Wednesday, March 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

PETERS *v.* MAGISTRATES OF GREENOCK.

Church—Stipend—"Competent and Legal" Stipend—Burgh—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 legall 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, in an action brought in 1891 against the Magistrates of Greenock, that an onerous contract had been entered into which bound the managers of the burgh and their successors in office to provide such a stipend to the minister of the Mid Parish out of the revenue of the burgh as should be legal and competent according to the circumstances of the time—the amount in case of dispute being from time to time fixed by the Court—*diss.* Lord Young, who was of opinion that the £1000 simply constituted a trust-fund with the managers of the burgh as trustees; further that if it was a case of contract, 950 merks should be the limit of the obligation.

The Rev. David Smith Peters, minister since 1877 of the New or Mid Parish, Greenock, raised an action againt the Provost, Magistrates, and Town Council of the burgh of Greenock to have it found and declared "that the pursuer, as the minister serving the cure of the New or Mid Parish Church and district thereof, within the burgh of Greenock, was and is entitled to be furnished and provided by the defenders, and that the defenders were and are bound to furnish and provide the pursuer, with a competent and legal stipend, to be paid out of the revenue of the burgh, or out of the other funds, property, and revenues held and enjoyed by the said Magistrates and Town Council for the special use and behoof of the minister serving the cure of the said church and district, from the date of his ordination and induction to the said cure, and in all time coming, during his lifetime and serving said cure," and he sought decree for payment of certain arrears upon the footing that from Whitsunday 1880 until Martinmas 1890 his stipend ought to have been £320 per annum, and from the latter date £400 per annum, or such other sum as should appear to the Court to be a competent and legal stipend, reserving his right and that of his successors in the cure to apply for an increase of stipend in the event of the sum presently decerned for ceasing to be a competent and legal stipend.

It appeared that prior to 1741 there had been only one parish and one church in the town of Greenock, and the population having so increased as to render a second church and minister desirable, Sir John Schaw, who was superior and principal heritor of the parish, and also patron of the parish church, took steps to have a second parish planted in the town. By charter, dated 30th January 1741, he empowered the feuars and sub-feuars of the burgh of barony of Greenock to meet yearly and choose managers of the public funds that had arisen or that might arise from assessment. At said date the existing funds, which were derived from a voluntary assessment upon malt, amounted to £1000, and upon 7th February 1741 Sir John Schaw granted to the managers a heritable bond for £1000, with interest from Candlemas of that year, the instrument of sasine upon which bond, dated 18th February 1841, bore that Sir John Schaw bound and obliged himself to repay the £1000 to these managers, and to the survivors or survivor, 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, and that the said rents thereof in time of vacancy may be uplifted and applied as accords of the law, and that the minister for the time being shall not have power to uplift or receive the principal sum above written without the consent of the persons above named, or major part of them, or the survivors or survivor of them, or the major part of the said survivors, and failing of them all, without the consent of the Procurator for the Church for the time being, and failing of him, without the consent of the Lord President of Session, or the King's Advocate or Solicitor, or the Dean of the Faculty of Advocates for the time being, to the end that the said principal sum so uplifted and received may forthwith, or as soon as possible, be employed upon land or annual rent for the same uses," and he bound himself to pay an annual rent of £50 for said sum, for which he conveyed certain lands in security to these managers, or the

survivors or survivor of them, in trust "for themselves and 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 employed 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 forenamed persons shall denude themselves by assigning and disponing this bond in security to and in favour of the minister."

Upon 15th July 1741 the New or Mid Parish was erected by decree of disjunction and erection pronounced by the Court of Teinds, which proceeded upon the narrative—"And whereas by the great encrease of the town of Greenock of late years, in trade and people, and consequently of the paroch of Greenock, whereof the town is a part, the erection of the new kirk is become absolutely necessary for the greater success of the Gospell in that place, and is much desired by all the inhabitants thereof, who have provided a sufficient fund for building a new kirk and endowing a minister with a competent stipend, not less than nine hundred and fifty merks of stipend, and fifty merks for communion elements, towards which the pursuers have already laid out upon heritable security on the lands of Kirkmachaell the sum of one thousand pounds sterling, and have bound themselves by contract to pay a certain contribution yearly for fifteen years, which will be sufficient to compleat a fund for the stipend, and to defray the expense of building a church." . . .

The decree found and declared—"That a new church be planted, builded, and erected, within the bounds @ described for the said new paroch, and that a minister be settled for serving the cure at the said church, and that the baillie of Greenock and managers of the fund for building and endowing the said church, and the feuars and elders of the said new erected paroch for the time being have, in all time coming, the sole and undoubted right of patronage of the said new church, and the right of presentation and calling a minister to serve the cure thereat how soon the said kirk shall be erected and accomodated for publick worship, and as oft in all time thereafter as any vaccancy shall happen; and of modelling and disposing the said church and haill seats thereof and bounds within the same, and of setting and uplifting rents for said seats, and of naming and appointing the beadles, bellman, or doorkeepers of the said new church, and of readers, precentors, and clerks for the said kirk and sessions thereof from time to time as they shall think fit; and of disposing, during any vacancy, of the fund which shall be provided by them for a stipend to their minister, or for communion elements, manse, or schoolhouse, with this provision and condition always that Sir John Schaw of Greenock, and the other heritors of the parish of Greenock, their heirs and successors, in their respective lands and heritages nor the teinds thereof, shall not be lyable in payment of any stipend to the minister of the new paroch, or for building, upholding, or repairing the kirk, manse, or schoolhouse thereof, or any other parochial burdens whatever; but have declared, and hereby declare, them free thereof in time coming, as also have decerned and ordained, and hereby decern and ordain, 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 nine hundred and fifty merks, with fifty merks for the communion elements."

From 1741 to 1751 the finances of the said New or Mid Parish Church were managed, and the revenues thereof were collected and disbursed by the managers, under said charter of 1741. In 1751 Sir John Schaw granted a new charter, authorising the feuars and sub-feuars of the town of Greenock to meet and choose, in place of the former managers, a body of two magistrates, a treasurer, and six councillors. This new body, upon its appointment, took charge of the financial affairs of the said church.

