that the contract should be held invalid in all respects in respect of the invalidity of part of it. Now, I can quite well understand that if the party in whose favour a stipulation is made finds that he cannot maintain it, and that consequently the consideration fails on account of which he undertook the obligation, it is reasonable for him to hold that the deed must go, on the ground that the consideration being removed the obligation no longer remains effectual. Accordingly that would have been a plausible position for the Countess of Seafield to have taken up, the position, namely, that as she could not get the ground of the churchyard and the site of the church she was no longer bound by the contract. But that is not the state of matters, for the Rev. James Bain's position is the reverse of all that. He loses nothing whatever by the judgment of the Lord Ordinary. As the Lord Ordinary has pointed out, he gains by the transaction. The churchyard and the site of the church are restored to the proper possessors, as being the property of the heritors of the parish in trust for the parishioners. It was part of his duty to defend these grounds from any encroachment, and to see that they were used for the proper purposes. Now, he has succeeded in restoring these matters to their proper legal position, so far at least as the site of the church and the churchyard are concerned. It is clear that he has given less consideration, as matters now stand, than under the original stipulation, and yet he retains everything that he stipulated for. And accordingly he cannot maintain that because part is illegal he shall be entitled to cut down that part of the contract which is perfectly legal.

The second objection maintained is, that the contract is invalid because the heritors were not consenting parties to it. That objection is not directed to that part of the contract which deals with the site of the church and the churchyard; it applies only to that part of the contract which deals with the glebe. The pursuer maintained that there can be no excambion without the consent of the heritors. He was asked for authority for that proposition, and he could produce none. On the other hand, Mr Maconochie showed us that on many occasions a contract of excambion entered into with consent of the Presbytery, and without the consent of the heritors, has been given effect to. It is quite true that the objection was not stated, but the facts of the cases show that had it been tenable the objection would have been stated. And yet the contract was unchallenged, although it appeared *ex facie* of the contract that no such consent had been given.

Lords Mure, Shand, and Adam concurred.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Comrie Thomson — A. J. Young. Agents — Gordon, Pringle, Dallas, & Company, W.S.

Counsel for the Defenders (Respondents)—D.-F. Mackintosh — Maconochie — A. S. D. Thomson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, July 15.

FIRST DIVISION.

DOW *v.* IMRIE (IMRIE'S EXECUTOR).

Contract—Stipend—Assistant and Successor—Ann—Personal Obligation.

The minister of a parish entered into an agreement with his assistant and successor, with consent of the presbytery, by which, in consideration of being relieved of the duties of pastor of the parish, he agreed to "surrender" to the latter a certain sum "of the annual income derivable from the benefice of said parish, payable half-yearly at the terms of Martinmas and Whitsunday" . . . . The minister died on 29th April 1887, and his assistant and successor claimed from his executor a sum in respect of services between Martinmas 1886 and the date of his predecessor's death. *Held* that the stipend payable at Whitsunday 1887 having passed to the next-of-kin of the deceased as ann, there was no stipend to surrender for the period in question; that the agreement contained no personal obligation upon the deceased; and that therefore no sum was due by the executor.

The Rev. William Malcolm Imrie, minister of the parish of Penicuik, applied in 1886 to the Presbytery of Dalkeith to sanction the appointment of an assistant and successor to him in consequence of his being unable on account of infirmity to discharge the duties of minister of the parish. The Presbytery agreed to Mr Imrie's request, and the Rev. Peter Dow was upon 3d August 1886 appointed assistant and successor to him. In connection with this arrangement an agreement was entered into between Mr Imrie as the first party, and Mr Dow as the second party, dated 30th July and 3d August 1886, which provided as follows—"The parties hereto considering that on or about the 26th of December 1885 the said party of the first part, in consequence of ill health, found it necessary to retire from the active duties of minister of the parish of Penicuik, and that he had agreed to surrender to an assistant and successor a certain sum of money *per annum*, as after specified, which said agreement was thereafter sanctioned and approved of by the Presbytery of Dalkeith,—therefore the parties have agreed, and hereby agree as follows, *videlicet:—First*, The said first party agrees (1) to surrender to the said second party the sum of £8, 6s. 8d. sterling, being the allowance for communion elements, and the sum of £165 sterling of the annual income derivable from the benefice of said parish, payable half-yearly at the terms of Martinmas and Whitsunday from and after the 3d day of August 1886, being the date at which the said second party is to enter upon the duties of assistant and successor, beginning the first term's payment thereof at Martinmas next for the proportion to fall due from the said 3d day of August 1886 to that term, and the next term's payment thereof at Whitsunday thereafter for the half-year immediately preceding, and so forth half-yearly, termly, and continually thereafter during the lifetime of the said Peter Dow, so long as he shall be the said first party's assistant;

and (2) to give up the manse and offices for the use and behoof of the said second party, on condition that he, the said second party, shall pay all taxes and other assessments exigible in respect of the manse and offices. *Second*, The said second party, in consideration of the premises, agrees to relieve the said first party of the duties of pastor of the parish of Penicuik."

