SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SIR JOHN GORDON SINCLAIR, of Murkle, bart. - - - - - - } *Appellant.*

WILLIAM MANSON - - - - - - *Respondent.*

A TENANT, by the terms of his lease, was bound to uphold and maintain the houses let in sufficient tenantable condition, during the lease, and to leave them so at his removal, subject to a special provision, that the timber in the sub-tenants houses should be valued at the commencement, and at the expiration of the tack; and that the out-going tenant should pay, or receive from the proprietor or in-coming tenant, the difference in value at those respective times.

The lease contained a further provision, that if the tenant should build an *additional* steading during the lease, the value thereof, at the expiration of the lease, to be ascertained by arbiters, at that time, should be allowed to him. Holding under this lease, the tenant pulled down the old buildings, and built a *new* steading.

It was decided on appeal, reversing in part the judgment of the Court below, that he was not authorized to pull down the old buildings without rebuilding or substituting others in their place, that the knowledge of such unauthorized acts without interference on the part of the landlord, did not conclude him on the principle of acquiescence, which is not applicable to such a case; but that the tenant is entitled to the value of so much of the new steading as ought to be considered as an additional steading, and not a substitution for the old buildings, subject to the provision in the lease, as to the timber in the sub-tenants houses. It was held also, that the tenant was entitled to be allowed for so much of the new buildings as consistently with the former finding he was entitled to have an allowance for, according to a valuation to be fixed at the time of removal, and not according to actual expenditure.

1821.

SINCLAIR v. MANSON.

IN the year 1785, the Respondent's father, obtained from the grandfather of the Appellant, a lease of the farm of Borrowstone, for the term of twenty-one years.

At the commencement of the lease, the buildings on the farm consisted of a servant's dwelling, a stable, a byre, two barns, a kiln, an oxen-house, and cot-houses, inhabited by sub-tenants.

The lease contained the following clause:—

" The tenants shall keep, uphold, and maintain " the *whole* houses thereby set in *sufficient tenant-* " *able condition*, during this tack, and *leave them* " *so at their removal*, with this provision and de- " claration, that the timber in the several sub- " tenants houses shall now be appraised and valued, " at the sight of two neutral men, one to be chosen " by each party; and the like appraisement and " valuation shall be made at the issue of this tack; " and that the out-going tenant shall pay to or " receive from the proprietor, or in-coming tenant, " according to the *difference* of those valuations to " be made by neutral men as aforesaid.

A clause was also inserted in the lease, by which, in contemplation of improvement, it was provided, " That in case, during the currency of this lease, " the said John Manson, or his foresaids, shall " build an additional steading * on said lands, &c. " at their own expense, *they shall have allowance of* " *the value of such steading, &c. at the issue of this* " *tack, from the said Sir John Sinclair, or his fore-* " *saids, according to a valuation to be put thereon at* " *the term of removal, by two neutral men as arbiters,*

* A farm-house and offices; see Jamieson, *sub voce*.

" one to be chosen by each party, whom the parties " shall be obliged to name, and whose determina- " tion shall be final."

The Respondent's father died in 1786, by which event this lease devolved upon the Respondent. Shortly after he came into possession, the Respondent pulled down the old buildings and erected on the land a new farm house, with offices.

These buildings were completed, without objection on the part of the landlord, two years after the commencement of the lease, and were occupied by the Respondent during the term.

At Whitsuntide, 1806, the Respondent quitted the premises on the expiration of his lease; and the land, together with these buildings, was let to another tenant, at a rent of 400 *l.*

Before quitting possession, the Respondent applied to the agent of the Appellant, who had succeeded to his grand-father's estate, and was then a minor, for the appointment of a person of skill, to concur with one to be named by the Respondent, to survey these buildings, and to make up a report of their value. These applications having been disregarded, the Respondent, on the 23d June 1806, made a notorial requisition by a written instrument, to the Appellant's manager, protesting, that in the event of failure within a time specified, judicial measures would be resorted to for such an appointment, and that the proprietor would be liable in the penalty stipulated in the lease, for this contravention.

No attention having been paid to this requisition by those who had the management of the Appel-

1821.