In the same year a local Act (24 Geo. II.) was obtained, which proceeded upon the narrative that "whereas the building of a new church, town-house, poor and schoolhouses, and also market-places for meal and flesh, and also of a publick clock, are extremely necessary, and much wanted within the said town, but the inhabitants thereof are not able to raise money to answer the expence thereof, nor to complete the said harbour, and to keep all the said works in repair, without the aid of Parliament," and authorised an assessment upon malt for thirty-one years. The church was completed and began to be occupied in 1761, and thereupon the Magistrates and Council proceeded to let the church seats, and to uplift the seat-rents. In 1767 they uplifted the £1000 contained in Sir John Schaw's heritable bond already mentioned, and applied the same in payment of debts due by the town, granting to the minister of said parish an obligation to pay annually to him, and his successors in office, the legal interest of the £1000, in partial satisfaction of the modified stipends of the parish for the time being. The said Magistrates and Council collected all the revenues of the church, and disbursed the minister's stipend and the other charges of the church down to 1833, when their place was taken by the Magistrates and Council elected under the Municipal Reform Act of that year, 3 and 4 Will. IV. c. 77. The last-named body now represented by the defenders, have continued the management of the church's financial affairs down to the present time, uplifting the seat-rents and other revenues, and paying the minister's stipend and other charges. The minimum stipend of 950 merks with 50 merks for communion elements amounted to only £55, 11s. 1⅓d. sterling per annum. In 1742,

£24, 8s. 10⅔d. was added to the then minister's stipend by the managers of the burgh as a gratuity, and another £20 also as a gratuity in 1766, making the stipend £100. This was augmented in 1796 to £125, and in 1800 to £180, in consideration of the then high price of every necessary of life, and the usefulness of the then minister, but under declaration that the town was only bound to provide "the original yearly stipend of £100."

In 1803 the stipend was £220, in 1808 £270, in 1812 £295, in 1843 £220, under a declaration that "the legal stipend" was £120 (including £20 for communion elements), and in 1861 £320 under a similar declaration. Upon 2nd September 1873, on the occasion of a vacancy in the incumbency of said parish church, the Magistrates and Council adopted a resolution to the effect that the legal stipend should be £120 with the use of the manse, and that the incumbent should receive the balance of the seat-rents after providing for that stipend and for the cost of the maintenance of the church fabric and manse and for necessary repairs so far as such cost exceeded an average amount of £50 a year.

The pursuer, who was elected in 1877, received £385, £355, and £347, as stipend for the first three years of his incumbency respectively. In the year 1880, having scrutinised the terms of the receipts submitted to him, he found that these bore reference to the resolution of 2nd September 1873, and that the sums tendered to him consisted of (1) the so-called "legal stipend" of £120, and (2) the balance of seat-rents, after providing for that stipend and communion element money and for the cost specified in said resolution. Being of opinion that these sums did not satisfy the defenders' obligation to supply a competent and legal stipend, he, in the said year 1880, declined to sign acknowledgments for the sums paid to him, except under protest that his legal rights should not be prejudiced thereby. The defenders paid him, upon such qualified acknowledgments, the sums admitted by them to be due to him for the period down to Whitsunday 1884, but thereafter on 3rd June 1884 they adopted a resolution instructing their chamberlain not to take receipts for stipend from the pursuer when these bore that payment was accepted under protest. In consequence of said resolution, and the pursuer's declinature to grant unqualified receipts, the pursuer obtained no payment of stipend from the defenders after 19th May 1884.

The pursuer pleaded, *inter alia*—"(1) According to the terms and meaning of the decree of disjunction and erection of the New or Mid Parish Church of Greenock, and to the usage and prescriptive use and enjoyment following thereon, the defenders, as representing the community of the burgh of Greenock, are liable in payment of a competent and legal stipend to the pursuer as minister of the said church."

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action. (4) The sum which the defenders are legally bound to provide to the pursuer, as minister of the New or Mid Parish, in name of stipend and communion elements, not being in any view more than £120 per annum, and the stipend paid, so far as in excess thereof, having merely been voluntarily paid out of the common good, in the discretion of the Magistrates and Council for the time, the action cannot be maintained. (5) It is incompetent to augment the stipend of the pursuer out of the funds of the burgh. (6) *Separatim*—The Court of Session has no jurisdiction to augment the pursuer's stipend."

Upon 23rd June 1891 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the obligation libelled contained in the decree of disjunction and erection dated 15th July 1741, is binding on the defenders: Finds that upon a just construction of the said obligation the defenders are bound to provide the pursuer and his successors in the New or Mid Parish Church of Greenock with a legal and competent stipend suited to the circumstances of the time, and the position and duties of the benefice: Therefore finds, declares, and decerns in terms of the first declaratory conclusion of the summons: *Quoad ultra* appoints the cause to be enrolled that parties may be heard as to the petitory conclusion, and reserves all questions of expenses; grants leave to reclaim."

"*Opinion.*—This case of the Reverend David Peters against the Provost and Magistrates of Greenock was lately argued in the Procedure Roll, and I shall now endeavour to explain shortly the view which I take of the rights of parties.

"The decree of disjunction and erection of 1741 must, I think, be read as expressing a judicial contract, to which the predecessors of the defenders were parties, and under which the church of the New or Mid Parish of Greenock was erected by the Court of Teinds. It is therefore a document which, at least upon the parties to it, was and is binding according to its terms, and which requires to be construed on the same principles as any other contract. Accordingly, the first question is, What is the true construction of the obligation contained in the decree whereby the predecessors of the defenders became bound, *inter alia*, 'to provide the minister of the new church so to be erected with a competent and legal stipend not under 950 merks, with fifty merks for communion elements, payable at two terms in the year, Whitsunday and Martinmas, by equal portions?'

"Now, in considering that question, it becomes important to keep in view that the predecessors of the defenders who undertook the above obligation did so, not gratuitously, but for more or less onerous considerations—(1) They received a sum of £1000 sterling, provided by the principal heritor, or raised by voluntary contribution, and which sum, it is admitted, although originally lent out on bond, was subsequently mixed with the town's funds and applied to its general purposes; (2) they

further obtained the patronage of the new church; and (3) they obtained the right to levy and appropriate the whole of the seat-rents, or at least to appropriate so much of them as was not required for the repair and upkeep of the fabric. In return they became bound to provide the minister with 'a legal and competent stipend,' not under the sum mentioned, which, including communion elements, amounted when converted into sterling money to £55, 11s. 1½d.

"In these circumstances I find difficulty in adopting either of the constructions of the decree which were at the debate suggested by the defenders. I do not, for example, think it is possible to hold that the obligation undertaken with respect to the stipend was limited to the minimum of £55, 11s. 1½d., and that anything beyond that was to be in the discretion of the defender's predecessors. If that had been meant, it would, I think, have been expressed, and it is in my judgment scarcely conceivable that it should have been meant, seeing that the sum in question—£55, 11s. 1½d.—did little more than represent the income of the £1000 which, as I have said, the defenders' predecessors received and spent. Nor would it, I think, have been altogether consistent with the onerous character of the contract that the debtors in the obligation should have been made the judges of the amount which they should pay. It is, perhaps, a more feasible proposition that a legal and competent stipend was to be fixed once for all, and that the parties to the contract being satisfied with the stipend as originally fixed, there was no room for recurring augmentations. But if the stipend was to be fixed once for all, one would have rather expected that it would have been so fixed in the decree. And on the other hand it can, I think, scarcely be doubted that a stipend to be modified from time to time, according to circumstances, was not only more in accordance with the language used, but also much more in accordance with the nature of the transaction, and with the probable requirements of the Court of Teinds,—not to speak of the elastic character of the revenue to be drawn by the town from the seat-rents.

