ing, then would have been to apply for an order vesting in him the uncompleted ship. Information was not given. The Admiralty requisitioned the ship, which was completed to suit their requirements. The price paid by the Admiralty was £86,000. This sum, as was explained at the Bar, represents £79,732, 16s. 4d., the sum sued for plus a sum to make up the value of the work done at the date of requisition under the original contract. This sum was £6267, 3s. 8d., the balance unpaid. Subject to adjustment the original contract price was to be £103,000. The difference between £103,000 and £86,000 being £17,000 was deducted, as the Admiralty did not require certain fittings contracted for. The settlement of the cost of completing the ship according to Admiralty requirements so far as exceeding the £86,000 was matter of separate arrangement.

The result of this is that the Clyde Shipbuilding Company at present have in their possession two sums of £79,732, 16s. 4d. as the price paid to them for the same work, *i.e.*, for the ship so far as built at the outbreak of war.

The defence put forward by them to the claim of the Custodian is that the sum of £79,732, 16s. 4d. which he asks for in the action as laid is the identical sum which was paid to them by the Austrian company and became their property. According to them the action is a *rei vindicatio* — an attempt to get back the same sovereigns or their equivalent. This the defenders say is a position the pursuer cannot successfully maintain, although I did not understand them to dispute that they would be liable if an action was brought against them for an accounting. This is too narrow a view to take of the matter. The true view is that so long as the ship was in the hands of the builders she was the property to the extent of £79,732, 16s. 4d. of the Austrian company, who had paid that amount. When the Clyde Shipbuilding Company received this sum over again (as part of the £86,000) it came into their hands as a *surrogatum* for the ship to that extent, and they were bound to hold it subject to the same conditions. They held property belonging to the Austrian company of the value of £79,732, 16s. 4d.: they parted with it, and thereafter held the amount of £79,732, 16s. 4d. instead, which is personal property of the Austrian company. This is the amount the Custodian sues for in this action. In my opinion he is entitled to decree.

As regards the counter-claim for £9200, I take the same view as the Lord Ordinary. I do not think there is any relevant statement.

I am of opinion that the interlocutor should be affirmed.

LORD CULLEN—I concur, though I have had considerable doubt whether the defenders' counter-claim should not be dealt with in the present process rather than reserved, the claim being one for costs which the defenders say were necessarily incurred in earning the price of the unfinished ship which is now being treated as *surrogatum*.

LORD SKERRINGTON was absent.

The Court adhered and found the defenders liable to the pursuer in interest at the rate of 5 per cent. per annum from 20th February 1919 on the sum of £79,732 16s. 4d. decerned for, reserving all the counter-claims of the defenders and also all further questions of interest on the said sum.

Counsel for the Pursuer (Respondent)—Lord Advocate (Clyde, K.C.)—Pitman. Agents—Thomas Carmichael, S.S.C.

Counsel for Defenders—Sandeman, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

Friday, February 21.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

FYFE AND OTHERS *v.* THOMSON AND OTHERS.

Church — Ann — Glebe — Revenue Derived from Sum Representing Proceeds of Minerals under Glebe—Act 1672, *cap.* 13.

The minerals under a glebe were leased for a grassum of £2100, and a grassum of £600, and a nominal rent. Those sums were invested in a bond and disposition in security in favour of the minister, the standing committee of heritors, and the presbytery, as trustees for behoof of the incumbent for the time being of the benefice. The minerals were wrought from pits in adjoining lands. An incumbent having died, his widow and children claimed ann out of the interest on the bond. *Held* that the interest on the bond formed part of the "rent of the benefice or stipend" in the sense of the Act 1672, cap. 13, and as such was subject to ann.

The Act 1672, cap. 13, enacts "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."

Margaret Patrick or Fyfe, widow of the Reverend James Lamont Fyfe, sometime minister of the parish of Dalry, as an individual and as tutrix and administratrix-in-law of her pupil children, and James Gabriel Fyfe, her minor son, *pursuers*, brought an action in the Sheriff Court at Kilmarnock against the Reverend Andrew Bald Thomson, B.D., the present minister of the parish of Dalry, and others represent-

ing respectively the Presbytery of Irvine and heritors of Dalry, as trustees under a bond and disposition in security granted in their favour by William Gardiner, dated the 12th and recorded in the Register of Sasines on the 18th, both days of May 1903, *defenders*, craving the Court "to grant a decree against the defenders, as trustees foresaid, ordaining them to pay (first) to the pursuer Margaret Patrick or Fyfe as an individual the sum of twenty-five pounds six shillings sterling; (second) to her as tutrix and administratrix-in-law foresaid the sum of eighteen pounds nineteen shillings and sixpence sterling; and (third) to the said James Gabriel Fyfe the sum of six pounds six shillings and sixpence sterling, with interest at the rate of five pounds sterling per centum per annum on each of said sums from the fifteenth day of May Nineteen hundred and sixteen till payment."

