

might not be obliged to make the bridge safer if it were necessary that engine-drivers should go along it in discharge of their duties. I am, however, unable to find that it was any duty of Clark's to go along to the signal-box on that night.

**LORD PRESIDENT**—I am of the same opinion. The fault charged against the Caledonian Railway Company is that they did not fence, by a parapet or otherwise, a bridge by which the railway crossed a turnpike road. It is impossible to say that all such bridges must be fenced like bridges which occur on a roadway. Nobody maintains that proposition; and therefore the question comes to be one of circumstances—whether it should be obligatory to fence a particular bridge? This one was situated between Gretna Station and the signal-box, the signalman of which had charge of the signals at the junction, not at the station. There has been a slight misapprehension about the signal-boxes. This pointsman has charge of the junction signals, not of the station signals. The station, or, as they are called, the home signals, are much nearer the station. The notion that there is a road between the station and the pointsman's box, and that there is an obligation upon the railway company to fence it, is misleading. There is no such road, and there is no need of it, and visits to pointsman's boxes are to be discouraged rather than encouraged. The more the pointsman is left to himself the better he will do his duty.

It is asserted that a servant of the Company might sometimes have occasion to cross the bridge, but it does not follow that even a servant would be justified in passing over it on a dark night without a light. Much less would a servant who was unacquainted with the line be justified in passing over it without a light. The danger was very great; it is bad enough to walk along a line in the daytime, but for anyone to attempt to walk along an unfenced railway in the nighttime without a light is most rash and foolhardy. That was the cause of the accident. It might be said that there was fault on both sides if there were an obligation on the railway company to fence, but that would only show contributory negligence. This is a sad case no doubt, but I fear it was the man's own fault.

The Court pronounced an interlocutor, which, after recalling the previous interlocutors and making the findings of fact contained in the Sheriff-Substitute's interlocutor, proceeded:—

“Find in law that the death of the said Thomas Clark was caused not by the fault of the defenders (appellants), but by his own rashness in walking along the line of railway with which he was not familiar, in a dark night without a lamp, and not in the performance of any act or duty which he was under an obligation to do or perform: Therefore sustain the defences, and assolvie the defenders, and decern,” &c.

Counsel for Pursuer (Respondent)—Asher—Brand. Agent—Adam Shiell, S.S.C.

Counsel for Defenders (Appellants)—Mackintosh—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Friday, November 30.

## FIRST DIVISION.

[Lord Curriehill, Ordinary.]

### LATTA v. EDINBURGH ECCLESIASTICAL COMMISSIONERS.

*Apportionment—Apportionment Act 1870 (33 and 34 Vict. cap. 35)—Whether applicable to Minister's Stipend?—Act 1872, c. 13—Ann.*

*Held (revg. the Lord Ordinary, Curriehill) that the Apportionment Act (33 and 34 Vict. cap. 35) has no application to the stipend of a parish minister, which must be held to be a case excepted under that statute, and for which other provision has been made, as it falls to be regulated by the Act 1872, cap. 13.*

*Church—Minister's Ann.*

The ann, or “half-year's rent of the benefice or stipend,” which is provided by the Act 1872, cap. 13, for the wife and children of a deceased parochial incumbent, runs from either of the half-yearly terms of Whitsunday or Michaelmas immediately preceding his death, and can never form part of his executry estate.