SINCLAIR v. MANSON.

lant's affairs, the Respondent presented a petition to the Judge Ordinary, the sheriff of Caithness, 'craving him to grant warrant to some fit person 'whom he should appoint, to concur with George 'Burn, architect, in the valuation of the houses and 'enclosures erected by the petitioner on the lands 'of Borrowstone and Lybster, during the currency 'of the before-mentioned lease, as the same stand 'at the present period, and to ordain them to re-'port the same to him; and after the said valuation 'has been carried into effect, to ordain the pro-'prietor's agent to relieve the petitioner, after pay-'ment and satisfaction has been made to him of 'the value of the said erections, in terms of the tack 'of the possession of the foresaid houses, and of all 'further risk or concern in the same.

Upon this application the sheriff pronounced the following deliverance:—"The sheriff-substitute "having considered the within petition, together "with the original lease therewith produced, grants "warrant for serving a copy thereof, and of this "interlocutor, upon Sir John Gordon Sinclair of "Murkle, Bart., and his tutors or curators, and "appoints them to concur with the petitioner in the "choice of a proper person or persons, to estimate "and value the houses and enclosures mentioned in "the petition; and that within fourteen days after "such service, with certification to them, if they "fail, that a person or persons will be appointed "by the Court to inspect, estimate, and value the "said houses and enclosures."

This petition and deliverance were served edict-

ally on the defender, and his tutors and curators, who appeared, and opposed the petition. After some discussion, in which the Appellant contended that his obligation went no farther than the original cost of the buildings, valued at the time of removal, the sheriff-substitute granted warrant to a mason and a slater to inspect and value the masonry and slate-work, and to a wright and a house-carpenter to value the timber-work of the houses, and report. In consequence of this warrant the inspectors gave in a report, from which it appeared, that the value of the mason-work of the buildings, &c. was £.355 2 11
and of the carpenter-work - - 403 2 6¾

Total - £.758 5 5¼

and the valuators deponed, in presence of the sheriff, that "the foresaid statement contains a just and "true estimate of the several buildings therein men-"tioned, according to the usual rates of charging "for such workmanship and materials in this "county, and according to the best of their skill and "judgment in those matters."

The Respondent made a requisition upon the Appellant's curators for payment of this sum, with interest from the term of Whitsunday 1806; and payment having been refused, he raised an action before the Court of Session, concluding for the above sum, "together with 100*l.*, being the penalty "stipulated by the lease for the contravention of any "of its provisions, which the Appellant had incurred "by refusing to name a person to inspect these "buildings, and thus occasioning delay in the inspec-

1821.

SINCLAIR
v.
MANSON.

" tion, during which the buildings were deteriorated, " and also for the expense of the proceedings before " the sheriff, in ascertaining the value of these " houses, together with the expenses of process."

Against this action defences were lodged for the Appellant and curators, objecting, 1*mo*, That the amount of alleged repairs, &c. thus claimed exceed ten years rents of the farm: 2*do*, That there is an action on the same ground, at the instance of the pursuer, depending before the sheriff of Caithness: 3*tio*, That the pursuer owes arrears of the stipulated rents, which were left in his hands to compensate any just claims for repairs of buildings.

The case came before Lord Succoth, Ordinary, who sustained the defence of *lis alibi pendens*, by pronouncing the following interlocutor :—— " Having heard parties procurators on the libel and " defences, in respect the sums now pursued for are " the subject-matter of certain proceedings between " the same parties, still in dependence before the " Sheriff of Caithness, dismiss this action," &c.

Against this judgment the Respondent represented that the proceedings before the Sheriff were not of the nature of an action for payment of this claim, but were merely preparatory, with the view of ascertaining the amount of the claim under the authority of the Judge Ordinary, as the Appellant had refused to concur in the mode pointed out in the lease; that the petition to the Sheriff accordingly contained no conclusion for payment, so that there was no *lis alibi pendens*, nor any means in that action of awarding to the Respondent the estimated value of these houses; but the Respondent after-

wards brought an advocation, *ob contingentiam*, of the process before the Sheriff, which was conjoined with the ordinary action in the Court of Session.

1821.