The pursuers *pleaded*—"The said interest on the said principal sum contained in the said bond and disposition in security as it fell due being part of the rent of the benefice or stipend of the parish of Dalry, of which the said James Lamont Fyfe was incumbent at his death, the said half-year's interest of £50, 12s., which fell due at Whitsunday 1916, and is in possession of the defenders as trustees foresaid, is part of the first half of the rent for the year 1916 of the benefice or stipend of said parish, and part of the ann of the pursuers, the widow and children of the said James Lamont Fyfe, and should have been paid to them by the defenders; and payment having been refused, decree should be pronounced in the pursuers' favour as craved with expenses."

The defenders pleaded—"1. The pursuers' averments are irrelevant and insufficient to support their pleas. 2. The sum sued for not being ann, the defenders are entitled to absolvitor with expenses."

On 24th July 1918 the Sheriff-Substitute (J. A. T. ROBERTSON) sustained the plea-in-law for the pursuers, and decerned in favour of the pursuers in terms of the prayer of the petition.

Note—from which the *facts* of the case appear—"In 1858 the minister and heritors of the parish of Dalry and the Presbytery of Irvine leased to the Eglinton Iron Company and the Glengarnock Iron Company for twenty-one years the blackband ironstone underlying the glebe of the parish, in return for a grassum of £2100 and a nominal rent. In 1879 the same persons leased the clayband ironestone under the glebe to the Eglinton Iron Company for twenty-five years for a grassum of £600, and a similar nominal rent. The said two sums of £2100 and £600 are at present invested in a bond and disposition in security in favour of the late minister and the standing committee of the heritors of the parish and the presbytery 'as trustees in trust for behoof of the incumbent for the time being of the benefice of Dalry.'

"On 14th November 1915 the Rev. James Lamont Fyfe, who had been incumbent of the parish since 1891, died. The pursuers, his widow and children, in the present action claim that one half-year's interest upon the bond, over and above what was due and payable to the deceased as incumbent, is payable to them as ann. The question raised is, so far as the diligent research made by both sides of the bar could show, a novel one in the Courts, although it, or a similar question, seems on three occasions at least to have been determined on a reference to the Procurator of the Church of Scotland.

"The defenders plead that the pursuers' averments are irrelevant. Their argument is that prior to 1672, according to the decision of the Court of Session, no ann was due from the glebe (*Colvil* v. *Lord Balmerino*, 1665, M. 464), and that the Act 1672, cap. 13, upon which the right to ann now stands made no change in this respect. They maintain that as the sum contained in the said bond and disposition in security is the product of the sale of part of the glebe, it is a *surrogatum* for that part and must be so treated. They argue that if a money *surrogatum* for the glebe or part of it is not to be dealt with in the same way and held to be subject to the same incidents as the glebe, the terms of the Glebe Lands Act 1866, s. 15, would be unintelligible. The argument is a cogent one and I was much impressed by it.

"It is quite clear that prior to 1672 the representatives of a deceased minister could not claim ann from the glebe. That follows from the nature of the rights involved. So far as I can ascertain, the ann has always been of the nature of a personal right, a right to demand payment from someone in money or in kind; the glebe right, on the other hand, is a right to occupy and possess. Historically I should think that down to a date much later than 1672 it was the rule for the minister of the parish himself to cultivate his glebe. It was not, therefore, in the ordinary sense of the term, a rent-producing subject. When the minister died his occupation of the glebe naturally ceased and there was no rent due of which payment could be demanded, and no person liable for it from whom it could be claimed.

"The Act 1672, cap. 13, provided that 'in all cases hereafter the ann shall be one half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency.' Its terms clearly indicate that the ann is not a right to possess any part of the benefice, but a right to demand payment in money or in kind.

"Although the parties seek to draw from the terms of the Glebe Lands Act 1866 arguments to support their several contentions, both are agreed that the Act has no application to the circumstances of this case. I cannot find from a consideration of it any assistance in the determination of the question raised.

"It is at the next stage of the defenders' argument that a difficulty arises. The right of the incumbent in a benefice to a glebe is a right to the possession and occupation of four acres of arable land. The benefits that accrue to him personally are those that flow from his possession and occupation, the produce of his cultivation of its surface. Lands which have been designated as a glebe

may form an allodial holding *a cœlo usque ad centrum*, but the minister cannot, if minerals are discovered under it, at his own hand open up mines and possess and enjoy them.

"It is true that by a practice of old standing, sanctioned by the Courts, the minerals under the glebe may be sold, as they were in this case, by the incumbent and heritors of the parish and the presbytery of the bounds, provided that the money received for them is invested at the sight of the same persons in trust for behoof of the incumbent and his successors in office. But where this has been done the glebe remains intact to the full extent to which it could be claimed or possessed or enjoyed by any individual incumbent, for from the nature of the case the minerals under a glebe will ordinarily be wrought, as they were in this glebe, from workings in the adjoining lands.

