HOUSE OF LORDS.

Thursday, May 18.

(Before the Lord Chancellor, (Herschell), and Lords Watson, Ashbourne, and Macnaghten.)

MAGISTRATES OF GREENOCK *v.* PETERS.

(*Ante*, vol. xxix. p. 507, and 19 R. 643.)

Church—Minister's Stipend—Obligation to Pay Legal and Competent Stipend not below Sum Named—Contract or Trust.

The New or Mid Parish of Greenock was erected by the Court of Teinds in 1741. The decree bore that the managers of the burgh (the predecessors in office of the present magistrates) having received a sum of £1000, raised by voluntary assessment, and having been promised further contributions, were to have the patronage of the new church, the right to levy and appropriate the seat-rents and certain other rights, and were to provide the minister with "a competent and legal stipend not under 950 merks, with 50 merks for the Communion Elements" (together equivalent to £55, 11s. 1⅓d). The sum of £1000 was subsequently mixed with the town's funds and applied to pay its debts.

Held (*aff.* the decision of the Second Division) that the burgh of Greenock was bound under the decree of the Court of Teinds to pay the minister a competent and legal stipend, varying with the circumstances of the time, that the obligation was not fulfilled by a minimum payment of 950 merks, and was not impaired by failure of funds or diminished contributions.

This case is reported *ante*, vol. xxix. p. 507, and 19 R. 643.

The pursuer, the Rev. David S. Peters, appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL) — My Lords, in this action the respondent sought to obtain a declaration that, as minister serving the cure of the new or mid parish church within the burgh of Greenock, he was entitled to be furnished and provided by the defenders, and that they were bound to furnish and provide him with a competent and legal stipend to be paid out of the revenue of the burgh.

The claim of the respondent was founded on a decree of disjunction and erection dated the 15th of July 1741. Prior to that date there had been only one parish and one church in the town of Greenock.

The action of disjunction and erection was raised before the Court of Session as commissioners appointed for the plantation of kirks and valuation of teinds. The pursuers were the Baron Bailie of Greenock and certain other persons, all feuars, for themselves and in name of the whole of the other feuars and inhabitants of the town of Greenock. The defenders were Sir John Shaw, Lord of the Barony of Greenock, and other persons. The summons stated that owing to the increase of the town of Greenock, which formed part of the parish of Greenock, the erection of a new kirk had become necessary, and was much desired by all the inhabitants thereof, who had provided a sufficient fund for building a new kirk and endowing the minister with a competent stipend, not less than 950 merks for stipend and fifty merks for communion elements, towards which the pursuers had already laid out upon heritable security on the lands of Kirk Michaell the sum of £1000 sterling, and had bound themselves by contract to pay certain contributions yearly for fifteen years, which would be sufficient to complete a fund for the stipend and to defray the expense of building a church.

By a charter of the 30th of January 1741, Sir John Shaw had granted to the feuars and sub-feuars of the burgh of the barony of Greenock to elect nine persons (the baillie or baillies being always of the number) to be managers and administrators of the whole of the funds belonging to the burgh.

The managers so appointed were the pursuers in the action, to whom on the 7th of February 1741 Sir John Shaw had granted a heritable bond for the sum of £1000 "in trust for themselves and the whole other feuars and householders of the said burgh of barony, and of the new parish of Greenock, when the same shall be erected, in order to be applied for the special effect and purpose of being part of the benefice of the said parish when or in case it shall be erected, and in trust that such erection being once legally made, the foresaid persons or survivor of them shall denude themselves by assigning and disponing the said bond in security to and in favour of the minister who shall be first settled in the said new erected parish, and to his successors in office in all time coming during the not-redemption or until payment, to the intent that such minister and his successors in office may receive the rents and profits thereof during their respective incumbencies." This was the heritable security referred to in the passage of the summons which I have quoted.

By its decree the Court separated and disjoined a specified part of the town of Greenock, and erected the same into a new and separate parish. It conferred on the Bailie of Greenock and managers of the fund for building and endowing the church, and the feuars and elders of the new erected parish for the time being, the right of patronage of the new church, and the modelling and disposing the said church and haill seats thereof and bounds within the same, and the settling and uplifting rents for the said seats, and the naming and appointing of beadles, bellman, or door-keepers to the new church, and the readers, precentors, and clerks for the kirk and sessions thereof, and disposing during any vacancy of the fund which should be provided by them for a stipend to their

minister. The decree also decerned and ordained "that the Baillie, feuars, and inhabitants of the said burgh be bound and obliged not only to defray the expense of erecting, building, and repairing such kirk, manse, and schoolhouse, and other parochiall burdens, but also to provide the minister of the new church so to be erected with a competent and legall stipend not under 950 merks, with fifty merks for the communion elements."