*Review per the Lord President of the law relating to the ann.*

This was an action brought by Mr Latta, S.S.C., trustee of the sequestrated estate of the Rev. R. W. Fraser, minister of the parish church of St John's, Edinburgh, who died on 10th September 1876, against the Edinburgh Ecclesiastical Commissioners, for payment of £300, being a half-year's stipend said to be due to Mr Fraser by the defenders at the term of Michaelmas succeeding his death, for the period from the Whitsunday preceding. It was averred that Mr Fraser had a stipend or salary at £600 per annum, payable by the defenders in terms of the Acts 23 and 24 Victoria, chapter 50, and 33 and 34 Victoria, chapter 87, in equal portions, at the terms of Candlemas and Whitsunday yearly. By the 16th section of the first-mentioned Act it was, *inter alia*, provided that the portion of the stipend or salary payable at the term of Candlemas should be for the period from Whitsunday to Michaelmas preceding, and that the portion of the stipend or salary payable at the term of Whitsunday should be for the period from Michaelmas to Whitsunday, and a similar provision was contained in section 25 of the Act 33 and 34 Victoria, chapter 87. Besides pleading his title to the whole sum, the pursuer pleaded—“(3) In any view, the said Rev. R. W. Fraser having survived the term of Whitsunday 1876, was entitled under the Apportionment Acts to a proportion of the salary due at Michaelmas 1876 corresponding to the period which elapsed between the said term of Whitsunday and the date of his death, and the pursuer, as trustee foresaid, and in virtue of the assignations founded on, is entitled to payment of this sum, with interest.”

The defenders, *inter alia*, pleaded in answer—“(3) Mr Fraser having died during the period between Whitsunday and Michaelmas 1876, the stipend for that period payable at Candlemas 1877 has vested in and belongs to the widow and

children of the deceased as annat, in terms of the Act 1672, cap. 13. (4) The Apportionment Acts do not apply to the sum sued for, in respect, 1st, that the said Acts do not apply to stipend or annat, and 2d, that their application is excluded by the terms of the Act 33 and 34 Vict. cap. 87. (5) The said half-year's stipend never having been *in bonis* of Mr Fraser, and not having been assignable by him or affectable by his debts, the defenders are entitled to be assoilzied, with expenses."

The question between the parties came finally to be solely as to whether the Apportionment Act applied or not.

The Lord Ordinary (CURRIE HILL) held that it did, and gave decree in favour of the pursuer for the proportion due to Mr Fraser. His Lordship added this note to his interlocutor:—

"*Note.*—The Rev. Robert William Fraser, minister of the parochial church of St John's, in the city of Edinburgh, died on 10th September 1876. His estates had some years before his death been sequestrated under the Bankrupt Statutes, and the pursuer is trustee in the sequestration, and, as assignee of Mr Fraser, now sues the defenders, the Edinburgh Ecclesiastical Commissioners, for payment of the sum of £300 sterling, as being the portion of Mr Fraser's 'stipend or salary due for the period from Whitsunday to Michaelmas 1876, and payable by the defenders at Candlemas 1877;' and he claims, alternatively, in virtue of the Apportionment Act 1870, a part of said stipend corresponding to the number of days during which Mr Fraser survived Whitsunday. The defenders, the Ecclesiastical Commissioners, who, under various Acts of Parliament, are the administrators of the fund provided by law for payment of the stipend of the parochial clergy in Edinburgh, resist payment (1) on the ground that Mr Fraser having predeceased Michaelmas 1876, had right only to the first half of the stipend for crop and year 1876, which was the half payable at Whitsunday 1876, and that he duly received payment thereof; and (2) on the ground that the Apportionment Acts do not apply to the stipend in question. The questions thus raised are important as regards the city clergy, and they are by no means free of difficulty.

"Apart from the question of apportionment, there would have been no difficulty in the case if Mr Fraser had been minister of any of the ordinary parishes of Scotland, or if the stipends of the Edinburgh city ministers had continued to be provided under the Act 1661, c. 265. The law as to the vesting of the stipends of all ministers was declared and fixed by the Act 1672, c. 13, which enacted—'The ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency, which is now settled to be thus, viz., if the incumbent survive Whitsunday there shall belong to them for their incumbency the half of that year's stipend or benefice, and for the ann the other half; and if the incumbent survive Michaelmas he shall have right to that whole year's rent for his incumbency, and for his ann shall have the half-year's rent of the following year, and that the executors shall have right thereto without necessity or expenses of a confirmation.' Mr Fraser therefore having survived Whitsunday, and died before Michaelmas 1876, he would have had right to the first half of the stipend for that year,