"It is, moreover, I think, impossible in this connection to disregard the usage which has followed on this decree for upwards of a century. The stipend appears to have been fixed in 1742 at the sum of £80, being an advance of £24, 8s. 10½d. on the minimum. It was raised to £100 in 1766, to £125 in 1796, to £180 in 1800, to £220 in 1803, to £270 in 1808, and to £295 in 1812. It was reduced in 1843 to £220, but again raised to £320 in 1861, and it appears to have stood at this last sum until 1873, when the new arrangement now complained of was sought to be made, and the present dispute may be said to have arisen. No doubt—as set forth in the defenders' statement—these successive augmentations were always qualified by a declaration that they should be personal to the successive incumbents, and should not import an obligation to continue the same to their successors. But no augmentation once granted was ever in fact withdrawn, except in 1843, and then only to the extent which I have mentioned, and the later minutes from 1843 onwards contain regularly an acknowledgment that to the extent at least of £120 the stipend was a legal stipend for which the town was bound. How this last sum was reached does not appear, but it will be observed that it at least exceeds considerably the original stipend, and is not therefore consistent with the contention that the original stipend satisfied the town's obligation under the decree.

"I appreciate the argument that this is a case of contract, and not of trust, and that there is always a certain presumption against an obligation which is indefinite, and involves a reference to the Court from time to time. I observe also, on referring to the decree itself, that it appears to have been at least anticipated that a sum should be raised by a voluntary tax continuing for fifteen years, sufficient (with the £1000 already raised) to build the church and provide completely for the stipend. But it does not appear how far this tax was levied, or what it produced; nor has it been suggested that by reference to this tax the means exist for now defining the stipend. In truth, the uncertainty of this source of income was, I think, not improbably the reason why the parties to the disjunction and erection, including the Court of Teinds, thought it necessary instead of resting satisfied with a prospective endowment, to impose on the town in general terms the obligation to provide a legal and competent stipend.

"I am, on the whole, therefore, of opinion that the defenders' predecessors came under an enforceable obligation to provide such a stipend to the minister as should be legal and competent according to the circumstances of the time—the amount, in case of dispute, being from time to time fixed by the Court, and I am greatly fortified in this opinion by being able to appeal to so excellent an authority as a judgment of the late Lord Wood. I refer to his Lordship's judgment (practically acquiesced in) in the case of *Cæsar* v. *The Magistrates of Dundee*, June 9, 1848, and reported in 20 D. 859. The obligation in that case was in terms identical with the present, and was contained in a similar decree of disjunction and erection. It was granted by the magistrates of the burgh of Dundee, and its construction having come into question under circumstances very similar to the present, Lord Wood pronounced the following interlocutor—'Finds that the sum of £105 which was originally fixed as the amount of stipend to be paid to the minister of the Cross Church of Dundee, of which the pursuer is now the incumbent, was not thereby made the permanent amount of the stipend for that charge in all time thereafter, so that the obligation imposed on the burgh by the decree 1788 was exhausted as regarded the amount of the stipend which could be claimed from the burgh, and all demand for any increase absolutely excluded, however inadequate the sum might subsequently, under exist-

ing circumstances, come to be for the support of the clergyman for the proper discharge of his duties, and for the maintenance of his position in society, and therefore to that extent repels the defences and decerns, and before further answer appoints the cause to be enrolled.' A similar judgment was pronounced in the action which shortly followed at the instance of the other ministers of Dundee against the magistrates, reported in the same volume of Dunlop; but the question there was as to the administration of a trust, not as to the enforcement of a contract, and accordingly it is not of course a precedent of equal authority.

"It remains only to consider whether the obligation undertaken in 1741 by the baron bailie and feuars of Greenock has now transmitted to the defenders. I confess I do not think that this can well be doubted. Greenock was up till 1832 only a burgh of barony, but between 1742 and that date it had gradually acquired a municipal constitution, and there can, I think, be no doubt that the managers of the burgh previous to 1832, and the Magistrates and Town Council since that date, have accepted the position of representing their predecessors and adopting their obligations. They have all along paid the stipend in question, and performed the other obligations imposed by the decree of disjunction and erection; and they have on the other hand drawn the seat-rents, and taken the benefit of their predecessors' funds, including the £1000 in Sir John Schaw's bond. They seem also to have exercised up to 1874 the patronage which was by the decree granted to their predecessors; and altogether I do not think that the case can be taken otherwise than if the present Magistrates and Town Council had been the municipal authority in 1741, and indeed, I do not gather that this was seriously disputed at the debate.

"I propose therefore to pronounce the following interlocutor [*as given supra*].

"If the parties cannot agree, it will be for after consideration how and on what principles the amount of stipend shall be fixed. It may be that the stipend fixed in 1861 may form a standard, or it may be (though I should deprecate such a result) that some inquiry may be necessary. As at present advised, however, I do not see that any inquiry is necessary as to the funds of the burgh. In the view I have expressed, this is not an action for administering a trust, but for constituting a debt; and decree must therefore go out as for any other debt, without reference in the meantime to the circumstances of the debtor."

The defenders reclaimed, and argued—(1) The £1000 which along with certain subscriptions were put into the hands of the original managers constituted a trust fund for the good of the benefice to be administered by these managers as trustees. It was not, as the Lord Ordinary seemed to have thought, for the benefit of the burgh. It could not be increased for the benefit of the benefice out of the burgh's funds. (2) If there was a contract here, it was merely to provide a stipend of 950 merks. By long usage £120 had come to be regarded as the "legal stipend," and the Magistrates were willing to recognise that as the measure of their obligation. Every increase above that sum had been given as a gratuity, and had been declared to be so at the time of granting—*Magistrates of Dundee* v. *Nicol*, November 18, 1829, 8 Sh. 66. (3) If the contract was for a stipend to vary according to circumstances, that was a contract *ultra vires* of the managers of the burgh, and not binding upon their successors. (4) The "common good" of the burgh could not be made available for this stipend—*Magistrates of Dundee* v. *Taylor & Grant*, March 20, 1863, 1 Macph. 701; *Wishart* v. *Magistrates of Edinburgh*, 2 Pat. App. 118. If it could, but if the funds were insufficient, was an additional assessment to be laid on for that object? (5) This was an attempt to obtain an augmentation of stipend from the Court of Session, which was incompetent. Besides, there was nothing of the nature of teinds here. The rights of the old parish had been in no way affected by the decree of disjunction.