SINCLAIR *v.* MANSON.

Lord Succoth accordingly recalled his interlocutor of the 15th February 1811, and appointed the case to be stated in memorials, upon considering which he pronounced the following interlocutor:— 12 May 1825.

" Having considered the mutual memorials for the " parties, and whole process, Finds, that it appears " from the proof adduced before the sheriff of " Caithness, that the steading upon the farm " of Borrowstone, belonging to the defender, was " both incomplete and in bad repair at the com- " mencement of the lease granted in the year 1785, " to the pursuer's father; and that although the " proofs were not satisfactory, the stipulations in the " lease, upon which the present question depends, " afford real evidence that this was the case: Finds, " That, by an express clause in said lease, it was " provided, that in case the tenant should build any " additional steading on the said lands, he should " have allowance of the value of the said steading at " the issue of this tack: Finds, That no restriction " is put upon the tenant, by this clause, as to the " nature or extent of the steading which he might " build upon the farm; and that it did not impose " an obligation on the tenant to communicate the " plans of the intended buildings to the landlord, or " to give him formal intimation before commencing " them: Finds, That the pursuer's father did erect " a new steading, consisting of a slated dwelling-

1821.

SINCLAIR v. MANSON.

" house, and farm-offices, which must have taken " considerable time to erect; and that no complaint " was made at the time by the landlord or his " factor that they were too large and not suitable to " the farm, nor any objection made until the pur- " suer came to demand the value of the same at the " expiry of the lease: Finds, That even, after the " cause came into this Court, the objection stated by " way of defence was not that they were too large " for the farm, but that the expense exceeded ten " years rents, (which does not seem to be true in " point of fact): Finds, That although by a clause " in the lease the tenant was bound to keep the " whole houses upon the farm in sufficient tenant- " able condition, yet that, according to a fair and " rational construction of this clause, he was not " bound to maintain old houses after he had built " new ones sufficient for the farm; and, therefore, " that the argument in defence, founded upon a sup- " posed breach of covenant in this respect, on the " part of the pursuer, is not well founded: Finds, " That as the interest of the money laid out in " building the new steading would be at least equal " to the sum which it would have cost the tenant to " keep the old steading in repair, the defender is " not entitled to insist for any deduction on account " of the pursuer having been saved the expense of " keeping the old houses in repair. Therefore, as " the reports and valuations which were made by " tradesmen appointed by the sheriff are not objected " to, and appear to have been made after a minute " examination of the premises, finds the defender

" liable in the sum of 758 *l.* 5 *s.* 5¾ *d.* being the " amount of the valuations of the houses, with " interest from the expiry of the lease, viz. Whit- " sunday 1806; and finds the defender liable in the " expense of the litigation since the interlocutor of " 3d January 1813, conjoining the advocation with " the process previously depending in this Court. " Lastly, as the claim for penalty and damages " arising from the delay which took place in valuing " the new steading, and which is said to have been " owing to the opposition given by the defender, " and also the amount of the ameliorations upon " the houses occupied by the subtenants, are not " sufficiently stated in the memorials, ordains parties " to be heard at the bar upon these points; and also " upon the expenses incurred in the Sheriff Court."

To this interlocutor the Lord Ordinary adhered, by refusing two representations; upon which the Appellant presented a petition to the First Division of the Court of Session, praying their Lordships " to " alter the interlocutor complained of, and to assoilzie " the petitioner from the present action, and find " him entitled to expenses." In this petition, the Appellant rested his case, 1*st*, Upon the interpretation of the clause in the lease regarding the expense of these buildings. 2*dly*, Upon the proof adduced in the proceedings before the Sheriff, by which he alleged it was made out, that the Respondent had failed to implement the obligations incumbent upon him with regard to the old houses on the farm, which he was bound to keep in a sufficient tenantable condition. 3*dly*, Upon the allegation that the buildings which the Respondent had erected were

1821.

SINCLAIR
v.
MANSON.

upon an extravagant scale, and altogether unsuitable to such a farm.

