down, and the roof taken off, in order to repair it thoroughly, and that the foundation of the whole is bad. In these circumstances, a new church was the most expedient course; and a new church being resolved on, it must, according to law, be built of sufficient size and dimensions to accommodate the whole parishioners. The expense of building such church, although, by the ordinary practice in the country parishes, is laid upon the heritors alone, according to their several valued rents in the parish, and the area of the church is divided amongst them in the same proportion, yet it is evident this rule, which has been established by custom alone, is altogether inapplicable to parishes like that of Peterhead, which consists of part landward and part burgh of barony. In the latter, the situation of the parish, and its population, suggests the necessity of a different principle of liability. All have right to the church. It is an accommodation more to the burghal population than to the country population; and therefore all ought to contribute to the expense of erection. The town has, by law, a right to a share of the area of the church, which necessarily presumes that they are liable proportionally to contribute to its erection. Accordingly the Court of Session has, by several decisions, established a rule with respect to the expense of erecting churches in such circumstances as the present, founded chiefly on the particular circumstances and situation of the parish, by which the heritors of the country part of the parish are made liable for the expense of building as much of the parish church as is necessary only for their own

1802.

HARLOW, &c. *v.* GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL, &c.

accommodation, and the feuars and proprietors of houses in town are made liable for the expense of building as much as is necessary for the accommodation of the inhabitants of the town; and the area is divided amongst them in the same proportion. Such was the rule adopted in the case of Crieff, after the most deliberate discussion, which has been followed by others since that time, and ought to be followed here.

After hearing counsel;

LORD CHANCELLOR ELDON said,

"My Lords,

(His Lordship, after reading the interlocutor appealed from, and stating the circumstances of the case, proceeded.)

"There were three questions made in the present cause. 1st. Whether the church should be *repaired* or *rebuilt?* 2d. What size the church should be of? 3d. On whom the expense should fall?

"On the first and second of these, I do not think, nor does my noble and learned friend, who has considered the matter with deep attention, that any alteration should be made in the judgment as to them. The only question then comes to be the expense; and this divides itself into two branches.

Lord Thurlow.

"1st. Whether the feuars, who are unquestionably heritors as well as those commonly described under that name, be liable in any degree? or, Whether the expense lies wholly on the landward heritors? 2d. If the feuars be liable, then in what proportion they and the landward heritors ought to contribute?

"The first branch was a good deal agitated in the Court below, with much reference had to treatises on the subject, to ancient statutes, and to the law with regard to teinds. But it seems the true conclusion to be drawn on this part of the case is, that the burden is a parochial burden, and falls upon the landholders. This is agreeable to the sentiments of the Court of Session; and, from any thing that appears in writers of authority, or books of decisions, prior to the case of Crieff, it is impossible to say that the burden was not laid on them when a parochial burden ought to be imposed.

"Forbes lays it down as a rule that it is a parochial burden, and to be proportioned among the heritors according to the valuation of every heritor's land. It follows from this rule, that feuars, as being also heritors, are liable in some proportion; the only question is, in what proportion? The case of Crieff, which is relied upon as a decision in point, was only pronounced in 1781, and is not even that species of authority which has ruled all questions since. It is still open to be considered, whether that case and the present have laid down the rule proper to be observed. The appellants argue, that the particular circumstances of that case of Crieff had an effect upon

the judgment; but I am not sure that your Lordships would have affirmed that case if brought before you on appeal.

"The rule in that case was, that the landward heritors were to bear a certain proportion, according to their valued rents; and the feuars the other proportion, according to their real rents. To apply this, the Court looked to the population; the town contained so many inhabitants, the landward parish so many; and, according to them, the respective quantum was fixed. The manner of apportioning that part of the expense which was allotted to the landward parish among the several heritors, was not liable to much objection. As to the allotment upon the heritors, if they were to bear an allotment to a certain extent, there was also little objection to the mode of apportioning it among them.

"It is the same in this case; and, granting the allotments to be just, there does not appear to be much *gravamen* in the apportioning of these among the heritors themselves, and the feuars by themselves. But the appellants insist, that the rule laid down as to the allotments is not well founded on principles of law. They say, that if the rule adopted where a parish is wholly landward be considered, it is altogether different; the contribution there is according to the value of the land, not the extent of population. A variety of cases upon the subject were put to and from the Bar.

"I shall only state this case. Suppose a person builds a village upon his estate, without creating either feuars or heritors. Another person lives upon his estate, with only the persons belonging to his family; if these estates be of the same valued rent, it is admitted that these two persons would contribute in the same ratio, only, perhaps, that the valuation made in Cromwell's time, may not now bear the same proportion to the real value of each estate. The same would happen when cotton mills or other manufactories were established.

"It must be admitted, therefore, that 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 alloting 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, greater 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 pro-

1802.

HOG, &c. v. THWAYTES, &c.

portion of the expense for one species of heritors, and another for another species; but that it is proper to lay the burden on the whole heritors, including the feuars of the town, according to their real rents.

"I therefore move that the interlocutors be reversed, and that it be declared that the expense of building the church is a parochial burden, which ought to fall equally on all the heritors according to the real rents of their estates."

LORD THURLOW,—

"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."

LORD CHANCELLOR,—

"In that case, it may be intimated in the judgment, that there was no such custom in this parish."

On his Lordship's motion this was ordered accordingly.

Ordered and adjudged that 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 rates 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. And it is further ordered that the said cause be remitted back to the Court of Session in Scotland to proceed accordingly. And it is further ordered and adjudged that the said interlocutor as to the rest be affirmed.

For Appellants, *Jas. Gordon, Arch. Campbell, jun.*

For Respondents, *Wm. Adam, W. Robertson.*

NOTE.—Unreported in the Court of Session.

[Mor. App. Legitim, No. 2.]

REBECCA HOG, otherwise LASHLEY, Spouse of THOMAS LASHLEY, Esq., and Him for his interest, ... } *Appellants;*

WILLIAM THWAYTES and Others, assignees of ALEXANDER HOG, London, and THOMAS HOG, Esq. . . . . } *Respondents.*

House of Lords, 24th June 1802.

LEGITIM—DISCHARGE OF—ELECTION.—In the succession of the late