Argued for the respondent — (1) This action was in no sense an augmentation. It was brought for the enforcement of a contract *ad factum præstandum*—a contract under which the Town Council of Greenock in return for certain money—which they had spent to pay the burgh's debts—and for other rights, were bound to provide this parish with a "legal and competent stipend" out of the common good of the burgh, respect being had from time to time to changes in the conditions of living. That this was the real meaning of the contract was shown by the way in which the managers of the burgh had acted throughout. (2) This was a competent transaction, and was by no means the first of the kind—Ersk. i. 5, 23; Connell on Parishes, 65, 86, &c.; *Moffat* v. *Magistrates of Port-Glasgow*, decided by Lord Robertson, 1846 (unreported); *Cæsar* v. *Magistrates of Dundee*, June 9, 1848, reported 20 D. 859; *Magistrates of Kilmarnock* v. *Aitken*, May 31, 1849, 11 D. 1089; *Presbytery of Dundee* v. *Magistrates of Dundee*, March 19, 1858, 20 D. 849—*aff.* 4 Macq. 228. (3) If the burgh had spent its funds, as it seemed, upon municipal buildings, the Council must assess for these buildings; this benefice was not to suffer because the funds for its benefit had been otherwise spent.

At advising—

Lord Trayner—I think the interlocutor of the Lord Ordinary submitted to review should be affirmed, and I concur in the views expressed by his Lordship in the opinion he has given. Had nothing been argued before us beyond what seems to have been argued before the Lord Ordinary, I should have contented myself with simply expressing my concurrence in the judgment which has been pronounced, for I could not add usefully anything to what the Lord Ordinary has said. But two questions were submitted by the reclaimer in argument

before us with which the Lord Ordinary has not dealt, and with regard to each of them I think it right to make one or two observations. The first of these questions is, whether the obligation in question was not *ultra vires* of the persons who undertook it, and if so, whether it is binding on the defenders? The Lord Ordinary has pointed out that the defenders now represent the persons who in 1741 (the date of the obligation) had the management and administration of the municipal affairs of Greenock, and therefore the defenders will be liable for the due fulfilment of the obligation if it was validly contracted. I see no reason for doubting that the obligation in question was one which it was within the power of those representing the inhabitants of the burgh at the time to grant or undertake. Such obligations appear not to have been at all unusual about the middle of last century. Several examples are given by Connell of similar obligations granted under similar circumstances and for a like purpose (Connell on Parishes, 86, *et seq.*); and Erskine (i. 5, 23) speaks of them as one of the modes by which provision may be made for the stipend of the minister of a newly erected church "either where there are no tithes, as in boroughs, or where the tithes have been already exhausted." The question whether a burgh or the representatives of a burgh could not validly grant such obligations does not seem to have been at all questioned in the times of the authors I have cited. But the question was distinctly raised in the case of the *Magistrates of Kilmarnock* v. *Aitken*, 11 D. 1089, where it was held that an obligation similar in all its important features to that now under consideration was not *ultra vires* of the magistrates of the burgh who undertook it. There is no authority to the contrary, and that being so, I take it to be settled by authority that the obligation in question was not *ultra vires* of the granters.

The second question argued before us was, whether it was competent to the defenders to pay the pursuer's stipend out of the common good of the burgh? Now, that question was also decided—and decided in the affirmative—by the case of *Aitken*, above cited. And it is difficult to see how any other conclusion could be reached. If the obligation was one which the magistrates of a burgh could validly grant, it is only out of the property of the burgh that the obligation can be met. The obligation does not bind the magistrates personally; it binds that which in their official capacity they are administering.

Another view was suggested in the course of the argument, if not maintained, to the effect that the obligation now sued on is in itself not a valid or lawful obligation, or one which the courts of law would or were bound to enforce. This view, as I understand, proceeds upon the consideration that the obligation in question is one for an uncertain—that is, an unfixed—amount, the amount of which may vary from time to time. After the best consideration I have been able to give this matter, I am unable to concur in this view of the obligation before us. I am disposed to regard the obligation as one the extent and quality of which is quite fixed and determinate. It is to provide a "legal and competent stipend." The value or extent of that obligation in money may vary with circumstances, but the obligation does not vary. It is an unvarying obligation to provide a certain thing each year, but which may cost more or less each year as circumstances change. An obligation to aliment is of the same character. The obligation to provide suitable aliment is one which does not vary; the amount of aliment to be provided under the obligation frequently does and always may. That the thing to be provided under the obligation is minister's stipend does not appear to me to affect the question. We are not dealing in the ordinary sense with an augmentation of stipend. Augmentation of stipend in that sense is only competent out of teind, and can only be granted by the Court of Teinds. We are now and in this Court dealing with the construction and effect of a civil obligation, and it no more affects the result that it concerns something to be paid and provided to a minister than if it was something to be paid or provided to a wife, a child, a parent, or a stranger. That it is so becomes apparent from the fact that we could as competently listen and give effect to a demand on the part of the defenders for a reduction of the amount being paid under the obligation as we can now listen to the pursuer's demand for an increase. In the Teind Court such a course could not be followed. We are therefore dealing with a matter of purely civil contract.

Whether the courts of law are under obligation to enforce such an obligation as that now before us, may, perhaps (since it has been questioned), be doubtful. I should humbly think they were. But the Court has already entertained and decided an action similar to the present in the case of *Cæsar*, 20 D. 859, and I am prepared to follow the same course.

A great part of the argument addressed to us related to the question of fact whether there is any common good in the burgh of Greenock available to meet the pursuer's claims if these were given effect to. I think that argument cannot be considered by us at present. The Lord Ordinary has still to determine to what extent the pursuer is entitled to decree under the petitory conclusions of the summons, and until that has been determined the defenders cannot say whether they are in a position to meet the pursuer's claims or not. It would be premature, in my view, to say anything in the present state of the case as to whether the defenders have or have not funds which may be made available or liable to meet the pursuer's demands.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Trayner, which I have had an opportunity of reading, and I have nothing to add.