but would have had no right to the second half, which would have belonged to his executors as their ann. So far the parties are at one; and I understand that neither of them maintains that by the recent legislation, to be immediately noticed, the right of the executors to ann—that is, to half a-year's stipend over and above what is due to the minister for his incumbency—has been taken away. The question upon which they differ rather is, whether by the recent statutes the regulations of the Act 1672, c. 13, as to the vesting of the stipend, have been altered? Before attempting to answer this question, it is desirable to ascertain the manner in which the stipends of the Edinburgh ministers were paid prior to the year 1860. The necessary information is contained in the Statute 1661, c. 265, and in the minutes lodged for the parties respectively, with relative productions, after the debate on 17th March.

"The stipends of the Edinburgh city ministers have not for many centuries been paid either out of teinds or out of the common good of the burgh. For many years before 1661 they appear to have been paid out of an annual assessment or annuity imposed by the inhabitants on themselves. This practice was approved and confirmed by the Legislature in the year 1661; and by c. 265 of the Statute of that year, which was passed on 6th June, it was enacted that the yearly stipends of six of the ministers of the burgh should be imposed upon and paid by the inhabitants, tenants, and occupiers of the several dwelling-houses, &c., in the burgh, at the rate of six per cent. of the rental. The assessment was to be paid to a collector quarterly, 'each three months advanced, the first quarter's payment beginning 1st of February last.' The annuity was to be collected by the deacons of the churches or by a collector to be appointed by the Magistrates and Council in their option. This tax, which was generally known as the Annuity Tax, was extended and reimposed by various statutes passed from time to time, until it was abolished by the Act 23 and 24 Vict. cap. 50 (1860). It would thus appear that the stipends of the ministers of Edinburgh payable out of the Annuity Tax were by the statute imposing the tax made payable quarterly—*at* Candlemas, Whitsunday, Lammas, and Martinmas. In practice, however, the stipends were, at all events during the eighteenth century, paid in equal proportions half-yearly at Candlemas and Lammas, the Candlemas payment being regarded as the stipend for the half-year ending at Martinmas preceding, and the Lammas payment for the half-year ending at Whitsunday preceding, the minister being entitled to the Lammas payment if he survived the previous Whitsunday, and to the Candlemas payment if he survived the previous Michaelmas. The sum paid at Lammas annually was thus the half of that year's stipend which became legally due at Whitsunday; and the sum paid at Candlemas following was the other half of the same year's stipend. And at Lammas 1860 Mr Fraser received out of the produce of the Annuity Tax payment of the half of that year's stipend which had become legally due at Whitsunday 1860.

"Now, if this statement of the practice under the old law be kept in view in reading the Act 23 and 24 Victoria, c. 50, which was passed in July 1860, and by which the Annuity Tax was abolished as from and after Whitsunday 1860, much of the

