LORD BENHOLME—I am of the same opinion. It is not necessary that there should be an interlocutor of the Sheriff in order to procedure. Nor is it necessary that the cause should be advanced. If there had been an adjournment of the cause that would have been enough.

LORD NEAVES—I am of the same opinion. I look with satisfaction on this section of the statute, but it is not to be judicially construed. I do not say that going through the form of enrolment, if the parties did not appear, would be enough to save a cause. But here the party who enrolled the case, and was entitled to ask for circumduction and his expenses, waived his right. When the parties again appear the Sheriff refuses to do anything. The appellant is entitled to maintain that the action is alive, and to obtain redress. The interlocutor of the Sheriff-Substitute is a plain denial of justice, and we should take it out of the way.

Agents for Pursuer—D. Crawford & J. Y. Guthrie, S.S.C.

Agent for Defender—David Cook. S.S.C.

Thursday, December 14.

HERITORS OF ABERDOUR *v.* RODDICK.

Minister—Manse—Heritors. A minister is entitled to let his manse for two months in the summer, and the heritors have no right to interfere with his letting the manse, unless there be danger of some injury to the building.

The facts of the case sufficiently appear from the following Note, which the Lord Ordinary (MACKENZIE) appended to his interlocutor assoilzing the defender:—

"*Note.*—The present action has been raised by the heritors of the parish of Aberdour, and by the Earl of Morton, the Earl of Moray, and Mr Wotherspoon of Hillside, three of the heritors, against the Reverend George Roddick, the minister of that parish, to have it found and declared that the defender 'has no right to let or hire out the manse of the said parish of Aberdour, or any part thereof, to tenants, strangers, sea-bathers, or others, or to occupy, or to allow or permit the same to be occupied by such tenants, strangers, sea-bathers, or others, not being his own family, servants, or other members of his household,' and to obtain interdict against the defender prohibiting him from so letting or hiring out the manse. The pursuers aver that the defender has for some years been in the practice of letting his manse during the months of August and September, and, in particular, that he did so in 1868 to Mr Drybrough, brewer, Edinburgh, at £25, and in 1870 and 1871 to Mr James Shand, a fire-engine manufacturer in London, at £30, for each of these two months. The defender admits these statements of the pursuers, and he explains that he so let his manse while absent, with the knowledge of the presbytery, from his parish for the benefit of his health, and that, besides visiting his parishioners, he has, during these two months, discharged his Sunday duties personally for at least half the time, and that during the remainder of the time his duty is performed either by other clergymen with whom he exchanges pulpits, or by means of a paid assistant, for whom he takes lodgings in the village of Aberdour.

"It is not easy accurately to define the nature of a minister's right to his manse. Lord Stair, in treating of infeftments of property, states that 'the gleibs of ministers seem to come nearest to allodials, having no infeftment, holding, rent, or acknowledgement, though they be more properly mortified fees, whereof the lifrent escheat befals to the King only' (2, 3, 4). In the same book, after defining infeftments of mortified lands, he says (2, 3, 40), 'of all these mortifications there remains nothing now except the manses and gleibs of ministers, which manses and gleibs are rather allodial than feudal, having no express holding, reddendo, or renovation, yet are esteemed as holding of the king in mortification, and therefore the liferent of the incumbent, by being year and day at the horn, falls to the King.' In the *Heritors of Cargill* v. *Tasker*, February 29, 1816, F.C., where the question was, Whether a minister is liable to be assessed for poor-rates? the Court, in deciding that he was not, observed, as the report bears, that 'he is *qua* minister, neither an heritor, a tenant, nor a possessor.' But this was explained by Lord Fullerton in the case of *Forbes* v. *Gibson*, December 18, 1850, 13 D. 341, 'as importing that, though *de facto* possessing, still the possession of ministers was, from their peculiar character, not such as to bring them within the assessing clauses' of the Poor Law Acts. The question in that case was, Whether a parish minister was, by reason of the provisions of the Poor Law Amendment Act, liable to assessment for support of the poor in respect of his manse and glebe? In the same case, in the House of Lords, the Lord Chancellor (Lord St Leonards) stated that 'ministers are in a sense owners.'

"The right of a parish minister to his manse is statutory. By the Act 1563, c. 72, it is provided that the 'minister have the principal manse of the parson or vicar, or sa-meikle thereof as shall be fundin sufficient for staiking of them, to the effect that they may the better await upon the charge appointed and to be appointed unto them, quhidder the saidis glebis be set in few or tack of before or not: Or that ane reasonable and sufficient house be bigged to them beside the kirk be the parson or vicar, or others, havand the said manses in few or long tackes.' By the Act 1572, c. 48, it is declared 'that the manses outher perteining to the parson or vicar maist ewest to the kirk, and maist commodious for dwelling, perteins and sall perteine to the minister or reader serving at the samin kirk: Together with four acres of land of the glebe at least lyand *contiguè*, or maist ewest to the said manse, gif there be sa-meikle,' and these are appointed to be designed 'to the use of the minister or reader that sall serve and minister at the said kirk in time cumming.' And by the Act 1663, c. 21, the heritors of the parish are ordained, where competent manses are not already built, to 'build competent manses to their ministers,' and, where competent manses are already built, to repair them, the ministers being bound to uphold them during their possession after being repaired and declared free. According to these statutes, manses pertain to ministers during their incumbency, and they are designed for their use, 'to the effect that they may the better await upon the charge appointed.'