LORD YOUNG—I am in such a hopeless minority here that I must have the greatest misgivings as to the soundness of the views which I take of this case. I have considered and re-considered them accordingly, knowing that your Lordships differed in opinion from me, or that I differ from your Lordships as I do from the Lord Ordinary, but that difference of opinion on my part and the distrust which I necessarily have of its soundness—my opinion remaining unchanged after consideration—makes it all the more necessary that I should explain distinctly the grounds of my opinion. The particular case is not one of any considerable importance. It is peculiar in many respects, but the general views upon which the Lord Ordinary has proceeded, and which are concurred in by my Lord Trayner and by the rest of your Lordships, are of the very highest importance, and as I am unable to concur in them, thinking them quite fallacious, I must explain distinctly the grounds upon which I do so.

The Lord Ordinary says at the conclusion of his note—and it is really the keynote of the ground of judgment from which I dissent—"This is not an action for administering a trust but for constituting a debt, and decree must therefore go out as for any other debt, without reference in the meantime to the circumstances of the debtor." In my view the case is one of trust—of the administration of a trust and nothing else. So that here, to start with, I altogether differ from the view of the Lord Ordinary. We have of course to consider the import and meaning of the decree of disjunction and erection of July 1741, and to see what obligation or duty, or whatever be its legal character, it imposes upon anyone enforceable in this action, and to that end we must see who were the parties to the proceeding which resulted in that decree which was really an arrangement among the parties to the proceeding. It was not a proceeding before a court of law, but a Parliamentary Commission, but nevertheless we must read and construe it in order to ascertain its import and meaning and any obligation or duty which it imposes upon anyone. To that end the first thing to be considered is, who were the parties to it, and what was their position? Now, this leads me to notice what is brought pretty prominently out in the course of these proceedings, that the management of the affairs of Greenock in the first half of the last century, and perhaps the whole of the latter half also, was very primitive. I do not suppose the case is unique; I daresay many other similar cases could be found, but we must regard their proceedings as very primitive indeed. The town, or village as they called it then, had no revenue—no property. The inhabitants were feuars or tenants of feuars of the baron—that is, the landed proprietor, the owner of the barony of Greenock. They do not seem to have had any sources of revenue whatever at that time, and such money as they needed was collected by what I must regard as voluntary subscription—simply subscription. They did it in an odd enough way, by imposing a voluntary tax upon themselves. A tax which at first at least I think was pretty consistently persevered in, was imposed upon malt. It was a voluntary tax upon malt, whereby they collected such money as they required for any purpose which they had in view. It does not seem to have occurred at first to the superior or baron, Sir John Schaw, that his consent to the inhabitants and feuars voluntarily taxing their own malt was needed, but this seems to have been suggested to him by somebody. It involved the preparation of a deed at least, and latterly he consented to their voluntarily assessing themselves by taxing their own malt. I suppose the view on which it was suggested to him that his consent was necessary was, that if they paid a tax upon their malt they would be so much the less able to pay him feu-duty. I do not know any other reason that could be suggested. It does not seem to have existed at all at first. Accordingly he gives his consent, and authorises them to appoint proper persons to administer the proceeds of the voluntary tax or subscription, as I should call it. The first deed we have as containing anything about it is in 1741, but the produce of that tax or subscription with which we are interested, amounting to the sum of £1000, existed at that date. They had voluntarily assessed themselves by a tax on malt, and had put the result, £1000, in the hands of persons appointed by themselves in 1741. By his deed—a charter, it is called—of 30th January 1741 Sir John Schaw says—"Considering that for the better government and management of the public funds allenarly that has arisen or may arise from any assessment laid on by the inhabitants of the said burgh with my consent on themselves upon all malt grounded at the milns of westward Greenock, it seems just, necessary, and expedient that a certain number of proper persons with necessary power should be appointed for the management and administration of the said funds," and so on. He authorises the feuars to appoint nine persons to manage the produce of such voluntary assessment. They are to be managers and administrators of the whole public funds belonging to the burgh, "or which shall hereafter pertain and belong to the same, either arising from the above specified voluntary assessment with my consent on malt or any other voluntary assessment that shall be consented to by me," and the expression "voluntary assessment" recurs repeatedly through the deed.

Now, the first we know about it is, that in February 1741—they had been appointed before, plainly—these managers were in possession of £1000 as the produce of a voluntary assessment upon malt. We know that, because in February 1741 those persons who were in possession of the money invested it, and invested it upon a deed which specifies a trust very distinctly. They lent the money, the produce of this voluntary assessment, to Sir John Schaw himself, and took from him a heritable bond dated 7th February 1741. We

have not got that bond here, but we have the instrument of sasine proceeding upon it in the print of documents. The notary who gave sasine is said to compear "having and in his hands holding one heritable bond, dated at Sauchie Lodge, the seventh day of February current, made, granted, and subscribed by Sir John Schaw of Greenock, in favour of the persons before named"—that is, those nine persons who had the produce of the voluntary tax for themselves—a bond to and in favour of those persons "for themselves and in trust in manner underwritten, whereby the said Sir John Schaw grants him at the term of Candlemas last to have borrowed and received from the said persons, all feuars and sub-feuars in Greenock, and who have had the management of the funds arising from a certain duty on malt, voluntarily imposed by them and the other feuars and inhabitants of the town of Greenock, with the said Sir John Schaw's consent, or themselves for themselves, and in the name of the whole feuars and householders of the burgh of barony of Greenock, all and haill the sum of one thousand pounds sterling money," which sum he bound and obliged himself to pay to those persons. Now, look at the words—they seem to me to be very important—[*His Lordship read part of the instrument, given supra*]—and so on; and he comes under an obligation to give them a yearly annual rent of £50 in return, and he conveys certain lands in security to these nine persons—[*His Lordship read as above*]. Now, I pause here only to ask, is it doubtful that this is a trust, and nothing else, and that those nine persons were trustees, and that this fund of £1000 was so invested, and the purposes of it declared in the deed of investment? I cannot think that doubtful for a moment, indeed it does not admit of doubt. This was in February 1741. Now, it seems that they were then, and had from the month of June preceding been in course of collecting a further sum by a similar voluntary assessment upon malt. I shall allude to that by and by, when I come to notice, as I proceed to do, the decree of disjunction and erection which is dated in the month of July 1741, and which is the deed more immediately in question.