This petition was appointed to be answered; and, thereafter, the First Division of the Court of Session, " having resumed consideration of this " petition, and advised the same, with the answers " thereto, refuse the desire of the petition, and " adhere to the interlocutor reclaimed against: " And, in the mean time, decern against the peti- " tioner for the sum of 700 *l.* Sterling, which sum " they ordain to be paid to the Respondent, on or " before theterm of Candlemas next; and, if not " then paid, decern also for the expense of extract, " and allow the interim-decree to be then ex- ,, tracted."

14 Nov. 1816.

The Respondent having also brought under the review of the First Division, that part of the interlocutor of Lord Succoth, which found him liable in the expenses of process, prior to the 3d January 1813, their Lordships " so far alter the interlocu- " tor reclaimed against, as to find neither party " entitled to any expenses which were incurred prior " to that date.

The Appellant presented a second petition, upon nearly the same grounds as those which were set forth in the former petition, against the judgment of the Lord Ordinary, which reclaiming petition was unanimously refused by the First Division, without answers on the part of the Respondent.

The above interlocutors being thus final in the Court of Session, the Appellant presented his appeal to the House of Lords.

For the Appellants, *The Attorney-General*, and *Mr. W. Adam.*

The determinations of the Lord Ordinary and the Court against the Appellant proceeded upon a misinterpretation or misconception of the real nature of the agreement between the predecessors of the parties, contained in the lease, founded on by the tenant in support of his claim. The Court of Session held that the bargain was, that the tenant should have it in his power to build a separate and entirely new suit of farm-offices, under the name of an additional steading, on the lands let, without reference to the accommodation which was previously on the farm; whereas the tenant was expressly bound to maintain and uphold the old existing steading, and even to leave it at his removal in sufficient tenantable condition, and therefore any new buildings which the tenant was to be entitled to demand compensation for from the landlord, were merely such as were necessary or proper additional buildings, over and above the other houses, which were to be at all events upheld. The case of Ducat * cited for the Respondent, is not applicable in its circumstances, and the authority of that case may be doubted.

The judgments under review are erroneous, in so far as they gave effect to a plea of the Respondent, founded on the alleged state of the houses in 1785, as appearing from a proof taken in the Sheriff's Court at an early stage of the present litigation. This evidence, it was said, showed the old houses to be

* Post, p. 33.

1821.

SINCLAIR v. MANSON.

so ruinous and worthless as to lead to a presumption that the parties had it in contemplation to allow the erection of an entire new suite of buildings. But parol proof is inadmissible to explain the lease; and the reasoning is not only irrelevant, and contrary to the express provisions of the lease, but proceeds on a view of the proof altogether inaccurate.

According to the judgments of the Court of Session the Appellant's claim to the value of the steading (or similar buildings), which the tenant was bound to uphold, was disallowed; but as the new buildings were erected partly with the materials of the old, the Appellant, by the decision against him for the full value of the whole new steading, has been obliged to pay a price for his own property.

The decree against the Appellant is untenable, as the additional buildings were unsuitable to the farm, as possessed by the Respondent and his predecessor.

The Respondent pleaded, that the Appellant was bound to pay the estimated value of the buildings in this case, because he or his predecessors and their factors acquiesced in the erection. This is also one of the grounds adopted by the Lord Ordinary and the Court, but is utterly unfounded both in fact and in law.

The plea of the tenant in this case, being unsanctioned by the special terms of the lease, has no other foundation in law or equity against the Appellant.

Even as to any part of the buildings which may be properly termed "additional buildings," the valuation, at present rates, is such as the tenant is not entitled to demand.

1821.

SINCLAIR v. MANSON.

Upon these grounds, if the tenant was found entitled to the value of any buildings at all, it ought to have been limited to such as had been fair and *bona fide* "additions" to the former steading on the farm; and even these ought to have been valued, not at the price of labour and materials in 1807, but at the actual rate of outlay when the buildings were erected.

For the Respondents, *Mr. J. P. Grant*, and *Mr. H. Stephen.*

The lease, in terms of which the Respondent possessed his farm, expressly bears, That in case the tenant should build "any additional steading "on the said lands," he should have "allowance of "the value of such steading, at the issue of this "tack, from the said Sir John Sinclair, and his "foresaids, according to a valuation to be put there-"on, at the term of removing, by two neutral men "as arbiters, one to be chosen by each party, whom "the parties shall be obliged to name, and whose "determination shall be final."