Mr Imrie continued to be minister of the parish notwithstanding the agreement. The stipend of the parish was due at Whitsunday and Martinmas, but was collected half-yearly at Whitsunday and Martinmas, and subsequent to the date of the above mentioned agreement it was collected at Martinmas 1886 by Mr Imrie's agent, who at that date paid Mr Dow the proportion of the sum of £165 then due effeiring to the period from the date of his induction to the term of Martinmas 1886.

Mr Imrie died unmarried on 29th April 1887, and as he died prior to the term of Whitsunday the stipend for the second half of crop and year 1886 passed as annat to his next-of-kin. A question then arose between Mr Dow and Mr Imrie's executor as to whether any sum was due to the former under the agreement in addition to what had been already paid to him as above mentioned. Mr Dow claimed a proportion of the sum of £165 corresponding to the period from 11th November 1886 to 29th April 1887 (the date of Mr Imrie's death), which proportion was admitted to be £76, 8s. under deduction of income-tax.

This Special Case for the opinion and judgment of the Court was accordingly presented, to which the Rev. Peter Dow was the party of the first part, and the Rev. David Imrie, executor of the deceased Revd. William Imrie, the party of the second part.

It was agreed between the parties that the income of the benefice was £314. Mr Dow maintained that he was entitled to a fixed sum of money from Mr Imrie during "the lifetime of the said Peter Dow so long as he shall be the said first party's" (Mr Imrie's) "assistant"; that on a sound construction of the minute of agreement, what Mr Imrie agreed to "surrender" was "a certain sum of money *per annum*," and not the stipend of the parish, and that the word "surrender" in the first article of the said minute of agreement imported an obligation upon Mr Imrie to pay; that the sum to be paid to Mr Dow was not to be so paid when the stipend became due, but at the terms of Whitsunday and Martinmas; that Mr Imrie paid to Mr Dow the proportion of the sum due to him up till Martinmas 1886 from the 3d August preceding, whilst Mr Imrie had only in point of fact received stipend up till Michaelmas 1886; that no part of the stipend of the parish was ever conveyed by Mr Imrie to Mr Dow; that Mr Dow did not draw from the heritors any part of it, but Mr Imrie during his lifetime drew the whole of it without asking or obtaining the consent of Mr Dow; and that as a condition of Mr Imrie drawing the whole of the said stipend, he was bound either to discharge the duties of parish minister himself, or to provide and pay a substitute, if he were not able; and that Mr Dow having been the substitute appointed, he is entitled to be paid out of Mr Imrie's estate the sum stipulated in the said minute of agreement, exclusive of manse and offices.

The second party maintained that on a sound construction of the agreement, and as in a question between Mr Dow and Mr Imrie, the former took the place of the latter as regarded the manse and offices, the communion element money, and the stipend so far as surrendered; that in consequence of Mr Imrie's death in April, the stipend which would otherwise have been payable at Whitsunday 1887 having passed to Mr Imrie's next-of-kin as annat, there was no stipend to surrender for the period in question; and that there being no personal obligation on Mr Imrie, independently of the agreement to surrender part of the stipend, Mr Dow was not entitled to more than had been already paid to him.

The question submitted for the opinion and judgment of the Court was in these terms—"Is the late Mr Imrie's executor bound to pay out of the executry estate the foresaid sum of £76, 8s. to Mr Dow for services as Mr Imrie's assistant and successor between the term of Martinmas 1886 and the 29th April 1887, the date of Mr Imrie's death?"

Argued for the first party—The question was entirely one of contract, and fell to be regulated by the terms of the agreement. This was not the case of an assignation of stipend, and there was no intimation of an assignation. It was the case of a surrender of a sum of money out of the stipend. It was a payment out of the annual income of the benefice, and it was of importance in the case to notice that there had been drawn in name of stipend more than sufficient to meet the present claim

Argued for the second party—There was no express personal obligation upon the minster or his heirs to pay the money, and clearly the first party could not have gone to the heritors with this agreement and demanded payment of his salary from them. The ann was carried away by statute, and was never *in bonis* of the deceased. Had the first party been minister of the parish he could not have made good his present claim, and it was anomalous to say that he was in a more favourable position for pressing it by being assistant and successor.

Authorities—*Latta* v. *Edinburgh Ecclesiastical Commissioners*, Nov. 30, 1877, 5 R. 266.

At advising—

Lord President—In the course of last year Mr Imrie, the minister of the parish of Penicuik, became incapacitated from discharging his duties, and Mr Dow, the first party to the present case, was appointed his assistant and successor with the approval of the Presbytery.