difficulty attending the case will disappear. By the 16th section of that Act the Ecclesiastical Commissioners were directed, out of the monies received by them under the provisions of the Act, 'to make payment, in two equal portions, at the terms of Candlemas and Whitsunday 1861, and annually thereafter, to each of the ministers for the time being of the parochial churches of the said city after mentioned, or to any person duly authorised to receive the same on behalf of the said ministers, a stipend or salary of £600 per annum,' . . . . . 'provided that the portion of the said salaries or stipends to be paid at the term of Candlemas shall be for the period from Whitsunday to Michaelmas preceding, and the portion to be paid at the term of Whitsunday shall be for the period from Michaelmas to Whitsunday; and such payments shall be in lieu of and shall include all claims for stipend or salary for the said periods respectively competent at law, and shall be subject to the whole conditions applicable by law to the stipends or salaries now payable to the ministers of Edinburgh from the produce of the said Annuity Tax.' The stipends presently payable to the ministers are regulated by the later Act, 33 and 34 Victoria, cap. 87 (1870), but the enactments regarding these termly payments (sect. 25, sub-section 4) are expressed in precisely the same manner as in the Act of 1860. So that the determination of the present question really turns upon the construction of the earlier Act. At the date when that Act was passed (23d July 1860), Mr Fraser and the other ministers of Edinburgh were each about to receive within a few days (*viz.*, at the term of Lammas), out of the produce of the old Annuity Tax, payment of half a year's stipend, being, as I have shown, the half of that year's stipend legally due at Whitsunday 1860. And these payments were in point of fact made; and, in entire consistency therewith, the Act of 1860 directed the first payment of £300 to be made to each of the ministers at the term of Candlemas 1861, as the portion of the stipend for the period from Whitsunday to Michaelmas 1860,—that is to say, the second half of the stipend for the year 1860; and the second payment of £300, which was to be made at Whitsunday 1861, was to be for the period from Michaelmas 1860 to Whitsunday 1861,—that is to say, the first half of the stipend for the year 1861. That statute therefore made no change in the terms at which the stipend was to be paid, except by substituting Whitsunday for Lammas as the term of payment of the first half of each year's stipend; but instead of each payment being for half a year, as had been the former practice, the Whitsunday payment was to be for the period from Michaelmas to Whitsunday, and the Candlemas payment for the period from Whitsunday to Michaelmas, thus making the periods for which the payments were to be made correspond to the legal terms of vesting of the stipend as fixed by the Act 1672, c. 13.

"The next question is,—Whether under this Act a minister who dies between Whitsunday and Michaelmas has any vested right in the proportion of the stipend payable at Candlemas? It appears to me that, as stipends under the Acts of 1860 and 1870 are to be subject to the whole conditions applicable by law to the stipends payable to the ministers under the old Annuity Tax,

the law as to the vesting of the stipends remains unchanged by these statutes, and a minister who dies after Whitsunday, but before Michaelmas, has, unless the Apportionment Acts apply to such a case, no right to any part of the stipend payable at Candlemas following.

"The application of the Apportionment Act, however, which is the only remaining point in dispute between the parties, appears to me to be unquestionable. The Apportionment Act of 1870 provides (sect. 2) that 'all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly;' and sec. 5 declares that the word 'annuities' includes 'salaries and pensions.' Now, the Acts both of 1860 and of 1870, under which the periodical payments are made to the ministers of Edinburgh, expressly design these payments as 'stipends or salaries.' It is therefore beyond doubt that the salary of £300 which was accruing for the period between Whitsunday and Michaelmas was apportionable; that Mr Fraser was at his death entitled to a part of that salary or stipend in proportion to the part of the period from Whitsunday to Michaelmas during which he survived; and that the same now belongs to the pursuer as assignee of Mr Fraser, and as trustee on his sequestrated estate.

"It was maintained for the defenders that all parties interested were not called, and that the widow and children of Mr Fraser should have been made parties to the action, in respect that the salary sued for belonged to them as ann. Intimation of the dependence of the action was made to the widow and children, but they did not enter appearance. But I do not think that they are necessary parties to the present action. They are admittedly entitled to one half-year's stipend as ann over and above what Mr Fraser was entitled to in respect of his incumbency; and whatever may be the ultimate judgment in this case in the event of my interlocutor being taken to review, the right of the widow and children to their ann cannot be thereby affected.

"Expenses have been given to the pursuer, but subject to modification, because he has failed on his main ground of action, *viz.*, that the stipend sued for was the first half of the stipend for 1876, and had vested in Mr Fraser by his having survived Whitsunday. He has succeeded only in his alternative plea, added at the adjustment of the record, that he was entitled to a proportion of the stipend in virtue of the Apportionment Acts."

