

No. 36. WILLIAM FORBES, and OTHERS, Appellants.—*Campbell—Wilson.*

JOHN SHAW, and OTHERS, Respondents.—*Spankie—Milne.*

Parish—Church—Relief.—A committee of heritors, appointed by the Court of Session to build a church and assess the heritors, having been obliged to raise money on their bills to meet deficiencies by the failure of heritors to pay;—Held, (affirming the judgment of the Court of Session), that the Committee were entitled to relief against an heritor pro rata; although he had paid his full share of the assessment.

July 22. 1830.

1ST DIVISION.
Lord Eldin.

ON the 8th of March 1805, the Presbytery of Linlithgow ordained the church of Falkirk to be immediately rebuilt, agreeably to certain plans and specifications. Of this decree, the late Mr Forbes of Callender brought a suspension, in which, after a great deal of litigation, the Court of Session found that the heritors were bound to build a church fitted to contain 1500 sitters, and appointed them ‘to hold a meeting within the parish-church to choose a collector, advertise for contractors, and take the other steps necessary for carrying the work into execution.’ A meeting was accordingly held, which was attended by an agent on behalf of Mr Forbes, and a collector appointed. On this occasion Mr Forbes protested, that no contract should be entered into for executing the work till the money was levied and lodged in the Royal Bank of Scotland. The Court thereafter appointed a committee ‘forthwith to advertise for contractors, and take the other steps necessary for carrying the work into execution;’ and, failing their doing so, authorized the Presbytery of Linlithgow to enter into such contract. Various meetings of the heritors then took place—the result of which was, that a new application was made to the Court, who authorized Shaw and others, (the respondents), as a committee, to enter into a contract for building the church, ‘with power to them to assess the heritors of the parish of Falkirk in the sums contained in the contract for building the church; and in general, to take such steps as are necessary for carrying the work into execution.’ The respondents thereupon entered into a contract with builders to erect the church for the sum of L. 3593, which they bound themselves to pay by instalments, according to the progress of the work; and the builders undertook to have it completed by the 1st of August 1811. At the same time the respondents assessed the heritors in the sum of

L. 1000, and authorized the collector immediately to recover payment of it. This having been resisted by certain of the heritors, the respondents again applied to the Court, who empowered them to assess the heritors in the sums necessary for building the church. In consequence of this, they declared the first assessment to be L. 2000; but, before it could be levied, the first instalment had become payable, and the respondents were obliged, on the 24th of May 1810, to grant their bill for its amount, being L. 500. In the month of June thereafter Mr Forbes paid his share of the assessment, being L. 594. 17s. A farther assessment of L. 1500 was authorized in November, of which Mr Forbes punctually paid his share, but various other heritors and feuars failed to pay their proportion. Certain extra work having been authorized, the expense of the work was increased about L. 1200, and, in October 1811, a farther assessment was ordered, of which Mr Forbes did not pay his share for six months afterwards, but he alleged that he had done so immediately on the amount being demanded. July 22. 1830.

In the meanwhile a considerable defalcation arose from heritors and feuars resisting payment in actions at law, becoming insolvent, &c.; and in August of the above year the respondents granted their bill to the builders for L. 793, and another on the 10th of January 1812 for L. 453. These bills were between that period and 1825 repeatedly renewed,—partial payments being occasionally made; and ultimately the balance amounted to L. 146, part of which was composed of stamps and discount. It was alleged by the respondents, that in states rendered to Mr Forbes he was made aware that the money had been raised in this manner; that he had paid his share of the discount included in these states; and that the subject of the arrears and the existence of the bills were repeatedly brought before meetings of the heritors, which were attended by Mr Forbes, or by persons on his behalf. At a meeting held on the 29th of July 1825, a majority resolved that the heritors should be assessed in a sum sufficient to relieve the respondents, and of which the share corresponding to the valued rent of Mr Forbes's estate was L. 119. 4s. 4d.

In the meanwhile Mr Forbes had died, having appointed trustees, and being succeeded by his son, (then a minor), against whom the respondents raised the present action, concluding for payment of the above sum. This was resisted on the ground that Mr Forbes had paid his full share of the expense of building the church, and that he could not be liable for others, nor for the discount of bills. The Lord Ordinary decerned in terms of the libel

July 22. 1830. with expenses, and the Court on the 5th of June 1827 adhered.*

Mr Forbes and the trustees appealed.

Appellants.—Heritors are liable for the expense of building a church only according to the valuation of their lands within the parish, and no heritor can be assessed for more than his rateable proportion. But it is admitted that Mr Forbes duly paid his proportion. He is not, and cannot be made liable to guarantee the sums allocated among the other heritors. The assessment could by ordinary diligence have been recovered from them, because their heritable estates were pledged for the amount. Besides, the respondents did not act with due discretion and judgment. Mr Forbes at the outset protested against any expense being incurred until funds were recovered and lodged in the bank; whereas the respondents voluntarily incurred a personal responsibility for payment of sums before it was possible to levy the assessments. If in this manner they have got themselves involved in difficulties, they must extricate themselves, and cannot have recourse on Mr Forbes or his representatives.