Now, who were the pursuers of that process for a decree of disjunction and erection? The trustees under the deed from which I have just read were the pursuers of that process. They come forward and they state to the Court or the Teind Commission that the inhabitants of Greenock desire to have this parish erected, and it is narrated [*as above*]. The first and most prominent deed mentioned here is the deed of trust investment which I have just read, and the other is what I referred to already as the arrangement which had been come to, and was in process of being carried out, of a further tax upon malt, the produce of which was to be applied in a certain way. Accordingly, the narrative of this decree proceeds, that the case being called, the parties came before the Court, and "for instructing the points and articles of the libel, produced in presence of the said Lords a consent by the whole heritors of the parish of Greenock to the disjunction and new erection libelled," and, what is most important, they produced—"Item, heritable bond by said Sir John Schaw of Greenock, Baronet, to the said managers of the funds of the town of Greenock for the principal sum of one thousand pounds sterling with interest from Candlemas last," to be applied towards making up a stipend to the minister of the new erected church, dated 7th February 1841." It is not doubtful, therefore, in my opinion, that the pursuers of this process put forward as the most prominent part of their title this trust-deed under which they acted as trustees of the fund of £1000, and put forward most distinctly that the beneficiary in the trust was the benefice of the new erected parish, and no other beneficiaries—not the town of Greenock, not the municipality of Greenock, but the benefice of the parish, the erection of which they were praying for. That was the only beneficiary in the trust. The deed, I repeat, does not admit of dispute with respect to that. Then they produced the instrument of sasine following upon the bond, from which instrument I have already read. Then—"Item, principal contract betwixt the said Sir John Schaw and the feuars and inhabitants of the burgh of Greenock, whereby the said feuars and inhabitants do voluntarily assess themselves in a certain duty on malt for fifteen years to come for the purposes of the said new erection, dated the 20th and 29th June last by past." Now, that is June 1740, and they were in course of collecting the second and the only other fund narrated to have been provided for the erection at that time. We have not got a very satisfactory account of what was the result of this new voluntary tax upon malt. I rather infer that it was not very successful, for the church of this benefice which was erected in 1741 was not built for sixteen years according to one of the parties, the pursuer here, and not for twenty years according to the other. They required this sixteen or twenty years—it does not signify which—in order to get money sufficient to build the church. This voluntary tax upon malt which began in June 1740, I rather infer, was not successful from the fact that after the lapse of about ten years they had to get an Act of Parliament to impose a compulsory tax upon malt, one of the purposes being to erect this church. Now, how much was recovered under the statute by the tax upon malt which was to endure for thirty years from 1751? What was recovered under that we do not know. There were a great many purposes to which it might be applied, and the nearest approach to information which we have on the subject is in the answers for the respondent to the minute of the reclaimers. In the answers they say that the church—that is to say, this church—was built in 1757, that is sixteen years after the decree of erection. They say—"It cost £2388, 17s. 8½d., of which £1058, 5s. 9d. was de-

frayed by subscription and the remainder paid by the Corporation." The remainder paid by the Corporation—I suppose out of the voluntary tax—would therefore be £1330. It is not suggested—there is not a hint of it—that any other funds than this source existed. There were no other funds set forth in the decree or set forth by the pursuers in the action than those I have mentioned. The trust money was invested upon a very proper deed of trust expressing very distinctly and minutely the purposes of the trust for a thousand pounds, and the intention which was in course of being carried out of getting further sums by an assessment upon malt, which resulted as I have stated. I can find nothing else, and I do not find anything in the deed suggesting that the pursuers—those nine individuals—had power to undertake any obligation beyond those funds, or did undertake any obligation beyond those funds, or that they had any power or authority, or represented that they had any power or authority to undertake an obligation of debt beyond those funds and make the burgh of barony of Greenock liable as debtors without any limit as to funds or with reference to anything except those trust funds to which I have referred. I find nothing in it to suggest that idea. They undertake to pay the minister and to pay for communion elements "not less than" a thousand merks, and that was, we are told, £57, 1s. 3d. They had an annual rent of £50, and with regard to the £7, 1s. 3d., unless the second effort to raise more money by subscription was successful they had nothing to meet it except the seat rents; but it would be a very unsuccessful church, built at an expense of between £2000 and £3000, if the seat-rents would not supply the £7. And is it not manifest to everyone—I confess it is very manifest to me—that that specification of the thousand merks had reference to the income from this trust money of £1000?

Now, when the erection was made had that any effect upon this trust? It was a trust which was created for the benefice of the parish, which was erected in 1741. Now, just suppose that the trust money had been re-invested, the trustees holding the fund ought in pursuance of the trust-deed, when the benefice was created and a minister appointed, to have transferred the trust to him as trustee. The heritable bond of 1741 specifies that very distinctly—I refer to the instrument of sasine. The trust is to be transferred to the minister for the time being, and to pass from one to another with very anxious checks upon their administration, for they are not entitled to interfere with the existing investment or any future investment without the consent of the Procurator of the Church, and, I think, the Lord Advocate and also the Lord President of the Court of Session. It is a check put upon the administration of this trust money of which the benefice was the beneficiary. Now, suppose the trust funds had been invested in such a way as to produce more than a thousand merks. I had myself at a very early period of my professional life a case which came before the Court upon an application for a scheme in connection with a charity fund—not for endowing a benefice, but for promoting education, the sum involved being exactly £1000, which is the same amount as here. The pious donor was a Dr Hutton, who had been a doctor of Queen Anne, but in the beginning of last century he left £1000 to trustees in Galloway, in the parish of Carlaverock, for the promotion of education and other pious purposes there. That was invested by the trustees early in the century, so that when the case was brought before this Court about 1842 or 1843 it was yielding an income of over £1000 a-year. It was invested in the purchase of a barony in the parish in Galloway. The sum which was actually invested was rather under £1000, because expenses had to be deducted from the legacy of £1000, but it was invested so as to yield an income in excess of the original capital in the first half of the present century, and I think it must now be yielding over £1500 a-year. That must all go to the beneficiaries of the trust; and if this had been similarly disposed of to profit, is it doubtful that the benefice would have been the beneficiary? Or can it be said that it was just a case of simple debt, not a trust administration at all, and that they must have, not necessarily a thousand merks or 950 merks of stipend, but a legally competent stipend without reference to the produce of the trust-estate? I cannot assent to that; it is not sound. On the other hand, as has happened and is not unlikely to happen again, the trust funds are invested so that the return is diminished, would they not equally suffer in that case as they would have gained in the other, for the same reasons—that they are the beneficiaries in the trust? Now that is the meaning which I attach to this decree. Suppose the trust had been transferred to the minister, as the trust-deed requires that it should. It was not so transferred. I do not know how this was neglected both by the original trustees and by the minister of the parish and his successors; I cannot account for it, and there is no explanation given. It was a neglect to carry out the terms of the trust-deed. But suppose the trust had been transferred to the minister, would there have been a debt upon the prior trustees for anything, or would he not have been entitled to every farthing that was drawn—the fruit of the trust? If there had been any money collected by the second attempt beginning in June 1740, that must have gone to the same trust; it was for the same purpose, and it is so expressed in the narrative of the decree—in trust for the benefice—but it produced nothing. I am assuming it produced nothing, and that when the Act of Parliament was passed ten years later they made no more money out of it or applicable to this purpose than was applied to this purpose, in building the church.