The defenders reclaimed, and argued—The Act of 1672, c. 13, excluded the application of the Apportionment Act. By the preamble and seventh section of the latter Act it was manifest that any special stipulation, either statutory or by agreement of parties, could so exclude it—*Tyrrell v. Clark*, 23 L.J., Ch. 283; *Tracy v. Corkran*, January 31, 1874, 8 Irish Rep., C.L. 40. The right of the widow and children to the ann or stipend of the half-year during the currency of which a minister died, was familiar to our law, and must not be defeated. If the Apportionment Act applied, it would be defeated, for they would lose so much of the current half-year as was due to the

minister in his own right. Further, they had no good claim to any stipend falling due after the expiry of that half-year. The Act 1672, c. 13, gave them the half-year's, not a half-year's rent.

The pursuer answered—The rights of the widow were not intended to be attacked. The ann would be hers as before, but would start from a different point, viz., where the minister's own earnings stopped. These must be held to run on so long as he lived. The whole question came to be—Would the Apportionment Act and the Act 1672 stand together? It could not be said that they did not, for the only object of the Act 1672 was to settle what the amount of the ann should be, and it settled it as a half-year's rent. It was not sought to interfere with that.

At advising—

LORD PRESIDENT—The question that is raised in this action is, Whether on the death of a parish minister between the terms of Michaelmas and Whitsunday, or Whitsunday and Michaelmas, the stipend payable for the current half-year is subject to apportionment under the Apportionment Acts? This question is obviously one of great importance and of general application, for I understand that neither party maintains that the statutes specially applicable to the stipends of the ministers of the city of Edinburgh create any peculiarity, and accordingly the case is to be dealt with as if it were the ordinary case of a parish minister with his stipend payable out of teinds. The Lord Ordinary has affirmed the proposition that the stipend is liable to the operation of the Apportionment Acts, and has accordingly found “that in virtue of the Apportionment Acts the said Rev. Robert William Fraser was at his death entitled to a proportion of said sum of £300 corresponding to the proportion of the period between Whitsunday and Michaelmas during which he survived, and that the same now belongs to the pursuer as trustee on the sequestrated estate of Mr Fraser.” Now, it is conceded at the outset that, in so far as the enacting words of the Statute of 1870 are concerned, the Apportionment Act does *prima facie* apply to such stipend, for it is provided—“All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly;” and the interpretation clause declares that “the word ‘annuities’ includes ‘salaries and pensions.’” The defenders, however, contend that while these words might in themselves be applicable to the stipend of a parish minister, there are other parts of the Act which show that apportionment was not intended to be applicable to cases of this kind. They refer, in the first place, to the preamble of the Act, which they say shows that it was intended to be corrective of mischief and inconveniences arising under the operation of the common law. It runs thus—“Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising, divers statutes have been passed”—which are then referred to—“and whereas it is expedient to make provision for the remedy of all such mischiefs and

inconveniences.” They appeal, in the second place, to the seventh section of the statute, which provides that “the provisions of this statute shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place.” These clauses, they maintain, show that the Apportionment Act is not intended to apply where by deed or otherwise provision is made for the disposal of such periodical payments, or where any special statute provides a mode of determining the questions that may arise in reference to such payments. Now, this matter of stipend accruing during the half-year in which the minister dies, has been completely settled for the last 200 years. The statute applicable to the matter is the Act 1672, cap. 13, which provides—“That in all cases hereafter the ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency, which is now settled to be thus, viz., If the incumbent survive Whitsunday, there shall belong to them for their incumbency the half of that year's stipend or benefice, and for the ann the other half; and if the incumbent survive Michaelmas he shall have right to that whole year's rent for his incumbency, and for his ann shall have the half-year's rent of the following year; and that the executors shall have right thereto without necessity or expenses of a confirmation.” He is therefore at his death to have right to half a year's stipend, being the past half-year, in his own right, and to a second half-year, being the current half-year, as his ann. To this it is replied by the pursuer that this statute is merely declaratory of the common law, and that it cannot fairly be said to be the introduction of a special statutory rule to settle the matter so as to exclude the operation of the Apportionment Acts.