"If that is so, can it be said that in any sense of the term the price of minerals is a *surrogatum* for the glebe or for any part of it? I do not think it can. The price is not a substitute for anything which the minister could claim or possess. It is, in fact, a fund created by the joint act of the incumbent, the heritors, and the presbytery out of something which the incumbent personally could not naturally possess or enjoy, for his benefit and that of his successors. In short, in my view it is an addition to the benefice. The interest derived from it will ordinarily be treated as stipend, and I have no doubt would form an element in the consideration by the heritors, perhaps by the Court of Teinds, of any application for an augumentation. If I am right this interest will form part of the 'rent of the benefice' within the meaning of the Act 1672, cap. 13, and as such be subject to the ann.

"I express this opinion with diffidence, because I am informed that three distinguished procurators of the Church, for whose opinions I have the greatest respect, have each determined otherwise; but I have the less hesitation in expressing it, since I understand that an authoritative decision will be sought and my judgment will have no effect."

The defenders appealed to the Court of Session, and argued—The fund producing the interest of which the pursuers claimed for one half-year was the price paid for minerals lying below the surface of the glebe. That fund was to be regarded as the equivalent of part of the glebe. In the present case the glebe was designated without reservation of the minerals, and hence in fact it did include the minerals. Moreover, in law minerals were included in the glebe as part of it. There was no instance of a designation of a glebe under reservation of the minerals. Further, it would not be lawful to designate a glebe reserving the minerals. The presbytery's duty was to designate a glebe by boundaries, and it was *ultra vires* for them to do anything else. Thus they could not designate a servitude right to cast peats — *Duff* v. *Chalmers*, 1769, M. 5147—nor a salmon-fishing—*Ogston* v. *Stewart*, 1896, 23 R. (H.L.) 16, 33 S.L.R. 516. Further, the minister's rights were not limited to the surface of the glebe, but extended to the minerals below it, and that without any difference in nature or quality. His rights were of the nature of a life interest, analogous to the rights of an heir of entail in possession—*Bontine* v. *Carrick*, 1827, 5 S. 811 (N.E.), 750, *per* Lord Alloway at p. 812. Both as regards surface and what was below it his rights had to be exercised *salva rei substantia*. Thus he might cut trees on the glebe — *Logan* v. *Reid*, 1799, M. App. Glebe, Pt. I, No. 1; *Bontine* v. *Carrick* (*cit.*). He could work marl—*Ramsay* v. *Heritors of Maderty*, 1794, M. 5153, and referred to in M. *voce* Glebe, App., Pt. I, No. 1. His right was not limited to the natural production of the surface, and he could work coal under it at the sight of the heritors and presbytery, whose function was to see that his successors did not suffer — *Minister* v. *Heritors of Newton*, 1807, M. App. Glebe, No. 6. *Lord Reay* v. *Falconer*, 1781, M. 5151, merely decided that a minister could not make kelp of sea-ware on the shore of his glebe, that right remaining annexed to the lands out of which the sea-ware had been designed. There was no decision that a minister could lease the minerals under the glebe. It had merely been inferred that as he could work the minerals himself he could lease them. That principle was at the root of the decision in the *Minister* v. *Heritors of Tranent*, 1909 S.C. 1242, *per* Lord Low at p. 1244, 46 S.L.R. 863, which case laid down no general law, for it was a decision in a special case upon an agreement between the interested parties. The proceeds of working coal or marl had to be invested for the benefit of the incumbents of the cure, as had been done in the present case—*Galbraith* v. *Minister of Bo'ness*, 1893, 21 R. 30, 31 S.L.R. 25. The minerals under the glebe or the proceeds thereof were therefore to be treated simply as part of the glebe, or at least the minister's right to them was the same as his right to the surface of the glebe. If so they were not subject to ann. Prior to 1672 the glebe and the proceeds thereof were not subject to ann—*Colvil* v. *Lord Balmerino*, 1665, M. 464. By the Act 1672, cap. 13, those things which were subject to ann were defined. If that Act had intended to alter the earlier law it should have done so expressly. What was subject to ann was after that Act limited to such of the fruits of the benefice as that Act subjected to ann—*Latta* v. *Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266, *per* Lord President Inglis at p. 272, 15 S.L.R. 168. Glebe and the profits derived from it were not mentioned in that Act, and they never were subject to ann—Ersk. Inst. i, 5, 14, ii, 10, 66, and Nicholson's note at vol. i, p. 592; Connell on Tithes (2nd ed.), ii, 92; Connell on Parishes, p. 435; Buchanan on Teinds, p. 513; Mair's Digest of Church Laws (4th ed.), p. 471. The minister's executors, and where the glebe was let, his tenants, had right to the crop sown before his death—Mair, *loc. cit.*; *Taylor* v. *Stewart*, 1853, 2 Stuart 538. Stair, ii, 8, 34, was not supported by the case referred to, viz., *Scrimgeor* v. *Murray's Executors*, 1664, M. 463.

