part of the Commissioners, because the constable retired in October with a pension of £50 or £60 a-year, and he died within a few days—died in November—and they awarded a pension to the children. Now, the statute applies no limitation except as to the amount; they may give it if they see fit to the widow or children or any of them. Now, the two young men here, although over fifteen, came within the meaning of the word children in this particular case. If we could hold that the limitation as to the stoppage of allowances when children attain the age of fifteen applies to this case, then I should arrive at the conclusion with the Sheriff that this was beyond the legal power of the Commissioners, and that therefore the money ought to be restored. But for the reasons which I have indicated I am of opinion that it was within their powers, and that the limitation does not apply. As I pointed out in the course of the argument I think every reasonable consideration and every desire on the part of the Commissioners ought to be in that direction. If they really, as I hope they will always in future, ascertain the facts, and, after applying their minds to them and exercising their discretion, think it reasonable and proper and fit that an allowance should be made in a particular case, it must be their desire that it should be in their power—for everybody must desire it should be in his power — to do what after due consideration is right, and reasonable, and proper. I am therefore of opinion that the judgment of the Sheriff is wrong, and that the pursuers are entitled to decree.

LORD RUTHERFURD CLARK — I am of opinion that the Commissioners were entitled to make the gratuity, and that further having made it by granting a cheque they were not entitled to stop payment of the cheque.

LORD TRAYNER—I agree.

The Court recalled the interlocutor of the Sheriff, and decerned in favour of the pursuers.

Counsel for the Pursuers—Asher, Q.C.—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defenders—Lees—Deas. Agents—Campbell & Smith, S.S.C.

Thursday, June 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

RAINIE *v.* FULLARTON AND OTHERS.

Burgh—Church—Minister—Stipend—Obligation to Provide "a Competent and Legal Stipend not under" a Certain Sum.

In 1779 the only surviving bailie and the treasurer of a burgh of barony, for themselves and as representing the council, freemen, and community of the burgh, raised a summons of disjunction and erection in the Teind Court, wherein they set forth that a new church had been erected within the burgh for the accommodation of the inhabitants, and concluded for decree disjoining the burgh from the parish with which it had theretofore been united, and erecting the same into a separate parish; providing always that the magistrates, council, and freemen of the burgh, and their successors in office, should be bound to provide the minister serving the cure of the said new kirk, and his successors in office, in all time coming, with a competent and legal stipend not under £60 sterling yearly at the usual terms.

Thereafter the Court pronounced a decree separating and disjoining the burgh, and erecting the same into a separate parish, and finding "that a committee of thirteen freemen annually to be chosen by a community meeting to be held for that purpose shall have the only right of modeling and disposing of the said church and haill seats thereof and bounds within the same and of letting and uplifting the rents for the said seats and if thought proper to sell and dispose of the seats and uplift the prices thereof. . . . Providing always that the magistrates council and freemen of the said burgh and their successors in office shall be bound and obliged to provide the minister serving the cure of the said new kirk and his successors in office in all time coming with a competent and legal stipend not under the sum of sixty pounds sterling yearly at the usual terms of payment with power to said committee of thirteen whereof nine to be unanimous if the funds shall admit of it to make such augmentation of said stipend as shall be just and reasonable the same being no burden on the funds of the community but upon the contingent funds under their management."

Held (following the case of *Peters* v. *Magistrates of Greenock*, March 16, 1892, 19 R. 643, *aff.* May 18, 1893, 20 R. (H.L) 42) that the obligation on the magistrates, council, and freemen of the burgh with regard to payment of stipend was not limited to £60, but was

to provide a competent and legal stipend according to existing circumstances of not less than that amount, and that the provision that the committee should have power to grant an augmentation out of the funds in their hands, which should be no burden on the funds of the community, did not relieve the magistrates, council, and freemen, of their liability under the decree.