It therefore becomes necessary to consider what the common law was previous to 1672. It would be of no profit, however, in this inquiry to go back beyond the Reformation. The whole regulation of the ann before the Reformation is so entirely different from what it has become in Protestant times that such an investigation is needless. Now, all our institutional writers—Stair, Mackenzie, and Erskine, for example—are agreed that the law of ann was borrowed by us from Germany after the Reformation. But was the rule of law so adopted by us that settled rule which was set up by the Act of 1672, or was there any settled rule at all? I hardly think there can be said to have been any settled rule.

I have referred to some authorities on this point, and I find the rule thus stated by Carpzovius, one of the most learned ecclesiastical writers of Saxony (lib. i. tit. 12, definition 183)—“Ultra salarium, quod defunctus ecclesie minister promeruit, ex singulari beneficio viduae ac liberis ejus etiam dimidius gratiae annus hinc in provinciis assignatur.” The custom in Saxony then is, that the widow and children receive half a year's salary of grace in addition to what the minister has earned for himself. A little lower down he states the motive for this—“Humanitatis nempe causa et pietas huic sanctioni causam dedit, quo etiam post mortem ministerium verbi dei gratitudo et liberalitas erga ministerium demonstraretur, et haeredes defunctorum solatio quodam reficerentur.” We gather therefore that in the State of Saxony the grace allowed to the widow and children of a minister

of God's Word was half a year's salary, and the motive for this was gratitude to the deceased minister.

But this rule was not generally recognised in other parts of Germany. In Boehmer's *Jus Eccles. Protestant.* lib. iii. tit. 5, sec. 289, we find this stated—"In ecclesiis Protestantium annus gratiæ in favorem viduæ et liberorum potissimum introductus, cum ministrorum ecclesiæ redditus non adeo solent esse pingues, ut viduæ et liberis suis sufficienter post mortem prospicere possint, inde humanitatis intuitu hoc lucrum adhuc iis indulgetur. Atque hæc lucra propriæ gratiam continent, cum nequitiam intuitu anni carentiæ, his, quibus debentur, assignentur. Inde, in plurimis locis receptum est, ut tamdiu vacet ecclesia, quamdiu annus gratiæ durat, et interim ecclesia vacans vicinorum fiduciæ committatur." Now, here the general rule is declared to be to allow a year's grace for the widow and children, and in many places he says that to secure this the church is kept vacant for the year and the cure is served by a neighbour.

The result is that in the country from which our rule was borrowed there was no uniform practice, although there was a general rule adopted that after the incumbent's death some allowance should be made for his wife and family. Sir George Mackenzie, in his *Observations on the Statutes*, tells us that this usage was introduced into this country from Germany soon after its introduction there in 1580. He also says that it was made the subject of a letter from King James VI. to the General Assembly that met at Montrose in 1595. That letter is not extant, but it seems very probable that it was written, for it is highly characteristic of the busy monarch, who thought no ecclesiastical arrangement could be satisfactorily made without his having a hand in it. What his recommendations were we do not know, but the General Assembly did not do much. The only Act they passed on the subject in that year is thus given in the *Book of the Universal Kirke*, vol. iii. 853, June 28, 1595—"Anent the Act made in favour of the executors of ministers, the Assembly and brethren foresaid for clearing thereof declares, if the minister die after Michaelmas, *quia fruges separate sunt a solo*, that his executors shall fall that year's rent and the half of the next." Now, the Act in favour of the minister's executors referred to is obviously the Act 1571, cap. 41, which is an Act in favour of ecclesiastics who should fall fighting against the King's enemies, and gives them and nearest of kin, not only the fruits on the ground, with the ann thereafter, but also the next presentation to the benefice. But that Act is intended for a different church and clergy, and for very different circumstances altogether, and there is not much light to be got from it. We find King James VI., however, taking the matter up again after the re-establishment of Episcopacy, as appears from a case reported by Durie, of date July 19, 1626—*The Earl Marischal v. the Relict and Bairns of the Minister of Peterhead*, 1 Br. Sup. 36—"In a double pointing at the instance of the Earl Marischal, who was charged by the relict and bairns of the deceased minister of Peterhead, who was incumbent and served the cure, and who died before the Feast of Michaelmas anno 1623, and who was on the other part charged by the new entrant minister for the