This is the obligation which the respondent is now seeking to enforce against the appellants.

It appears to have been argued in the Court below that the obligations imposed by this decree (whatever they were) have not descended on the appellants, but the point was not pressed at the bar, and there appears to be no doubt that they have succeeded to those obligations. The question to be determined is, what is the nature and extent of the obligation imposed by the words which I have last quoted from the decree?

It was contended on behalf of the appellants that they were under no legal liability to do more than pay to the respondent as minister of the church the minimum sum of 950 merks mentioned in the decree. The respondent, on the other hand, maintained that they are bound to provide him with a "competent and legal stipend," whatever they may amount to, according to the varying circumstances from time to time.

It was argued that the authorities of the burgh could not in the year 1741 lawfully undertake such an obligation as this so as to bind their successors. I cannot concur in this view. The town could not of itself have erected the new parish. It was necessary for that purpose to resort to the Court of Teinds, and that Court was, I think, entitled to make it a condition of the decree of disjunction and erection that proper provision should be made for the stipend of the minister. It is to be observed that the right of uplifting the rents for seats in the church was conferred on the burgh, and these seat rents have been continuously received by the municipal authorities down to the present time. The burgh also received the £1000 secured by the heritable bond, and that sum was applied in discharging the debts of the town.

The only further question involved appears to me to be the true construction of that part of the decree which relates to the provision of a legal and competent stipend.

I do not think that the actings of the municipal authorities since the date of the decree assist much in the solution of the question to be determined. Additions were from time to time made to the amount of the stipend originally paid, but these additions were always strictly limited to the term of the incumbency of the minister to whom it was agreed to make the payment.

I am unable to accede to the argument which found favour with Lord Young in the Court below, that we have to deal merely with the case of a trust, and that the appellants' only legal obligation is to pay to the minister the interest on the sum received in respect of the heritable bond and the other moneys, if any, which came to their hands for the endowment of the church. Their duties are not, I think, regulated by the terms of the trust declared by the heritable bond. The decree of disjunction and erection, in my opinion, sanctioned and gave legal authority to a new arrangement, and the obligations of the baillies, feuars, and inhabitants of the burgh were thereafter measured and ascertained by the terms of the decree.

On the best consideration I have been able to give to the case I have come to the same conclusion as the majority of the Court below. Having regard to the right which was conferred of uplifting the seat rents, and to the fact that there was no provision as to the mode of application of the moneys thus received, I do not think it would be reasonable to hold that however much circumstances might vary, the stipend was unalterably fixed at the date of the decree, and that whatever the seat rents amounted to, the burgh would have discharged its obligation by paying to the minister the sum of 950 merks per annum.

In a process of modification brought in December 1708, the minister in his libel concludes for "a competent fixed legal stipend suitable to the weight of the charge and circumstances of that paroch and the extend of the free tiends"—1 Connell, Law of Tithes, p. 413. The legal and competent stipend could not of course in that case exceed the amount of the teinds, but the use of the expression in such a process in the Court of Teinds throws light, I think, upon the sense in which the words are used in the decree of that Court pronounced in 1741. Indeed, if the only liability intended to be imposed was the payment of a sum of 950 merks a year, it is not easy to see why the words "legal and competent stipend" should have been introduced at all.

The only authority upon the construction of the language found in the decree is the decision of Lord Wood in the case of *Cæsar* v. *Magistrates of Dundee*, 20 Court Sess. Cas. 2nd Series (Dunlop) (note) 859, which was in accordance with the judgment pronounced by the Court below.

For these reasons I am of opinion that the interlocutors appealed against ought to be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, at the bar of the House the appellants did not dispute, as they seem to have done in the Courts below, that they are bound by the decree of the Court of Teinds, dated the 15th of July 1741; and that the nature and extent of their obligations to the respondent depend upon the construction of its terms. But, on that assumption, they argued that the effect of the decree is either to make them trustees of a capital sum of £1000, the respondent as present beneficiary being entitled to the interest arising from it; or otherwise to impose upon them an absolute

obligation to pay him the sum of 950 merks yearly, with power to them, in their discretion, to withhold any further payment, or to make such additional payment as they may think fit.