Interest upon the sale of part of the glebe under the Glebe Lands (Scotland) Act 1866 (29 and 30 Vict. cap. 71) was subject to apportionment, and was therefore not part of the stipend—Mair, *op. cit.*, 516. Further, if the pursuer was right, section 15 of the Act of 1866 was inexplicable, but if the defenders were right that section was explicable as being a statutory provision that the rent and feu-duties, which for the first time were made legal as revenue of the glebe, should be subject to ann. In any event the trust here in question was in favour of the incumbent for the time being. His widow and bairns were not beneficiaries, and could not without reducing the trust deed succeed in their present claim.

Argued for the pursuers—The terms of the trust deed were irrelevant in the present question. The widow and bairns could never have been named as beneficiaries, but that did not exclude them from claiming ann out of the trust funds if those were subject to ann, for ann did not effeir to the widow and bairns but to the minister. It was his ann—Act of 1672, cap. 13—and was a gift to him for his widow made out of gratitude—*Latta* v. *Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266, 15 S.L.R. 168 (*cit.*), *per* Lord President Inglis at p. 272. Further, the framers of the deed in the present case were not in the position of independent donors of a mortification who could choose such terms as they chose in setting out the trust purposes, and the legal quality and incidents attaching to the funds in question in relation to stipend and ann did not turn upon the terms of the bequest as in the *Church of Scotland Ministers' Widows' Fund* v. *Ness*, 1917 S.C. 696, 54 S.L.R. 581. The framers of the trust deed here could not affect the legal quality of the subjects producing the money or of the money. The revenue in question was subject to ann. The ancient rule excepting glebe from ann was perfectly intelligible. When it was fixed no question except as to the surface of the glebe had been raised, and the glebe was invariably in the natural possession of the minister. He required a manse to shelter him and a glebe for his sustenance. Hence the glebe was not a rent-producing subject. When the minister died his successor required a glebe as much as he did a manse. If, then, the glebe had been subject to ann the new minister would have been without the means of sustenance for a half-year. Hence the glebe in that condition of things was necessarily not subject to ann. Hence a new minister could eject tenants of the deceased minister from the glebe—*M'Callum* v. *Grant*, 1826, 4 S. 527. That was consistent with Stair, ii, 8, 34. The Act of 1672 was couched in wide terms, which covered all the fruits of the benefice in whatever form. If anything was to be regarded as excluded a substantial reason for exclusion must be alleged. The exclusion of the surface of the glebe had been explained. Apart from that ann was applicable to everything which could be called stipend or rent of the benefice. Those words were not synonyms. Stipend was what was payable out of teind; rent of the benefice was what was payable *aliunde*—*Latta's* case (*cit.*), *per* Lord President Inglis at p. 271, referring to *Earl Marishal* v. *Relict and Bairns of the Minister of Peterhead*, 1626, 1 B. Sup. 36. The revenue of the fund in question was fruits of the benefice which took the shape of money—*Cheyne* v. *Cook*, 1863, 1 Macph. 963, *per* Lord Justice-Clerk Inglis at p. 971. Ann was exigible from stipend payable out of teind, and also from fruits of the benefice payable *aliunde*—*Representatives of Sheils* v. *The Town of St Andrews*, 1709, M. 466; *Wood's Relict* v. *Magistrates of Edinburgh*, 1747, M. 467; *Magistrates of Stirling* v. *Gordon*, 1837, 15 S. 657, *per* Lord Corehouse at p. 662; Small Stipends Act 1810 (50 Geo. III, cap. 84), section 16; Parliamentary Charges Act 1824 (5 Geo. IV, cap. 90), section 24. It was exigible from everything which in a vacancy went to the ministers' widows' fund—*Cheyne* v. *Cook* (*cit. sup.*), *per* Lord Justice-Clerk Inglis. When the minister worked the minerals or they were leased the proceeds had to be invested at the sight of the heritors and presbytery, and the interest on the capital sums so invested were part of the fruits of the benefice—*Ramsay* v. *Heritors of Maderty*, 1794, M. 5153; *Minister* v. *Heritors of Newton*, 1807, M. App. Glebe, No. 6, and the session papers therein; Robertson's Coll., vol. xxvi (6), No. 11; Campbell's Coll., vol. cxxv, No. 80; *Cadell* v. *Allan*, 1905, 7 F. 606, *per* Lord Kinnear at p. 626, 42 S.L.R. 514. Such sources of revenue as were not derived from teinds were elements to be considered in granting augmentations—*Stewart* v. *Lord Glenlyon*, 1835, 13 S. 787; *Minister* v. *Heritors of Kilmalcolm*, 1875, 3 R. 32, 13 S.L.R. 16; *Rainie* v. *Magistrates of Newton-on-Ayr*, 1897, 24 R. 606, *per* Lord President Robertson at p. 610, 34 S.L.R. 447; Connell on Tithes, vol. i, p. 418. If so that revenue fell to be treated in the same way as stipend in a question of ann. Vacant stipend included everything that the minister was in receipt of at the date of his death—*Church of Scotland Ministers' Widows' Fund* v. *Ness*, *cit. sup.* Rent for long leases and feu-duties were subjected to ann by the Act of 1866, because such revenue from the glebe was then for the first time rendered legal, and it was necessary to fix its position so that third parties might be aware of it. No such necessity existed as regards such revenue as in the present case. The Acts 1546, cap. 4, 1571, cap. 41, 1563, cap. 72, and 1572, cap. 48, were referred to.