In 1779 Robert Alexander, one of the freemen, the only surviving bailie, and James Reid, another of the freemen, and the treasurer of the burgh of barony of Newton-on-Ayr, for themselves, and as representing the council, freemen, and community of said burgh, raised an action of disjunction and erection before the Court of Teinds, setting forth, *inter alia*, that a new church had been erected within the burgh for the accommodation of the inhabitants at the expense of the community, and concluding for decree disjoining the said burgh, and the whole lands belonging to the said burgh and community, from the united parishes of Monkton and Prestwick, and erecting the same into a separate parish, "providing always that the said magistrates, council, and freemen of the said burgh, and their successors in office shall be bound and obliged to provide the minister serving the cure of the said new kirk and his successors in office in all time coming, with a competent and legal stipend not under the sum of £60 sterling yearly at the usual terms." . . .

Thereafter on 15th December 1779 the Lords Commissioners pronounced decree of disjunction and erection, whereby they "separated and disjoined the burgh of barony of Newton-on-Ayr and whole lands belonging to the said burgh and community and haill inhabitants thereof from the united parishes of Monkton and Prestwick and erected the same into a separate parish and pastoral charge to be called now and in all time coming the kirk and parish of Newton-on-Ayr. . . . Found that a committee of thirteen freemen annually to be chosen by a community meeting to be held for that purpose shall have the only right of modeling and disposing of the said church and haill seats thereof and bounds within the same and of letting and uplifting the rents for the said seats and if thought proper to sell and dispose of the seats and uplift the prices thereof and to name and appoint beadles bellmen and doorkeepers of the said new kirk and readers precentors and clerks for the same and session thereof from time to time as they shall think fit and of disposing during any vacancy of the fund provided by the community for a stipend to their minister or for communion elements manse or other emoluments to other proper uses Found that on any vacancy of the said parish the said committee shall have the sole and undoubted right of election of a minister to the said new kirk in all time coming nine of the said committee being always unanimous Providing always that the magistrates council and freemen of the said burgh and their successors in office shall be bound and obliged to provide the minister serving the cure of the said new kirk and his successors in office in all time coming with a competent and legal stipend not under the sum of sixty pounds sterling yearly at the usual terms of payment with power to said committee of thirteen whereof nine to be unanimous if the funds shall admit of it to make such augmentation of said stipend as shall be just and reasonable the same being no burden on the funds of the community but upon the contingent funds under their management As also the said community shall be bound and obliged to pay for the said minister the rent of a house ay and untill a house shall be built proper for his accommodation which shall be done as soon as convenient and likewise to give him the liberty of a cows grass to be herded with the towns cows on the common belonging to the community and in like manner to furnish Communion elements so oft as the Sacrament of the Lords Supper shall be dispensed in the said new kirk and give such allowance to the minister serving the cure as may be necessary for defraying his expences at that time."

The Rev. William Rainie was ordained minister of the parish of Newton-on-Ayr on 20th July 1881. From that date until Whitsunday 1892 he received a stipend of £60, and an annual gratuity of a sum varying from £80 to £100, as also £8 for Communion expenses and also the Communion elements. At Martinmas 1892 he received £30, being the half-yearly payment of stipend, but no gratuity, on the ground that, in consequence of recent repairs made on the manse, there was no part of the contingent funds available for that purpose.

In May 1894 Mr Rainie brought an action against Alexander Fullarton and others, the existing Magistrates, Councillors, and Freemen of the burgh of Newton-on-Ayr, for themselves, and as representing the whole body of the community of the said burgh, and their successors in office, to have it found and declared "that the pursuer, as minister serving the cure of the parish of Newton-on-Ayr, 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 suited to the circumstances of the time and the position and duties of the benefice, from the date of his ordination and induction to the said cure, and in all time coming during his lifetime and serving the said cure;" and for decree ordaining the defenders to make payment to him as such minister, "of the sum of £400 sterling per annum, as a competent and legal stipend for each of the" two preceding years, "or of such other sum as in the circumstances shall appear to our said Lords a competent and legal stipend for each of the said two years;" and further, to make payment to him as such minister "of the sum of £400 sterling per annum as a competent and legal stipend from and after the said term of Whitsunday 1894, or of such other sum, less or more, as in the circumstances shall appear to our said Lords to be a competent and legal

stipend from and after said term . . . beginning the first half-yearly payment at the term of Martinmas 1894 . . . and so forth half-yearly and termly during the lifetime of the pursuer and his serving the said cure (but reserving the right of the pursuer and his successors in the said cure to apply for an increase of the said stipend in the event of the stipend to be decerned for in the process to follow hereon at any time ceasing to be a competent and legal stipend), with interest on each term's payment . . ."