In the case of *Ducat against the Countess of Aboyne* *, the plea of the landlord was much stronger than in the present case. For in that case, the claim of the tenant for the expense of erecting a new dwelling-house was sustained, although the lease did not contain any express clause authorizing a new house to be built; and although the proprietor, before the house was begun, distinctly signified

* Fac. Coll. 14 May 1803.

1821.

SINCLAIR v. MANSON.

to the tenant that he was determined not to make any allowance for such an expenditure. The lease contained a clause binding the tenant to leave the houses on the farm, which he was to take under inventory, in a sufficient and habitable condition at his removal, and "if the said houses shall be then "found to have been ameliorated, the said Charles "Ducat shall have allowance therefor from the "said Countess of Aboyne." After the lease had subsisted some years, Ducat, instead of ameliorating the old house, pulled it down, and built an entire new one; and before commencing this building, a protest was taken, that the proprietor should not be liable in the expense. Ducat, notwithstanding, went on with the work, and at the expiry of the lease brought an action for the difference between the estimated value of the new house which had been erected, and the old houses upon the farm, and in this action he prevailed, although the proprietor pleaded that the clause in the lease applied only to meliorations on the houses existing on the farm at the commencement of the lease; and although the tenant had been distinctly informed before he made this outlay, that no allowance would be made for it at the expiry of the lease.

The appellant having refused, though required by a notary-public, to name a person to concur on his part in the valuation of the farm, the Respondent had no other means of ascertaining the amount of his claim than by an application to the Sheriff of the district, to name neutral persons of skill, to inspect and value the farm-steading, who gave in a report upon oath that the buildings which had

been erected by the Respondent, were worth the sum for which decree has been given.

There being no limitation in the lease as to the amount of the sum to be expended in these farm-houses, and the Appellant's predecessor having made no objection at the time to the nature or extent of the accommodation, the Appellant is not entitled, at the end of the lease, to derive the whole benefit of buildings erected at the Respondent's expense, without making a fair allowance for their value.

After erecting a complete and substantial farm-steading sufficient for all the purposes of the farm, the Respondent could not reasonably be considered as being any longer under the obligation of keeping up the old houses, which were thus rendered unnecessary.

Even if the Respondent had been still under the obligation of keeping up the old houses, after he built a new farm-steading, the Appellant has not shown either that the Respondent allowed those old houses to fall into any other disrepair than what was necessarily occasioned by lapse of time, or that he ever required the Respondent to keep up those houses.

Any supposed deficiency in the implement of such an obligation can never afford a legal defence against a clear and liquid claim upon the Appellant for the estimated value of these houses.

The buildings erected by the Respondent, the value of which was not equal to two years rent obtained for this farm at the expiry of the lease, did not contain any superfluous accommodation, or any

1821.

SINCLAIR
v.
MANSON.

thing more in this respect than is usually allowed to a tenant paying a rent of 400*l.* per annum.

The Appellant, as proprietor of the estate, derived an advantage from these buildings equivalent to the sum he has been decerned to pay, and he is not entitled to this benefit at the expense of the Respondent.

[In the course of the argument the following observations were made.]

9th Feb.

The Lord Chancellor :—The principle of acquiescence is undoubted. But if I covenanted with my tenant, and he with me, that he should keep the buildings in repair, and he pleases, instead of repairing, to rebuild, can it be said, (unless there are special circumstances in the contract,) that because I stand by and permit him to rebuild I must pay for the alteration? Is there any case to such effect?

Lord Redesdale :—The decision in Ducat's case did not go so far as this. For there the judgment was only for the difference between the value of the new and the old buildings, so far as the substitution of the one for the other was an amelioration. In ordinary cases, not governed by any special contract, if a tenant pulls down and rebuilds he is entitled to no allowance. In Ducat's case, under the circumstances of the contract, it was held, that the tenant was entitled to the value of amelioration. That was a strong decision; but does it warrant the judgment in this case? If he had made an addition, that was to be the subject of allowance

according to the contract. But has he done so? If he has acted, not under the contract, but according to his own discretion, he must bear the legal consequences. If it is a mere substitution, he is entitled to no allowance. To the value of additions he is entitled under the contract, but not for mere substitution, according to the judgment of the interlocutor. What is substitution, and what addition may be the subject of inquiry.