At advising—

LORD PRESIDENT—According to the law of Scotland "the right of ann does not extend to the glebe," but where the minerals in a glebe are leased with the consent of heritors and presbytery the produce must be funded for behoof of the benefice, and the interest on the produce must be paid to the incumbent as part of the rent of the benefice, and therefore, in my opinion, forms part of "his ann."

It is common ground that the decision of the question now before us depends entirely on the just interpretation to be put upon the Act 1672, cap. 13. The question we have to answer is, What does the expression "rent

of the benefice" as used in that statute mean? For it is certain that the statute introduced "a new and settled rule to put an end to the inconsistent and conflicting decisions which had been pronounced under the common law. It adopts the principle . . . which declares that the incumbent is the person in whose interest and in gratitude for whose services the provision called 'ann' is made"—*Latta* v. *Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266, *per* Lord President Inglis at p. 272, 15 S.L.R. 168. The answer then to the question put to us is, the "rent of the benefice" means, to use the words of Lord Justice-Clerk (Inglis) in *Cheyne* v. *Cook*, 1863, 1 Macph. 963, at p. 968, "all the annual fruits of the benefice that take the shape of money," or to use the words of the Act itself, the whole year's rent due to the deceased minister for his incumbency. Now I do not think it can be doubted that the interest of the sum of £2700 was due to the deceased minister "for his incumbency." For, in terms of the bond referred to in the condescendence, it was to be paid over to the incumbent for the time being of the benefice of Dalry, and to his successors in office as incumbents of that parish. If, then, this interest formed part of the rent for his incumbency, it follows inevitably that it must be embraced within "his ann." Equally there is no doubt that it was quite competent to let the coal or minerals in the glebe "provided that the yearly proceeds in the shape of rents and royalties are accumulated and invested." For if this course be followed, then "the accumulated amount of the yearly payments comes in place of the minerals which have been removed, and the benefice is benefited by deriving income from what would otherwise be really of no benefit to the holders." These are the words of Lord Low in the *Tranent* case, 1909 S.C. 1242, at p. 1244, 46 S.L.R. 863. If this is sound law, it appears to me to be decisive of the present controversy. The authority of that case was, however, challenged by the Lord Advocate on behalf of the appellants on what ground I know not. It appears to me, however, to be good law and in perfect harmony with the prior cases, which were all quoted in the argument addressed to us. Undeniably the glebe is part of the benefice; and so long and so far as it is in the occupation of the minister is no more included in "his ann" than is the manse. The reason is obvious; the glebe forms part of the benefice, but the beneficial possession of the glebe does not "take the shape of money." As Lord Balgray observed in *Stewart* v. *Lord Glenlyon*, 1835, 13 S. 787, at p. 798—"It is perfectly true that the proper and legal fund for the maintenance and support of the clergyman is the teinds of the parish. . . . There can be no doubt, therefore, that our law considered the teinds as the legal fund from which the maintenance of the clergy was to be taken. The glebe being intended by the law to be a benefit to the minister was bestowed for a quite different purpose. It never was intended as a source of revenue or of pecuniary emolument, but solely for his private convenience and accommodation." The minister has undoubtedly a limited ownership in this part of the benefice. It is subject to the qualification *salva rei substantia*. It has been so held with reference to timber, marl, coal, and peats, the price or produce of which was directed to be accumulated and only the income thereof paid to the minister. But that this income was in law part of the rent of the benefice enjoyed by the incumbent, and therefore included in "his ann" I see no reason to doubt. To say that the £2700 here in question is *surrogatum* for part of the glebe is not by any means conclusive of the controversy although it was so argued. The glebe is not included in the "ann," not because it does not form part of the benefice, but because its occupancy does not "take the shape of money," and in that sense is not part of the fruits of the benefice. The glebe is *in pari casu* with the manse. The possession of both is "equally necessary to enable the minister to reside in his parish"—(Lord Robertson in *M'Callum* v. *Grant*, 1826, 4 S. 527). But when part of it is converted into money and yields an income, it at once becomes part of the annual fruits of the benefice that "take the shape of money." And all such fruits fall within the expression "rent of the benefice" as used in the Act 1672, cap. 13. So to hold does not suggest any doubt of the soundness of the decision in the case of *Colvil* (1665, M 464), where it was found (*first*) that "the nearest-of-kin have right to the annat, albeit the defunct has neither wife nor bairns," and (*second*) that the nearest-of-kin had right to the crop of the glebe, "they always proving that the defunct had sown the same before his decease." These findings, if accepted, in no way traverse the judgment we are about to pronounce. Nothing that we now decide can ever be cited in support of the view that the incumbent's possession and occupancy of his glebe is embraced within "his ann." I am therefore for affirming the interlocutor of the Sheriff-Substitute.