The theory of a trust appears to me to be unwarranted by the terms of the decree. The summons of disjunction and erection upon which it proceeded, narrated the fact that £1000 had been subscribed and invested in trust for the purpose of securing a stipend to the minister of the new parish, but it was not represented to be sufficient for that purpose. On the contrary, it was stated that certain persons had bound themselves to pay a yearly contribution for fifteen years, which would be sufficient "to compleat a fund for the stipend." No one conversant with the practice of the Teind Court can suppose that their Lordships would have erected a new parish *quoad omnia* with no better security for the future sustenance of the holder of the benefice. These statements appear to have been introduced with the view of giving the Court some assurance that the municipality would be able to fulfil the obligations which they offered to undertake. No reference was made in the conclusions of the summons, to which they asked the Court to give effect, either to the trust fund or to contributions. The only conclusion relating to stipend was that "the baillie, feuars, and inhabitants of the said burgh" should be bound and obliged "to provide the minister of the kirk so to be erected with a competent and legall stipend not under nine hundred and fifty merks, with fifty merks for the communion elements, payable at two terms in the year —Whitsunday and Martinmas—by equall portions." The operative decree of the Court was in the precise terms of that conclusion. It imposes a direct obligation upon the burgh, which could not be impaired by the loss of the trust fund, or by any deficiency in the expected contributions.

The language in which the obligation is expressed does not favour the suggestion that the minister's stipend was to consist of 950 merks, it being left to the burgh managers to determine whether they would or would not make a further allowance. I can hardly conceive that the Court of Teinds would have described an income of which the sufficiency was to be dependent on the goodwill of the municipality as a competent legal stipend which they were "bound" to provide; or that the Court meant to give the seat rents to the burgh without any obligation to apply the surplus towards augmenting the stipend, which is the contention of the appellants. I agree with the construction which was put upon a similar clause of obligation by the late Lord Wood in *Cæsar* v. *Magistrates of Dundee*, 20 Court Sess. Cas. 2nd Series (Dunlop) (note) 859, not because it is an authority binding upon the Court, but in respect that it appears to me to be in consonance with the intention and practice of the Court of Teinds.

The authorities relied on by the appellants had really no bearing upon the point arising for decision in this appeal. *Maule* v. *Maule*, 1 Will. & S. App. 266, is the leading authority upon the question to what extent the heir in possession of an entailed estate is bound to aliment his eldest son and heir-apparent, a question involving very different considerations from those upon which the amount of a competent and legal stipend to a minister depend. The ground of decision in that case was, that the allowance made to the pursuer was in full, if not in excess, of what his father was legally bound to give him. But it was neither pleaded nor suggested that the action was excluded, or that the Court was incompetent to determine whether the aliment afforded was sufficient.

I shall say no more, because I fully concur in all the reasons which have already been expressed by the Lord Chancellor.

Lord Field, who is unable to be present, desires me to state that he entirely approves of the judgment proposed.

Lord Ashbourne—My Lords, I concur. I have had an opportunity of reading the opinion which has been delivered by my noble and learned friend on the woolsack, and I entirely concur in the conclusion at which he has arrived, and in the reasons upon which he has based his opinion.

Lord Macnaghten concurred.

The House ordered that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

Counsel for the Appellants—The Lord Advocate (J. B. Balfour, Q.C.)—J. D. Sym. Agents—Durnford & Company, for Cumming & Duff, S.S.C.

Counsel for the Respondent—Graham Murray, Q.C.—J. F. M'Lennan. Agents—Harvey & Capron, for Miller & Murray, S.S.C.

Thursday, June 15.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, Macnaghten, Morris, and Shand.)

CARSWELL *v.* COLLARD.

(*Ante*, vol. xxix. p. 856, and 19 R. 987.)

Ship — Charter-Party — Delay in Taking Delivery—Rescission.

By charter-party dated 3rd July 1891 the owner of a steamer then being fitted out in the Clyde for the summer traffic, agreed to let her to a charterer till 30th September. The charter-party provided that the charterer should "pay for the use and hire of the said vessel at the rate of £425 per month, commencing the day of delivery . . . . whereof notice shall be given to the charterer . . . payment of the hire to be made in cash monthly, in advance, . . . first month's hire to be paid before the steamer leaves the Clyde.