Now, what is the position of the Magistrates and Council at the present time?

The trust-estate which I have referred to was brought to rather a sad end a long time ago, as I shall notice; but suppose it had continued, either upon the investment which was made in 1740 or upon another investment which was substituted, what would have been the position of the Magistrates and Council of Greenock now? Would they not just have come in place of the original trustees? There is no other *locus standi* for them in this case. They came as trustees in room and in place of the original trustees, in trust not for the town and burgh of Greenock, but for this benefice and nothing else. There is nothing new in this; it is the most familiar thing in the world that the magistrates and council of a burgh may be trustees for any limited purpose you like. They might be trustees for erecting a monument to the memory of Sir Walter Scott. I forget whether the Magistrates and Council of Edinburgh were trustees of his monument in Princes Street; but they might be trustees for a public reading-room or for any place of public recreation or instruction, or any limited purpose you like which they choose to accept. Generally speaking, the magistrates and council of a burgh would decline to accept the trust except for some purpose in which some part at least of the community of the burgh was interested. But they would have been trustees for this benefice and for nothing else if that trust had continued, and I know of no other position which they occupy now. We are told that in 1761—that is, exactly twenty years after this trust investment was made—the trust money was simply uplifted by the trustees and spent. It is said it was spent in paying off some debts of the town of Greenock. Well, nobody will doubt that that was a most unwarrantable proceeding, and those who were guilty of it—the trustees who violated their trust and their estates—should be responsible for the misappropriation or misapplication, which is the same thing, of the trust funds with which they were charged for a particular purpose, but as it happened a century and a quarter ago the money has hopelessly disappeared; there is no possibility of recovering it.

How shall the town of Greenock of the present day be in the least degree responsible for the breach of trust by the nine individuals, or any number you please, in the year 1761? I am afraid that in many, if not in most burghs in Scotland there has been great misappropriation of trust property—property in the hands of the magistrates and council in trust for any purpose you like to name which is a lawful purpose. If you read the history of Edinburgh, you will find very grave grounds for the conclusion that a great amount of trust property in the hands of the Magistrates and Council—and they cannot have it otherwise than in trust—was most scandalously misapplied—lent or conveyed away, really without any consideration at all, to the effect of diminishing public ground, and making it the property of private individuals; but there is no remedy for that now. There might have been a remedy against those who were guilty of it, but when the thing has been accomplished a century and a quarter ago, there is no such remedy now. This trust-estate of £1000 disappeared in 1761. There was nothing except the seat-rents, and looking with all anxiety I cannot find any trust-estate whatever in the hands of these trustees who are now before us—and we have none but trustees before us—except seat-rents. I think they are bound to apply the seat-rents in accordance with the trust, and that you find the purposes of the trust in this deed of erection. They are always referred to as trustees. See how the right to let seats and to draw rents is given to them. The declaration of the decree is—[*as above*]. So the right to exact rents is by the decree given to the managers of the fund for building and endowing the church and the feuars and elders of the new parish. These are the people who are to collect seat-rents. It is not the Magistrates and Town Council of Greenock as the Magistrates and Town Council of Greenock, but as trustees coming in place of the original trustees as the managers of the fund for building and endowing the church, and it is in that capacity—and in that capacity alone—that the right is given to them to impose the seat-rents and to exact them, and they came into their hands as funds for the church. I can find no funds of the trust available except the seat-rents. For a great many years back at all events those seat-rents have been sufficient to uphold the church in a state of repair and to pay the church officers, and to afford the minister a stipend of between £200 and £300 a-year. That is a pretty good fund. It is a trust fund in the hands of these trustees for the benefice, and they are able to keep up the benefice with it. But then it is said—"Oh, but here is no trust or trust administration at all; we have nothing to do with the trust; it is an action for debt; there is simply a debt imposed upon the town of Greenock which is to be recovered without the least reference to the trust or trust funds." I cannot agree in that. I cannot see any indication of it in the decree.

And now that is sufficient for the disposal of this case—sufficient for sustaining the defences and assoilzieing the defenders from the conclusions of the action. The minister has been in receipt, I suppose, of all that which the trust funds in the hands of these trustees can afford, or if he has not—if he thinks that the trustees have misapplied the trust funds and not given him the whole of these to which he is entitled—he has an action against them as trustees, but just as trustees. It is the very opposite of what the Lord Ordinary says it is; it is an action for trust administration, and it may be very greatly to his advantage. I do not know whether this is a popular preacher or not, but a popular preacher may fill the church and crowd the church, and may get a great amount of seat-rents, though I think these seat-rents would be trust funds for the benefice in

the hands, as the decree expresses it, of the managers of the fund for creating and endowing the church, and it may be enormously to the advantage of the minister, or the advantage of his successor, to have an action against those managers who have the seat-rents to administer them as trust funds according to the direction of the trust-deed. But we have nothing to do with that. It is an obligation for a legal and competent stipend. If there had been no trust here, and no trust funds here, but an obligation to provide and pay a stipend—a legal competent stipend "not under" 1000 merks—I should be clearly of opinion that a 1000 merks was the limit of the obligation. I quite agree with Lord Trayner that there is no distinction between the minister and anybody else. We have nothing to do with augmentation, or with what is a more statutory and unique proceeding, with nothing analogous to it or in the least degree resembling it in this or any other country. The statutory Commissioners are allocating stipend out of teinds from time to time. I agree, therefore, that there is no distinction with regard to an obligation of the kind I am now imagining between a minister and anybody else; and I repeat that I am very clearly of opinion that if an obligation is come under to pay a minister of the Established Church, or of a dissenting Presbyterian Church, or a bishop or an incumbent of an Episcopal Church, a legal and competent stipend or income of "not less than" £50, that is the measure of the legal obligation, and that with the exception of the case *Cæsar*, in which Lord Wood's opinion is quoted—and it is only the opinion of a single Judge—there is no case in which such a thing is even suggested. I do not think his opinion would have extended to anybody but a minister, and I cannot help feeling that his views, from which I entirely dissent, are influenced, as I think the Lord Ordinary's are—indeed, he says it—by the analogy of augmentations in the Court of Teinds.