LORD MACKENZIE—The question is whether the right to ann attaches to the interest on two sums of £2100 and £600 invested in a bond and disposition in security in favour of the minister of the parish, the standing committee of the heritors of the parish, and the presbytery "as trustees in trust for behoof of the incumbent for the time being of the benefice of Dalry." Each of these two sums was paid by way of grassum under leases granted of the minerals under the glebe. The minerals were wrought from pits in the adjoining lands.

The right to ann has since the Act 1672, cap. 13, been regulated by its terms. There is no question here that the statutory conditions are fulfilled, and that the widow and children are entitled to ann. The only question is whether the right extends to the interest on these bonds. That depends upon whether it forms part of the "rent of the benefice or stipend" within the meaning of the Act. The learned Sheriff-Substitute has decided that it does, and I

agree not only in this conclusion but in the reasons which are very well expressed in the note.

If the language of the bond be alone regarded, it is seen that it contains a provision for the incumbent for the time being, and that it takes the form of money. It is to no purpose to say that the widow and children are not made parties to the bond. The widow and children receive a half-year's salary of grace in addition to what the minister has earned for himself. The motive for this is gratitude to the deceased minister. It is "his ann," to use the words of the statute, and they have right to it without confirmation. Ann is a statutory right which operates *per se*. When the Act 1672, cap. 13, says that if the incumbent survive Whitsunday he shall have for his incumbency "the half of that year's stipend or benefice, and for the ann the other half," it is only reasonable to conclude that "the items included in each half are the same." In the present case the incumbent survived Michaelmas and was therefore entitled to the whole year's rent for his incumbency. The first half-year's rent of the following year is claimed as his ann. The right of the minister to the interest on the grassum was different in kind to his right to the manse or the glebe. It is stated by the text-writers that the right of ann does not extend to the glebe, and the theory upon which this proceeds is intelligible if by glebe is meant those 4 acres occupied by the minister for cultivation or pasture. These are not, or were not, proper rent-producing subjects. The position of the subjacent minerals has always been considered different. In this view the case of *Colvil* v. *Lord Balmerino* (1665, M. 464) does not affect the question raised here. In letting the minerals, as they did here, parties were within their legal rights. As this was disputed in the course of the Lord Advocate's argument it may be observed that not only is the legality recognised in the *Tranent* case in 1909, but it appears from the argument as reported in the session papers in the *Newton* case in 1807 that the general question was there raised and decided. The minister in that case proposed to let the coal, and the attempt to stop him was unsuccessful. This, however, does not mean that the minister is the proprietor of the coal to dispose of as his property. He has right to do so only at the sight and under the direction of the presbytery, and as the judgment in *Newton's* case (M. App. Glebe No. 6) runs, "the value and proceeds of the coal are also to be under their controul and management for behoof of the minister and his successors." There is an MS. note in the session papers to the effect that the coal might be worked for the use of the benefice under such precautions as were laid down in the case of *Maderty* (M. 5153, App., Glebe No. 1). That was a case relating to marl, and there was imposed an obligation to restore the surface.

The proceeds of the minerals are therefore legally in the hands of the defenders in this case, and the bond was taken in the proper terms. The interest of the money, in my opinion, forms part of the rent of the benefice or stipend under the Act 1672, cap. 13. In *Cheyne* v. *Cook* (1 Macph. 963) the Lord Justice-Clerk (Inglis) at p. 970 deals thus with the two Acts passed in 1672, the first, cap. 13, regarding ann, the other, cap. 20, regarding vacant stipend—"In both of these Acts the words used are such as extend to the fruits of the benefice, whether in the form of stipend or not. The provisions do not extend beyond the annual fruits of the benefice that take the shape of money, but they extend to all such fruits." From the *Blair Atholl* case (*Stewart* v. *Glenlyon*, 13 S. 787) (referred to by Lord President Inglis in the *Kilmalcolm* case, 3 R. 32, 13 S.L.R. 16) it appears that a glebe of uncommon extent would be taken into account in considering the question of an augmentation of stipend. As Lord Balgray points out, if there be more than one glebe, and one which cannot add to the personal convenience or family accommodation of the minister is let to a tenant for a rent in order to be occupied with prudence or common sense, there is no reason why such income should not be held as part of the benefice.

The position of minerals has throughout been regarded as different from the surface. So far as necessary for the support of the surface they are needed in order that there may be peaceable possession of the surface. In so far as they may be worked without injury to the surface, it has always been considered that they may be worked and the proceeds invested.

It was not until 1866 that the restrictions on the minister in regard to the surface were relaxed. Before the Act passed in that year no part of the glebe could be feued, nor was a lease of the surface to extend beyond the life of the minister valid. The fact that the Act contains an express provision that ann shall attach to feu-duties and rents, but is silent as regards the interest on the price in case of sale, does not appear to me to advance the case on either side here.

For these reasons I am of opinion that the appeal fails.

LORD CULLEN—The pursuers are the widow and children of the late James Lamont Fyfe, minister of the parish of Dalry, Ayrshire, whose incumbency was terminated by his death on 14th November 1915, and the question in the case is whether their right of ann under the Act 1672, cap. 13, extends to the revenue of certain funds which are held in trust for behoof of the incumbent for the time being of the benefice and are presently represented by the bond and disposition in security mentioned on record.