The Presbytery of Ayr and the individual members thereof were called for any interest they might have, but no decree was sought against them, nor were expenses asked, except in the event of their appearing to oppose the conclusions of the action, which they did not do.

The pursuer averred that looking to the increase in the population of the parish, and to the greater expense of living, less than £400 would not be a competent stipend.

He pleaded—"(1) Upon a sound construction of the decree of disjunction and erection of the parish of Newton-on-Ayr, the defenders, as representing the community of the burgh of Newton-on-Ayr, are liable in payment of a competent and legal stipend to the pursuer as minister of the said church. (2) The pursuer is entitled to decree for payment of the stipend of £400 concluded for from and after Whitsunday 1892, in respect that the same is a competent and legal stipend in the circumstances condescended on."

The defenders, the magistrates, councillors, and freemen of the burgh, explained "that they have through their delegates always administered, and at present administer, the contingent funds entirely for church purposes. When possible they have from time to time granted gratuities of varying amount to the minister in the charge, but special forms of receipt were always taken to preserve evidence of the fact that the payments were merely gratuities, and "reserving always, as hitherto, right to the delegates to give the minister such gratuity in future as they may think fit. The defenders have no revenue out of which the augmentation asked by the pursuer could be made. The income from the community property is inconsiderable, and is the private property of the forty-eight freemen of the burgh of Newton. Explained that of the original Newton lands parts have become individual possessions in the hands of the freemen, parts are in the hands of third parties who have purchased from freemen, the latter preserving their freedom rights as pertaining to the lands retained by them. The property still held in common by the freemen consists of portions of the original lands that have been undivided, the feu-duties of such other parts as have been feued to third parties, and the rents of their council hall property, which includes three shops. This property is the common or community property, the community meaning the forty-eight freemen. The income derived therefrom, which does not exceed £100 to £150, has always been enjoyed by the freemen, all of whom have acquired their position by onerous purchase or succession to those who have acquired by purchase.

They pleaded—"(1) No relevant case. (2) The liability of defenders to make any augmentation of pursuer's stipend being confined to the contingent funds under their management, and there being no surplus of said funds, the defenders ought to be assoilzied with expenses."

Upon 9th January 1895 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Finds that on a just construction of the decree of disjunction and erection of the kirk and parish of Newton-on-Ayr, dated 15th December 1779, the defenders are bound to provide the pursuer and his successors in office with a competent and legal stipend suited to the circumstances of the time and the position and duties of the benefice: Therefore finds, decerns, and declares in terms of the declaratory conclusions of the summons; *quoad ultra* appoints the cause to be enrolled that parties may be heard on the petitory conclusions, and reserves all questions of expenses: Grants leave to reclaim."

"*Opinion.*—It must be held as settled by the judgment of the House of Lords in *Peters* v. *The Magistrates of Greenock*, L.R. 1893, Ap. Cas. 258 (affirming 19 R. 643), that where an obligation is imposed upon the administrators of a burgh, by decree of the Court of Teinds, to provide a competent and legal stipend not under a certain sum to the minister of a new parish, the obligation is not necessarily fulfilled by their making payment of the sum so named in the decree as a minimum, but means that they shall pay such a sum as is suited to the reasonable requirements of the benefice from time to time, and that of the sufficiency of this in case of dispute a court of law shall be the judge.

"The present case, which relates to the burgh of Newton-on-Ayr, would be precisely ruled by the Greenock case, if it were not for two specialties on which the defenders strongly found. These are (1) that here the seat rents are not directly made over to the defenders, but are to be levied and administered by a committee of their number; and (2) that power is given to this committee, 'if the funds shall admit of it, to make such augmentation of said stipend as shall be just and reasonable, the same being no burden on the funds of the community but upon the contingent funds under their management.'

"I have come to the conclusion (though not I own without difficulty) that these two points do not make a distinction in principle between this and the *Greenock* case.