Take the case of aliment. Suppose anybody came under an obligation to furnish a legal and competent aliment to a person of not less than £50, could the Court increase it? Or would it depend on whether the person was the son or daughter of a Duke or of a millionaire? Would that have to be inquired into? Is anybody acquainted with any statute or rule of common law which will inform this Court what is a legal and competent aliment to anybody you choose to instance? What is a legal and competent stipend to a minister of the Church of England? There is no statute which defines it—no rule of common law which defines it; there is the most infinite variety in stipends. In England £50 is rather a large stipend. There are a great many stipends much under that, and on the Continent a great many do not exceed one-half of it. But what is the measure of a legal and competent stipend? Is not that really just general loose language? Is £250 legal and competent, or is £1000 illegal and incompetent? A suggestion was made that the Court could determine it, but we can only determine according to the statute and common law of the land. There is no statute or any law of the land applicable to such a matter. A father—let him be a millionaire—is bound to aliment his children. It is not in the power of the Court to fix from time to time, according to changing circumstances, the amount of aliment. The rule is simply this, that he must keep them from being public charges,—that is to say, he must keep them off the poor's fund. There is no other way; and if you wish to get an obligation for aliment, or stipend, or salary, you must have the sum specified, and if it is specified, and we think that it is to be not less than so-and-so, then that is the amount of the legal obligation, and I am not in the least prepared to affirm—taking the case of aliment as an illustration—that if a man came under an obligation to give a legal and competent aliment to A, B, or C of not less than £50 a-year, by the law of Scotland that might be increased or reduced. It is said there was no augmentation here, and that it might not only be increased but diminished according to changing circumstances. I am not prepared to affirm that the law of Scotland is in accordance with any such proposition, or that decree could be given for more than the sum specified as the least that he was bound for. I think that language is not the language, properly speaking, of legal obligation, and indeed such a decree as this decree of erection is not a proper instrument of obligation at all. It is mere familiar language, and means only that we will give you more if we conveniently can if the administration of the funds in our charge will afford it. If a Dissenting congregation entered into an arrangement with their minister to give him a stipend of not less than £200 a-year, I have no idea that he could come to this Court as upon a matter of debt, and say—"I wish this raised, for it must be a suitable stipend according to changing circumstances, and I am entitled to the judgment of the Lord Ordinary, of the Inner House, and of the House of Lords upon that." It is said that the Court might refuse. I really think they would. They not only might do it, but they must do it. The Court can have no will in the matter. If it is a legal debt the Court must consider it in the best way they can, and decide it. The Court can never exercise its option, and if it is not a matter of legal obligation they are not entitled to consider it. How should we judge of it? Are we to take the evidence or advice of men of skill? Of what are we to allow evidence? Are we to consider what is an average stipend? I entirely dissent from such a view. Reviewing and re-considering my opinion, in reference to the fact that I am, as I have expressed it, in such a hopeless minority which renders it likely that there is some error pervading my views, I must adhere to them, and conclude by saying that I do adhere to them. I apologise for having detained the Court at so great length, but

it was incumbent on me to explain my views as fully and as clearly as I could.

LORD RUTHERFURD CLARK—I agree with the opinion expressed by Lord Trayner.

The Court adhered

Counsel for the Pursuer and Respondent — Sol.-Gen. Graham Murray, Q.C.— M'Kechnie — M'Lennan. Agents — Miller & Murray, S.S.C.

Counsel for the Defenders and Reclaimers — D.-F. Balfour, Q.C. — Sym. Agents—Cumming & Duff, S.S.C.

Friday, March 4.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

THE LIQUIDATORS OF THE EDINBURGH EMPLOYERS AND GENERAL ASSURANCE COMPANY, LIMITED *v.* GRIFFITHS AND OTHERS.

Company — Misrepresentation — Winding-up—Contributory.

The directors of a company formed in 1887 issued a prospectus in December 1890, which contained material misrepresentations as to the state of the company's affairs. After a number of new shares had been taken up on the faith of this prospectus, the directors, on 12th May 1891, issued a circular to all the new shareholders acknowledging the misleading character of the prospectus, and intimating that they proposed to present to the Court a petition for authority to rectify the register by deleting therefrom the names of the new shareholders. Two of the new shareholders, W. and D., wrote in reply to this circular on 14th and 20th May respectively, expressing their desire to have their names removed from the register, and approving of the course which the directors proposed to take. On 18th May the directors issued a notice of an extraordinary general meeting, to be held on 26th May, for the purpose of passing resolutions confirming a provisional agreement for the transference of the company's business to another company, and for the voluntary winding-up of the company. On 20th May the directors presented a petition for removal of the new shareholders' names from the register. The petition was intimated to each of the new shareholders and no answers were lodged, but before the *inducice* had expired a petition was presented on 26th May to have the company wound up by the Court, and under this petition an order was subsequently pronounced for the judicial winding-up of the company.

In a note by the liquidators for settlement of the list of contributories, the Court *held* (1) that the company not having been publicly declared insolvent, the directors were acting within their powers in issuing the circular of 12th May and presenting the petition of 20th May, and that it was irrelevant for the liquidators to aver that the directors had acted in the knowledge that the company was insolvent at the date the circular was issued, and in order fraudulently to avoid the personal liability which they had incurred; (2) that W. and D. were entitled to have their names removed from the list of contributories in respect that before the petition for winding-up was presented they had, by their acceptance of the offer contained in the directors' circular, taken steps to have their names removed from the register; and (3) that the names of all the other new shareholders must be placed on the list of contributories.

The Edinburgh Employers Liability and General Assurance Company was incorporated under the Companies Acts on 18th February 1887, its registered office being in Edinburgh. The nominal capital of the company was £150,000, divided into 150,000 shares of £1 each, of which 5s. per share was paid up. Down to December 1890 only 27,063 of these shares were subscribed for.

In December 1890 the company issued a prospectus offering a new issue of shares, with the result that 6108 additional shares were taken up by 65 new shareholders at a premium of 1s. 3d. per share in addition to the 5s. paid up. On 12th May 1891 the directors of the company issued the following circular to the new shareholders (at the same time sending a copy of it to the old shareholders):—"Dear Sir,—The financial year of this company expired on 28th February last. The directors have since had a thorough investigation made into the affairs of the company, and they regret to inform you that their investigation discloses some startling results. When the prospectus for the issue of new shares was published in December last the directors, proceeding upon the previous balance-sheet, and the business which was subsequently placed before them, were of opinion that the company was in a satisfactory condition. The investigation, however, has brought to light the fact that claims to a large amount had been intimated to the late manager before the balance-sheet for 1889-1890 was adjusted, and many of them before the financial year expired, which he omitted to disclose to the board or to the auditor, and of which no account is taken in that balance-sheet. The directors had no means of knowing of these claims except through the manager. The result is that the directors are now satisfied that no profit was earned for the previous year, and, on the contrary, that the sum treated as a premium reserve was more than exhausted by claims actually intimated before the balance-sheet was issued. As at 28th February last, therefore, the paid-up capital of the company has been practically lost,