The principal sum of £2700 due under the said bond is the *cumulo* amount of the grassums paid under two leases of ironstone within the glebe dated in 1858 and 1879 respectively, and granted by the then minister of the parish, the presbytery, and the heritors. The bond is in favour of the late Mr Fyfe as minister of the parish and his

successors in office, the presbytery, and a standing committee of the heritors, "as trustees for behoof of the incumbent for the time being of the benefice of Dalry," and provides that the free interest and annual produce is to be paid over to the incumbent for the time being.

The leasing of the ironstone and the placing of the proceeds in trust in manner above mentioned appears to have followed a practice resting on the case of *Newton*, 1807, M. App. "Glebe," No. 6, relating to coal within a glebe, and the earlier case of *Madderty*, 1794, M. 5153, relating to marl. In the case of *Newton* the Court found "That the minister has right to work the coal in question below his glebe at the sight and under the direction of the heritors and presbytery, and that the value and proceeds of the coal are also to be under their controul and management, for behoof of the minister and his successors."

The legality of the practice was affirmed by the Court in the case of *Tranent*, 1909 S.C. 1242, 46 S.L.R. 863. In the course of the discussion in the present case the Lord Advocate contended that the rule of *Newton* was not intended to authorise leasing of minerals within a glebe as contrasted with the adoption of some method by which they could be worked at the sight of the presbytery and heritors without leasing. The session papers in the case of *Newton*, however, show that leasing of the coal was there in view. In the case of *Tranent* the Court held a sale of minerals within a glebe to be competent.

The Act of 1672, cap. 13, defines the ann to be "an half year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency." As explained by Lord President Inglis in the case of *Latta* v. *Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266, 15 S.L.R. 168, the Act was passed to introduce a definite rule where decisions under the common law had been conflicting, it having sometimes been held that the ann was a whole year's rent of the benefice and sometimes that it was a half year's rent. With regard to what is covered by the words "rent of the benefice or stipend," there is an authoritative pronouncement in the opinion of the same eminent judge in the case of *Cheyne* v. *Cook*, 1 Macph. 963. Referring to the Act 1672, cap. 13, as to the ann, and the Act of 1672, cap. 20, as to the vacant stipend, he says, at p. 970—"In both of these Acts the words used are such as extend to the fruits of the benefice, whether in the form of stipend or not. The provisions do not extend beyond the annual fruits of the benefice that take the shape of money, but they extend to all such fruits." On the basis of this rule the pursuers' claim appears to be well founded. The appellants, however, contend that the rule has here no application in respect (1) that the trust funds in question represent the value of minerals which formed part of the glebe, and (2) that it has been decided, as they say, that in the matter of the ann the glebe is a thing entirely apart, so that a claim for ann cannot touch either the glebe *in forma specifica* or any annual fruits of the benefice in the shape of money which have in any way issued from it.

The decision on which the appellants rely is that of *Colvil* v. *Lord Balmerino*, M. 464, in which it was held that the executor of a deceased minister could claim the crop on the glebe if sown by the deceased, but had no claim on the glebe in respect of the ann, the glebe being for the use of the intrant minister. Stair, ii, 8, 34, says—"The annat divides between the relict and nearest of kin, if there be no bairns, and is extended to the profit of the glebe if there be no new intrant—July 19, 1664, *Scrimzour contra Murray's Executors*, M. 463—but where there is an intrant the glebe belongs to him, and is not part of the ann, nor did belong to the former minister, unless it had been sown by him and the crop upon it at the entry of the intrant—July 6, 1665, *Colvil contra Lord Balmerino*, M. 464." Sir John Connell (Tithes, vol. ii, 92) says—"The right of ann does not extend to the glebe, but the executors of the minister are entitled to the crop on the glebe if sown during the minister's life," and cites the case of *Colvil* and the passage in Stair above quoted. And in later writers similar statements are to be found based on the case of *Colvil*.

Now it is clear that the case of *Colvil* related to the ordinary beneficial occupation and use of the arable land on the surface of a glebe. Here we have to deal with a different matter, namely, the revenue arising from a money fund produced from minerals found under the surface of the glebe and held, according to law, for behoof of the incumbents of the benefice in succession. To such a fund the *ratio* of *Colvil* does not seem to me to apply. The glebe is given in order to procure to the incumbent for the time the beneficial occupation and use of a certain extent of arable or pastoral land, and apart from statute he cannot let the land so as to bring in a money revenue for a period extending beyond that of his incumbency. It is not a purpose of the provision of glebe to provide ministers with ironstone or coal or marl or other subjacent minerals. The presence of valuable subjacent minerals is an accidental feature of a glebe, and is of the nature of a windfall for the benefice so far as it can be turned to money account in order to increase the rents and profits thereof without interfering with the arable or pastoral uses of the surface lands. And if such minerals are turned to money account by being leased or sold the proceeds fall by law to be held for behoof of the benefice so that the revenue goes to augment the annual value thereof to the incumbent for the time being. Such revenue accordingly becomes one of "the annual fruits of the benefice that take the form of money," and to all such fruits the claim of ann extends.