"It is a plausible argument to say that the decree, having provided for the case of future augmentation, and provided for it in a way which did not form a burden on the burgh funds, cannot have intended that there should be a concurrent obligation on the burgh to provide an augmentation

if necessary, out of its own funds. But, I think, the fallacy lies here. If the intention of the decree had been what the defenders contend for, it would have laid on the burgh, not an obligation to provide 'a competent and legal stipend,' but a fixed annual sum, leaving the question of augmentation to depend entirely upon the financial prosperity of the church. Now, the Court of Teinds, adopting the proposals submitted to them and giving them the force of contract, selected an expression which implies an obligation fixed in its nature but elastic in its amount. I do not think that it derogated from that obligation by conferring on another body (for the committee, though representative of the burgh, is not the burgh) a power to devote a portion of the proper church funds to the increase of the stipend. It was quite right, though perhaps not strictly necessary, to declare that such an augmentation should be no burden on the burgh funds, because the committee had no power over the burgh funds. The pursuer admits that, in determining from time to time what is a competent and legal stipend, the administrators of the burgh, or, if necessary, the Court, must take into account any augmentation already made by the committee. But what if no augmentation has been made by the committee? That is admitted to have been the state of matters since Martinmas 1892. The defenders accept responsibility for it, and, so completely do they identify themselves with the committee, that they claim right to charge the cost of certain repairs which they recently executed upon the manse against the seat rents, just as if the seat rents were under their own direct management. I observe also that in their second plea-in-law they ignore the committee altogether, and speak of the church funds as under their own management. But I am not concerned with any question of liability for the repairs on the manse, or of the proper exercise of the power of augmentation entrusted to the committee. Neither party asked for a proof, or founded to any extent on the actings which had taken place since the date of the decree. They concurred in asking me to construe the decree itself, and therefore the sole question at this stage is whether the obligation on the burgh to provide a competent and legal stipend not under £60—which, if it stood by itself, would undoubtedly mean an obligation to pay more if circumstances required it—is reduced by the clause which follows to an obligation to pay no more than £60 except of goodwill. I cannot so hold. I think that the words of Lord Watson in the *Greenock* case are equally applicable to the present case when he says—'I can hardly conceive that the Court of Teinds would have described an income of which the sufficiency was to be dependent on the goodwill of the municipality as a competent legal stipend which they were bound to provide.'

"I shall therefore follow the course which Lord Kyllachy took in the Greenock case, by giving decree in terms of the declaratory conclusion of the summons, and appointing the cause to be enrolled that parties may be heard on the petitory conclusions."

The defenders reclaimed, and argued—The case of *Peters* v. *Magistrates of Greenock*, March 16, 1892, 19 R. 643, *aff.* May 18, 1893, 20 R. (H.L.) 42, and L.R. 1893, App. Cas. 258, relied upon by the pursuer, differed from the present case in several important respects. In that case there was no fund out of which an augmentation could be paid except the burgh funds, and the magistrates received all the seat rents. Here the seat rents formed a separate contingent fund. From it, and it alone, any augmentation was to be made. The liability of the burgh was limited to £60, and there was an express stipulation in the decree that such augmentation should be no burden on the funds of the community. As a fact there were no funds belonging to the burgh from which the payment here demanded could be made.

Argued for the pursuer—The question of what funds were available was not at present before the Court. As in *Peters'* case, it was desirable to have the declaratory conclusions first disposed of. The Lord Ordinary's interlocutor was clearly right. The burgh by their summons in the action of disjunction and erection had undertaken to provide a legal and competent stipend of not less than £60. *Peters'* case made it clear that £60 was the minimum and not the measure of their obligation. The declaration in the decree relied on by the reclaimers was to prevent the committee at their own hand burdening the burgh with an augmentation beyond what the contingent funds would meet. Out of those funds they could give gratuities, as they had been in wont to do, to the minister, and these would be taken into account in judging whether he was receiving a competent stipend, but such payments could not relieve the burgh of its legal responsibility.

At advising—

LORD PRESIDENT—An examination of the record satisfies me that the only question which we have to determine is that stated by the Lord Ordinary, and I am of opinion that the interlocutor under review has rightly decided that question.

The defenders admit that they are the parties responsible to the pursuer under the decree of disjunction and erection for payment to him of a competent and legal stipend, whatever is ascertained on a sound construction of the decree to be the true meaning of that obligation. They maintain, however, that the true reading of the decree is that the minister is not entitled ever to get more than £60, unless the seat rents, which constitute the "contingent funds" referred to in the decree are sufficient to allow of an augmentation being made, and unless the committee in charge of those funds resolve to make such augmentation.