"Such being the statutory right of ministers, the Lord Ordinary has been unable to see any sufficient grounds on which the pursuers, as heritors of the parish of Aberdour, can, in the circumstances, and on the grounds averred by them, obtain the decree of declarator and interdict for which they conclude in their summons. It is not said that the defender, by letting the manse for two

months annually at a high rent to a family of respectability, has dilapidated the manse, or that he is applying it otherwise than for the purposes of a dwelling-house. The pursuers aver that the manse has not been declared free, but the defender states in the record that it has been virtually so ever since his entry; that he has improved the premises by means of the rent which he has received; and that he will put no difficulty in the way of the heritors having it declared free. The Lord Ordinary does not feel called on to give any opinion whether the heritors would be entitled to prevent the defender from completely inverting the possession of the manse, and from using it in a way which would be injurious. All that he has decided is, that, on the facts averred by them, the heritors are not entitled to the decree concluded for. He considers that the letting of the manse complained of is not beyond the powers of the defender as minister of the parish, and that the heritors are not entitled to prevent him from doing so. The Acts above referred to, under which the minister has right to his manse, are not adverse to such letting. The Act 1563, c. 72, only ordains 'that na parson, vicar, nor uther ecclesiastical person, set in few or lang tackes, onie of their manses or gleibes perteining to the saidis kirkes, without special license and consent of the Queen's Grace in writ.' The Act 1572, c. 48, also provides—'Quilkes manses and acres of land, sa marked and designed as said is, it sall not be leasum to the ministers or readers, present or to cum, to sell, annalie set in few or tackes, or to put ony in possession of the samin in prejudice of their successors; bot the samin to remain alwayes free to the use and easement of sik as sall be admitted to serve and minister at the said kirk.'

"There are some averments in the record which seem to imply that the defender does not duly discharge the duties of his parish during the two months that he lets his manse, and that the pursuers seek to remedy this by preventing him from letting the manse during these months. The Lord Ordinary considers that such averments are not relevant in the present case, and that he can take no cognisance of them. If the heritors conceive that the defender neglects the duties of his cure, the church courts, which can alone take cognsisanc of that matter, are open to them."

The pursuer reclaimed.

The Solicitor-General (CLARK), FRASER, and SCOTT, for them.

WATSON and ASHER for respondent.

At advising—

LORD JUSTICE-CLERK—I am not prepared to differ from the result at which the Lord Ordinary has arrived. By adhering to his interlocutor we do not resolve several of the questions which were argued before us. The summons is of a very comprehensive kind, and substantially concludes for declarator that the minister is not entitled to let his manse on any excuse or pretence whatever. A minister is subject to certain ecclesiastical and civil conditions. He owes a duty to the presbytery and a duty to the heritors. I must assume in this case that he has performed his ecclesiastical duties. His duty to the heritors is to maintain the fabric of the manse in proper repair, and if he does not do so the heritors have right to interfere. But there is no allegation here of injury to the building. Assuming, then, that these two elements, neglect of ecclesiastical duty and injury to the building, are out of the case, have the heritors any right to pursue the declaratory conclusions? They have no title to do so beyond the interest they have in the preservation of the manse; and there is no injury that is alleged.

I do not say that a minister can alienate his manse or let it from year to year. I can conceive a case in which the manse had become quite unsuitable for the residence of the minister, and it may be that in such circumstances it might not be illegal for him to let it. But on the legality of such a proceeding I give no opinion.

It was argued for the pursuers that the minister stood in the same position in regard to the church and churchyard as in regard to the manse and glebe; they were provided to him as a public officer, and were held by the heritors as trustees. I cannot conceive rights more distinct. The minister has no patrimonial interest in the church and churchyard. He has a limited right of proprietorship in the manse and glebe. As administrator for himself, and as representative of a series of incumbents, he may vindicate his right against all the world. The heritors, on the other hand, have no right to the manse and glebe. Their duty is to provide a suitable manse, and to repair it when it falls into decay, the minister being bound to execute all ordinary repairs.

I am satisfied that this action was a superflous interference with the rights of the minister. It is not desirable that he should be always on duty, and if the presbytery dispense with his attendance the heritors have no right to interfere. If the minister has the opportunity of change of residence, it is good for his parish that he should be able to take advantage of it.

LORD COWAN concurred.

LORD BENHOLME—I concur. It was argued that church, churchyard, manse and glebe, were all in the same position. That is a great mistake. The church and churchyard have been given for the benefit of the congregation—the one for the benefit of the souls of the congregation, the other for the repose of their bodies. No one but the clergyman of the parish has any beneficial interest in the manse and glebe. No doubt the heritors are entitled to look after them so far as their own interests are concerned, and also on behalf of any successor in the benefice. If it had been pretended that their interests were prejudiced their title to object would have emerged. But they come forward seeking to prevent the minister doing what may be of important advantage to him, and cannot prejudice them. It is not of importance to himself alone that he should have a change of air for his health—it is of advantage to all the parish.

LORD NEAVES concurred.

Agents for Pursuers—Wotherspoon & Mack, W.S.
Agents for Defender—Adamson & Gulland, W.S.

Friday, December 15.

FIRST DIVISION.

MRS M. A. MENZIES OR CAMPBELL (NOW CLARKE) AND OTHERS (CAMPBELL'S TRUSTEES) *v.* CAMPBELL'S TRUSTEES AND OTHERS.

Trust — Construction — Succession — Intestacy — Accumulations. Where a testator had left his