I am accordingly of opinion that the appeal should be refused.

LORD SKERRINGTON was absent.

The Court refused the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Pursuers (Respondents)—Watson, K.C.—Patrick. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders (Appellants)—The Lord Advocate (Clyde, K.C.)—Hunter. Agents—Simpson & Marwick, W.S.

Tuesday, March 4.

FIRST DIVISION.

[Lord Cullen, Ordinary.

H. E. RANDALL, LIMITED *v.* SUMMERS.

Landlord and Tenant—Lease—Restrictive Condition in Favour of Tenant—"Business of Similar Nature"—Remedy for Breach.

The proprietrix of a number of adjacent shops leased one of them to R. & Co. "to be used exclusively for the purposes of their business as boot and shoe sellers, including the usual accessories," the lease further providing that during its continuance "the proprietrix shall not lease any other shop in the property [in question] belonging to her for the purpose of being occupied for a business of similar nature" to that of R. & Co. Some years later, while R. & Co.'s lease was still current, the proprietrix let another shop in the premises to G. & Co., who were naval outfitters and who dealt in boots and shoes as incidental to and not separate from that business. The lease provided that "the premises . . . let shall be used by the tenants exclusively for the purpose of their business." In an action by R. & Co. against the proprietrix concluding for declarator in terms of the restrictive clause in their lease, interdict against her from letting the shop to G. & Co. for the purpose of being occupied as a boot and shoe selling business during the currency of their lease, and for damages for injury to their business alleged to have been caused by the sale of boots and shoes by G. & Co.—*held* (1) (*rev.* judgment of Lord Cullen) that the two businesses in question were not in fact substantially similar in nature, and that accordingly the proprietrix was not in breach of her obligation to R. & Co.; (2) that G. & Co. could not without contravening the terms of their lease use the premises let to them exclusively for the purpose of their boot and shoe department.

Opinions per the Lord President and Lord Mackenzie that assuming the proprietrix had been in breach of her obligation, the pursuers' proper remedy was by way of claim for abatement of rent.

H. E. Randall, Limited, carrying on business as boot and shoe sellers at 118b Princes Street, Edinburgh, *pursuers*, brought an action against Miss Margaret Sibbald Summers, the owner of the shop held on lease by the pursuers, *defender*, concluding for declarator that during the continuance of their lease the defender was bound not to lease any other shop in the property in Princes Street belonging to her for the purpose of being occupied for a business of a similar nature to that carried on by the pursuers; for interdict against the defender permitting anyone to occupy any part of her property for the sale of boots and shoes or from leasing or continuing to lease the premises or any part of them belonging to her at the corner of Princes Street and Castle Street to Messrs Gieve, Matthews, & Seagrove, Limited, during the currency of the lease to the pursuers, for the purpose of being occupied by them for a boot and shoe selling business, or under any terms or conditions which permitted them to carry on a boot and shoe business, and for £1000 damages.

The *lease* between the pursuers and defenders, after leasing to the pursuers the shop at 118b Princes Street for ten years after Whitsunday 1911, the date of entry, at a rent of £500, provided as follows:—"*Sixth.* The premises hereby let are to be used by the tenants exclusively for the purposes of their business as boot and shoe sellers, including the usual accessories. During the continuance of this lease the proprietrix shall not lease any other shop in the property in Princes Street, Edinburgh, belonging to her for the purpose of being occupied for a business of similar nature."

On 29th May and 23rd June 1916 the defender executed a *lease* of the shop No. 118 Princes Street, another part of her property there, to Messrs Gieve, Matthews, & Seagrove, Limited, for five years from Whitsunday 1916 at a rent of £1250, which provided:—"*Sixth.* The premises hereby let shall be used by the tenants exclusively for the purposes of their business." The lease contained no restriction as to the selling of boots and shoes.

The pursuers *pleaded, inter alia*—"1. The defender being bound in terms of the lease condescended on not to lease any other shop in her property in Princes Street for the purpose of being occupied for a business of a similar nature to that carried on by the pursuers, the pursuers are entitled to decree in terms of the declaratory conclusion of the summons. 2. The defender being in breach of the obligation condescended on undertaken by her in the said lease between her and the pursuers, and persisting in said breach, the pursuers are entitled to interdict as concluded for. 3. The defender being in breach of her contract with the pursuers as condescended on is liable to them in damages therefor."

The defenders pleaded, *inter alia*—"4. The pursuers' averments, in so far as material, being unfounded in fact, the defender should be assoilzied from the conclusions of the summons. 5. The defender not being in breach of the provision in the lease to the pursuers founded on, decree of absolvitor should be pronounced.

On 12th July 1918 the Lord Ordinary (CULLEN), after a proof, pronounced the following interlocutor—"Finds and declares in terms of the declaratory conclusion of the summons: In respect the conclusion for