In support of their contention the defenders strongly appealed to the proceedings which are recited in the decree. But

among all the documents there rehearsed, by much the most important part would seem to be the conclusions of the summons, in which the pursuers formulate their own proposal for the sustentation of the minister. Now, that proposal is that the magistrates, council, and freemen of the burgh and their successors in office shall be bound and obliged to provide the minister and his successors in all time coming with a competent and legal stipend not under the sum of £60 sterling yearly. Had decree been pronounced in these terms, proposed by the magistrates themselves, it is impossible to doubt, after the decision in the *Greenock* case, that the obligation would have the elastic meaning contended for by the present pursuer. Now, this fact seems to me to exclude the theory that the only liability ever contemplated by the burgh was liability limited to £60, and that the future ministers for all time were to be dependent solely on the seat rents for an increase of their stipend. The summons proves conclusively that the magistrates were prepared to undertake, and offered to undertake, precisely the obligation which the pursuer now asserts to be incumbent on the defenders.

The words in the decree about augmentation from the seat rents, upon which the defenders rely, seem, from the proceedings rehearsed in the decree, to have been first proposed when the case was before the Lord Ordinary (Lord Westhall). Is it to be held that they were inserted in order to abate, and have they the effect of abating, the obligation which the magistrates came into Court to undertake? No such conclusion seems at all necessary, and the explanation of the clause is very different.

It is to be observed that the administration of the seat rents was placed in the hands, not of the magistrates, council, and freemen, but of a special committee of thirteen. The primary purpose of these funds not being the support of the minister, it seems reasonable that special provision should have been made authorising the administrators of these funds at their discretion to add to the income of the minister out of the surplus of an ecclesiastical fund. It seems also reasonable enough to say, as the decree does, "the sum (that is, the augmentations granted by the committee) being no burden on the funds of the community but upon the contingent funds under their management." This means, as I take it, that the committee are to see that they do not give to the minister, except out of a surplus, the existence of which was a contingency, and do not by premature generosity to the minister, throw on the town the burdens primarily incumbent on the seat rents, such as keeping up the church and the services. The structure of the clause seems to me to forbid the theory that the words about not burdening the community apply to the legal and competent stipend—they only apply to the action of the committee.

I agree with the Lord Ordinary in considering that the power conferred on the committee does not derogate from the obligation imposed on the magistrates, and that that obligation is expressed in words, the legal significance of which, apart from some modifying context, is quite settled.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Jameson — W. Campbell. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders — Guthrie — Hunter. Agent—John Macmillan, S.S.C.

Thursday, June 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

HAGART'S TRUSTEES, &c. *v.* HAGART.

(*Ante*, vol. xxxi., p. 865, 21 R. 1052.)

Marriage-Contract—Provisions to Children —Conveyance of Property "now belonging or which shall belong to me at time of death."

By antenuptial marriage-contract a wife assigned to her husband in liferent, in the event of his surviving her, and to the children of the marriage in fee, all estate that might belong to her at the time of her death. She reserved to herself no power of apportionment among the children.

The spouses subsequently executed a mutual trust-disposition and settlement in which the wife assigned to her husband, in the event of his surviving her, and to the children equally amongst them, share and share alike in fee, her whole estate presently belonging or which should belong to her at the time of her death.

Held (*aff.* judgment of Lord Stormonth Darling) that these deeds only conferred upon the children of the marriage a right to share equally in such estate as their mother might leave at her death, and did not entitle them to object to their mother disposing of her estate by *inter vivos* gifts to one of their number.

Fraud and Circumvention.

Opinion indicated by Lord Stormonth Darling that, while the law gave a remedy for circumvention when it occurred, it would not interfere to prevent circumvention. *Opinion reserved* on this point by Lord Kinnear.

Mr and Mrs Hagart were married in 1833. Mrs Hagart was then institute of entail in possession of the entailed estate of Glendelvine.

By antenuptial contract of marriage dated 15th April 1833, Mr Hagart assigned and disponed to Mrs Hagart in liferent, in the event of her surviving him, and to the children of the marriage, excepting the eldest