Respondents.—The respondents were appointed, by the Court of Session, a committee on behalf of the whole heritors, to carry into effect a legal obligation imposed upon them—the building of the church. They accordingly, as trustees for and on behalf of the heritors, bound themselves personally to the builders. In doing so they acted gratuitously, and consequently the heritors were bound to provide them with funds, or, if they made any advances, to relieve them. With this view the heritors, including Mr Forbes, appointed a collector to levy the assessments; the warrants of which the respondents were authorized to issue. It was not by the fault of the respondents that the full sums for which those warrants were granted were not realized; and as they were compelled to grant their bills, and borrow money to pay for the expense of the church, which was a debt truly due by the heritors, they are entitled to be relieved *primo loco*, reserving to the heritors their relief *inter se*.

LORD CHANCELLOR.—This can only be sustained as an assessment for the purpose of rebuilding the church. The power of making the

* 5. Shaw and Dunlop, 761.

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assessment was vested by the Court of Session in the committee; and as long as that authority existed in the committee, it appears to me, according to my present impression, that the heritors could not exercise that authority—they could have no authority concurrently with the committee. That is a point of some consequence, and as it is a point that was not taken in the Court below, I should like to have an opportunity of considering it.

As to the other question, Whether the committee can be considered justly chargeable with negligence? it appears to me that they were bound to pay the money by the contract; and, being so bound, they were under the necessity of borrowing it, or had a right to borrow it. An incident of that borrowing was the payment of interest, and there is no reason to suppose they did not exercise diligence in recovering the arrears. The rest of the heritors had the same right of enforcing that money; the collector was their servant.

With regard to the first question which I have stated, Whether the heritors or the existing committee had the right to make the rate?—as that point was not made in the Court below, I should like to look into the Scotch authorities upon the subject; therefore let the case stand over.

LORD CHANCELLOR.—My Lords, There is a case of Forbes against Shaw, which was argued some time since at your Lordships' bar, and the question stood over for the purpose of considering a point of form. It was a case with respect to a church assessment. In the interlocutor pronounced by the Court of Session, the committee of heritors were empowered to make a rate for the purpose of defraying the expense of rebuilding the church. The committee, in pursuance of the power with which they were so entrusted, did make a rate; and the question has been raised, Whether or not there had been any negligence on the part of the committee in collecting the assessment? The collector, who was appointed for that purpose was the officer of the heritors, and he was an officer also appointed by the committee. Your Lordships were of opinion, upon the merits, that there was no negligence on the part of the committee, and one of your Lordships expressed an opinion to that effect at the time. I stated to your Lordships what my impressions with respect to that part of the case was, and the House concurred in that opinion. In point of fact, the collector, who was the officer of the heritors, experienced many difficulties in collecting the assessment. In consequence of these difficulties, none of which are attributable to the collector, it became necessary to make a new assessment for the purpose of supplying the deficiency. That, in whatever form it was done, was an assessment for the purpose of rebuilding the church; but it appears that this new assessment was not

July 22. 1830. made by the committee, but it was made by the heritors. It was argued at the bar, that the heritors had no power of making the assessment; but that power was given to the committee by an interlocutor of the Court of Session. Undoubtedly the committee were empowered to make an assessment for the purpose of building the church, and if they had made one which could have been collected and was operative, it is clear the heritors could not have made another; but as the whole amount could not be collected under the former assessments—as a large sum remained uncollected, it was necessary to make a second assessment—and as there are no negative words in the interlocutor preventing that—and as the heritors have by the law of Scotland a power to make assessments for purposes similar to the present, I should submit to your Lordships, that the second assessment was a regular and valid assessment, not interfering with any powers in the committee; because the committee had made the only assessment they intended to make—nothing further being capable of being done by them. I apprehend, under those circumstances, it was competent for the heritors, according to the general law of Scotland, to meet and make a second assessment, that the money which was requisite to complete the contract might be collected. I submit therefore to your Lordships, that the point reserved for further consideration will not avail the appellants. It does not appear to have been argued in the Court below, but I am to take it for granted, that the Court below considered that the heritors had the power of making the assessment. As in this case there was no doubt about the merits—as the point of form never was argued in the Court below, and there being nothing in that point of form—the opinion of my noble and learned friend concurs with my own, that there ought, under such circumstances, to be costs to the amount of L.60.

The House of Lords accordingly ‘ordered and adjudged, that the interlocutors complained of be affirmed, with L.60 costs.’

J. CHALMER—HENRY HYNDMAN,—Solicitors.