stipend of the year 1624; to the which stipend for the whole year the said entrant minister craved the only right, and alleged that he ought to be answered therof for both the terms of Whitsunday and Martinmas that year, in respect he served the cure that whole year; and the relict and bairns of the deceased minister claiming right to the half of that year's stipend, by reason of an Act and Statute of the Kirk, introduced in favour of the relicts and bairns of deceased prelates and ministers, which appoints the duties of the half of the profits of the prelacy, and siclike of the stipend for the year subsequent next after the decease of the incumbent, to pertain to the relict and bairns of the said deceased incumbent, and the other half to pertain only to the entrant—The Lords having seen and considered an ordinance and Act made by the bishops, which had relation to a letter of the deceased King James tending and written for that same effect, and which was engrossed in the said Act, and which Act was produced by the said entrant minister; by the which Act it was found that when the prelate dies before the Michaelmas, and after the Whitsunday, that his relict and heirs shall have that year's profits and rents of the benefice, both the Whitsunday and Martinmas terms thereof that year, and nothing of the year subsequent; and if the prelate die after the Michaelmas, that his relict and heirs shall have right to the half of the profits and rents of the subsequent year beside and attour the whole rents of that year wherein he dies;" and they proceed to give effect to the Act so made by the bishops under the authority of the King. What has become of that Act and letter we do not know, but they were adopted in 1626. If the matter had stopped there, we might have said very plausibly that there was a common law very like that which was declared to be law by the Act 1672. But there is a subsequent authority which is not to be reconciled with this view, viz., the case of *Fairley's Executors*, July 5, 1662, M. 472. Observe what is laid down in that case—if an incumbent be deposed or transported before Michaelmas, he gets nothing for that year, not even the first half, which according to the Statute of 1672 would belong to him in his own right; but if he survives till 1st January, he has not only the past year *proprio jure*, but the whole of that next year for his ann. That is a judgment as inconsistent as may be both with the decision of 1626 and the Act of 1672. Indeed, according to Lord Stair, it was with the view of putting an end to such anomalies that the Act of 1672 was passed.

Let us come to it then and see what are its provisions. Now it settles distinctly—(1st) The ann is to be a half year's stipend in all cases, neither more nor less; (2d) it is settled that "if the incumbent survives Whitsunday there shall belong to them for their incumbency the half of that year's stipend or benefice, and for the ann the other half; and if the incumbent survive Michaelmas he shall have right to that whole year's rent for his incumbency, and for his ann shall have the half year's rent of the following year; and the executors shall have right thereto, without necessity or expenses of a confirmation."

It appears to me, therefore, that comparing that statute with the common law prior to its date, it is the introduction of a new and settled rule to put an end to the inconsistent and con-

flicting decisions which had been pronounced under the common law. It adopts the principle of the corresponding German custom, which declares that the incumbent is the person in whose interest and in gratitude for whose services the provision called ann is made. If the incumbent dies, as has happened in this case, after Whitsunday, he is to have the first half year's stipend for his incumbency, the second half year's stipend for his ann. The principle of the enactment is that he is to have half-a-year's stipend, in addition to what he has earned, for behoof of his wife and children; that is given to him on such conditions that it can never form part of his executory estate, for it is never *in bonis* of the defunct; but that only enhances the value of the gift, for his widow and children will always have a claim to it preferable to the claims of his creditors. It is none the less a gift to him.