It became necessary to enter into some arrangement for the remuneration of Mr Dow while he continued assistant, and accordingly an agreement was entered into, the principal conditions of which can be very simply stated. The stipend of the parish was £314; of this Mr Dow was to receive £165, with £8, 6s. 8d. for communion elements, and he was to occupy the manse. This agreement was reduced to writing, and it is the language and provisions of this written agreement which we are now asked in this Special Case to construe.—[*His Lordship here read the terms of the agreement quoted above*]. In conformity with this arrangement the first payment was duly made to Mr Dow at Martin-

mas last of the one-half of £165, but before the next term of payment arrived Mr Imrie had died, the exact date of his death being I think 29th April 1887.

Now the effect of Mr Imrie's death was this, that no stipend belonged to him after Martinmas 1886, while the stipend from Martinmas to Whitsunday 1887 passed to his next of kin, and belonged to them, not as his executors, but in their own right. That half year's stipend never belonged to Mr Imrie at all, in consequence of his death in April 1887, and Mr Dow's contention is that although this stipend never belonged to Mr Imrie, yet his executor is liable to him in payment of a sum equal to the half of £165, as stipend since Martinmas. I can quite see that there is a great deal of hardship in the case of Mr Dow, because he has performed the work, and, if effect is not given to his contention, is to receive no remuneration; but it is impossible to get over the words of the agreement. The sum of £165 is surrendered by Mr Imrie to Mr Dow. That means, or rather it assumes, that Mr Imrie has himself to draw the stipend before he can pay any share of it to Mr Dow. Mr Dow has no title to uplift the stipend from the heritors, and the heritors would not have paid him because he has no assignation to the stipend or any part of it. It is therefore clear that before any part of that sum could go to Mr Dow it must be uplifted by the minister; then there undoubtedly is an obligation on the minister to pay over the stipulated portion of the stipend, but of course the obligation to pay the £165 can never come into operation until the £314 or some proportion of it is actually uplifted.

It appears to me that the terms of this agreement entirely preclude Mr Dow's claim, which is that the executor shall pay over to him what is equivalent to one half of the £165 for the term of his services after Martinmas 1886, meaning of course to construe the agreement as imposing a personal obligation upon Mr Imrie. As I can find no such personal obligation in this agreement, I think the present question falls to be answered in the negative.

Lords Mure, Shand, and Adam concurred.

The Court answered the question in the negative.

Counsel for the First Party—Ure. Agent—Lindsay Mackersy, W.S.

Counsel for the Second Party — Pearson. Agent—H. W. Cornillon, S.S.C.

Friday, July 15.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HOULDSWORTH *v.* POLICE COMMISSIONERS OF WISHAW.

Property — Interdict — Nuisance — Contract — Acquiescence.

The proprietor of an estate brought an action against the police commissioners of an adjoining burgh, as the local authority, to have it declared that the defenders were not entitled to discharge upon his lands any sewage from the pipes under their control, and for interdict.

The facts of the case were that between 1850 and 1864 the pursuer's predecessor had constructed sewers for carrying off the sewage from houses built upon part of his property which at the date of this action was within the burgh, and held on feu or long lease from him; that under the terms of the feus and leases the proprietor was, on certain conditions, entitled to the whole sewage; and that he had constructed settling ponds for collecting the sewage and irrigating his lands. In 1868, after the pursuer succeeded to the estate, the defenders constructed a new system of drainage, and connected new drainage pipes with certain of the pursuer's existing drains. The result was that a greater quantity of sewage was thereafter discharged upon the pursuer's lands. After 1874 the settling ponds were disused, having proved a failure, and the nuisance first began to be offensive in 1877, when the attention of the local authority was called to the matter. The defenders maintained (1) that the pursuer not only allowed the use of his drains without objection, but took part in setting up the sewage system, and that the facts implied an agreement for the mutual advantage of the parties, by which the defenders were allowed to get rid of their sewage, and the pursuer was allowed to utilise it for the benefit of his land; and (2) that the pursuer was barred by acquiesence from complaining of a nuisance which he ought to have prevented before any cost was incurred if he did not intend to submit to it, and which could only be altered at great expense. *Held* that the pursuer had not bound himself to submit to the continuance of the nuisance in perpetuity, and that he was not barred from maintaining the action by acquiescence.

This was an action by James Houldsworth, Esquire, heritable proprietor of the entailed estate of Coltness in the county of Lanark, against the Police Commissioners for the Burgh of Wishaw, acting under the General Police Improvement (Scotland) Act 1862, and as such Commissioners being the local authority of the burgh under the provisions of the Public Health (Scotland) Act 1867, and John Logan, their clerk.

The conclusions of the summons were these—"That the defenders are not entitled to emit or discharge from the sewers or pipes under their control any sewage or drainage matter on to or upon the lands of the pursuer; and further, the defenders ought and should be interdicted and discharged, by decree foresaid, from emitting or discharging any sewage or drainage matter from the said pipes on to or upon the said lands."

The pursuer averred that the defenders as the local authority were vested in and possessed of a system of sewers and drains, and that although the principal main sewer of their system had a properly constructed outfall upon lands which did not belong to him, still part of the sewage of the burgh was discharged upon the pursuer's property by means of five outfalls