The Lord Chancellor, after stating the lease and obligations, proceeded to make the following observations:—Among the provisions of this lease, it is material to observe the respective times when the valuations are to be made, with respect to the timbers of the sub-tenants houses, and the additional steading. The timber is to be valued at the commencement and the issue of the tack, and if the tenant builds an *additional* steading, he is to have the value of *such* steading at the issue of the tack, according to a valuation then to be made.

21 February, 1821.

It might be difficult to collect the meaning, or to put a satisfactory construction upon these clauses of obligation, taken singly; but looking at them altogether they tend to explain each other. What precisely was intended by the parties, in the provision for building an additional steading, is not, perhaps, with certainty to be ascertained. But instead of the addition contemplated or expressed, new edifices have been erected. Upon this state of things the question arises how the valuation is to be made between landlord and tenant in a case apparently not

1821.

SINCLAIR v. MANSON.

anticipated *. The interlocutor of the Lord Ordinary, affirmed by the Court of Session, finds the Appellant liable in the whole amount of the valuation of the new buildings; but the obligations of the lease require that the old buildings should be kept and left in repair, subject to certain valuations of timber, and the tenant is at liberty to build an additional steading, not to pull down the old one and replace it by new buildings. Under these circumstances it is impossible at the end of the tack to allow the tenant the whole value of the new steading. He cannot claim more than he would have been entitled to demand if the obligations had been observed as to keeping the old buildings in repair and making the addition of the new steading. The allowance by the Court of Session of the whole value of the new steading is too much.

Under the circumstances of this case it will be proper for the House to embody some special findings in their order †, and remit the case to the Court below for re-consideration.

Lord Redesdale:—According to the covenants in this case, the tenant was bound to repair the old tenements, and he was authorized by the contract to add new buildings; but he was not authorized to pull down and rebuild. Having done so, when the new buildings were substituted for the old ones, all

* Here the Lord Chancellor recapitulated the interlocutor of the Lord Ordinary, stated *ante* p. 26.

† The Lord Chancellor here read the proposed minutes.

the covenants applicable to the old became obligatory as to the new buildings. That part of the clauses of obligation, which relates to the valuation of the timber of the sub-tenants houses, seems to explain what is otherwise difficult of construction.

The timbers before the commencement of the lease were probably in a state of decay, and it was foreseen that it would be necessary to substitute new timbers: it was therefore provided, that in case of such substitution the value of the timber at the entry should be estimated and compared with the value at the expiration of the lease, and that landlord or tenant should pay or receive the difference, according to the result of such valuation. This provision shows that the tenant was to have allowance only for ameliorations. The landlord is not to be deprived of the old buildings, and to pay the full value of the new ones without compensation for the repairs which the tenant was bound to make.

Die Mercurii, 21st February 1821.

The Lords, &c. find, That according to the terms of the lease the tenant was bound to keep, uphold and maintain the whole houses set in sufficient tenantable condition during the tack, and to leave them so at his removal, subject to the particular provision respecting the timber on the sub-tenants houses; and that the tenant was not authorized by any provision in the lease to pull down the old buildings without rebuilding the same, or substituting other buildings instead thereof; but inasmuch as the tenant was authorized by the terms of the lease to build an additional steading, and has built an entire new steading, and pulled down the old buildings, he is entitled to the value of so much of such new steading as ought to be considered as an additional steading, and not a substitu-

1821.

SINCLAIR
v.
MANSON.

tion for the old buildings; subject nevertheless to the particular provision in the lease touching the timber in the sub-tenants houses: Further find, that according to the terms of the lease the Respondent is entitled to be allowed for so much of such new buildings as, consistently with the former finding, he is entitled to have an allowance for, according to a valuation to be put thereon at the time of removal, and not according to the actual expenditure in making such new buildings: And it is ordered, that, with these findings, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with such findings.