As I understand the matter, then, Mr Fraser is entitled to the whole year's stipend—to the first half-year's stipend for his incumbency, to the second for his ann. What is the effect of the Apportionment Act on his rights? If the minister is to receive only as much of the second half-year's stipend as corresponds to the number of days he lives beyond Whitsunday, he gets less than he is entitled to get under the Statute of 1672. The Lord Ordinary and the pursuer endeavour to surmount this difficulty by saying—"Let the ann stand as it does at present, but it must not run from Whitsunday, but must run for half-a-year from the date of the minister's death; that is directly contrary to the provisions of the Statute 1672; those who are in right of the ann have no claim to the fruits of the benefice except that portion to which the Act of 1672 gives them right. These two Acts therefore cannot stand together.

Then we come back to the contention that the Apportionment Acts are reformatory of the common law only, and do not interfere with statutory enactments about the division of profits, rents, or income, or with cases where there has been any special contract upon such questions. Section 7 may not perhaps be directly applicable, because it refers to cases in which it is "expressly stipulated" that no apportionment shall take place; but it illustrates the meaning of the statute, for it shows that it was merely intended to provide for cases where no other provision was made, and where the regulation of such payments was left to the common law. Here the matter of minister's stipend in the year in which the minister dies is made matter of regulation by a statute which established a rule in 1672 for the first time with reference to a custom which up to that time had acquired no uniform shape. By that statute we must be guided, and must hold that the Apportionment Act has no application.

LORDS DEAS, MURE, and SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders against Lord Curriehill's interlocutor, dated 28th March 1877, Recal the said interlocutor: Sustain the third and fifth and the first part of the fourth pleas stated for the defenders,

and in respect thereof assolvie the defenders, and decern: Find the pursuer liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer (Respondent)—Kinnear—Blair. Agents—J. A. Campbell & Lamond, C.S.

Counsel for Defenders (Reclaimers)—Lord Advocate (Watson)—Pearson. Agent—James Mac-knight, W.S.

Friday, November 30.

## SECOND DIVISION.

[Lord Craighill, Ordinary.]

MACKENZIE v. BANKES.

*Property—Loch—Riparian Owner—Joint Property in Two Pieces of Water separated by Narrow Channel.*

In an action of declarator of joint right or common property in a piece of water alleged to be part of an inland loch, in which the pursuer and defender had equal rights, the latter asserted that he was the sole owner and the only riparian proprietor of the water, which bore a different name, and was separated from the loch by a causeway erected upwards of forty years previously, and not since taken exception to.—*Held* (rev. judgment of Lord Ordinary Craighill—*dub.* Lord Gifford) that the two pieces of water must be held to be separate lochs, judging, *inter alia*—(1) from their difference of name; (2) from the configuration of the ground; and (3) from the existence of the causeway for the period of prescription.

*Observations* (per Lords Justice-Clerk and Ormidale) on the cases of *Menzies v. Macdonald*, March 10, 1854, 16 D. 827, 2 Macq. 463, and of *Scott v. Napier*, June 11, 1869, 7 Macph. H.L. 35.

This was an action raised by Mr Osgood Mackenzie of Davoch of Inverewe and other lands, in the parish of Gairloch and county of Ross, against Mr Meyrick Bankes of Letterewe, in the same parish and county, concluding, *inter alia*, for declarator that "the pursuer (who and the defender are the only proprietors whose lands lie around and border on the loch after mentioned) has, along with the defender, a joint right or common property in the loch called Fionn Loch, lying in the said parish, and particularly in that part of the same sometimes called the Dubh Loch, and a joint right of boating, fowling, fishing, and exercising all other rights in or over the said loch, and particularly in or over the said part thereof: And it ought and should be found and declared, by decree foresaid, that the defender has no exclusive right either of property or of use in or over the said loch or the said part thereof: And further, the defender ought and should be decerned and ordained, by decree foresaid, to desist and cease from molesting and interrupting the pursuer in the exercise of any of his rights aforesaid." There was also a conclusion for damages.