arises from the fact that Mr MacLachlan intended to give the complainer formal warning; and that affords ground for the observation that he did not regard what passed on 28th February as a final warning.

"But I do not think that the complainer can avail himself of this. The question is was the warning given such that the complainer was entitled to act upon it? Now the intimation which he received on the 28th February was such that had it been the landlord's interest, and had he tried to hold the complainer to his tenancy, he would at once have been successfully met by the defence that he had himself given intimation, and that on the faith of it the tenant had taken other premises. If, then, the notice given on 28th February was sufficient, the landlord was not bound to give, neither was the complainer entitled to receive further notice; and the fact that the landlord intended to peacewarn the complainer is only of importance in testing the credibility of the evidence which he gives as to what passed on 28th February. It would be unfortunate if the law could not give effect to the good faith of the case. I do not think I am straining it in holding that the intimation given on 28th February 1895, and acted on by the complainer, was timeous and sufficient."

Counsel for Complainer—M'Lennan—A. M. Anderson. Agents—Donaldson & Nisbet, Solicitors.

Counsel for Respondents — Dean of Faculty Asher, Q.C. — Cooper. Agent — James Watson, S.S.C.

Friday, January 17.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

THOMSON *v.* MAGISTRATES OF GREENOCK.

Church—Burgh—Minister—Stipend—Obligation to Pay Fixed Stipend.

A summons for the disjunction and erection of a parish *quoad sacra* in a burgh contained a conclusion that the magistrates of the burgh and their successors in office should be bound and obliged to provide the minister of the new parish "in a competent stipend."

On 8th March 1809 the Court pronounced an interlocutor in the action, by which they decerned "in the disjunction, erection, and annexation *quoad sacra* as libelled on the magistrates . . . engaging to be answerable for a stipend of £200 sterling per annum." Thereafter the magistrates by an act of council undertook to be answerable for a stipend "of not less than £200 per annum."

An action was raised in 1895 by the minister against the magistrates for a stipend exceeding £200, on the ground that the decree, as interpreted by the conclusion of the summons, and the subsequent act of council, imposed upon them the obligation to provide a competent stipend.

Held that the contract between the parties was unambiguously expressed in the interlocutor of 9th March 1809, and that under that contract the magistrates were liable only for a stipend of £200.

Peters v. *Magistrates of Greenock*, 19 R. 643, and 20 R. (H.L.) 42, *distinguished.*

In 1809 the Magistrates and Town Council of Greenock and the members of a committee of managers appointed by the proprietors of the East Chapel of Greenock brought a summons of disjunction and erection of the East Church and parish of Greenock. Prior to raising the action resolutions had been passed at a meeting of the Magistrates and Town Council of Greenock on 30th January 1809, which bore that the magistrates "agree to execute, as representing the town, the necessary bond for the payment of such stipend as the Commissioners for Plantation of Kirks may fix upon, not exceeding £150, and the usual allowance for communion elements, and on the conveyance and renunciation above mentioned being procured, authorise the clerk to prepare the requisite bond."

A bond embodying this obligation was lodged in the teind process.

In the summons this resolution was narrated with the omission of the words "not exceeding £150." The summons concluded (1) that certain parts and portions thereof should be separated and disjoined from the Old or West Parish of Greenock; (2) that these portions should be erected into a new and separate parish and pastoral charge, to be called in time coming the East Church and Parish of Greenock. The summons then proceeded—"And it ought further to be found and declared by decreet foresaid that the Magistrates and Town Council of Greenock for the time being, and a committee of seven to be named by and from the proprietors of seats reserved in the said chapel, shall in all time coming have the sole and undoubted right of patronage of the said church, and the right of presentation and calling a minister to serve the cure thereat, and as oft in time coming as any vacance shall happen, and of modelling and disposing of the said church and haill seats thereof and bounds within the same, under the exceptions before and after mentioned, and of setting the said seats, and uplifting the rents thereof, and of naming and appointing the beadles, bellmen, and doorkeepers of the said church, 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 which shall be provided by them for a stipend to their minister, or for communion elements, manse, or schoolhouse." Then followed a reservation of certain existing rights in seats in the chapel, and a declaration freeing the heritors of the said parish of Greenock from liability for stipend, &c.; "and in

order that the said church may be kept in repair and the minister supplied with a proper stipend, it ought to be found and declared by decreet foresaid that the said Magistrates and Council of the said burgh and barony of Greenock, and their successors in office, and the Corporation and community of the said town, shall be bound and obliged in all time coming, not only to keep in repair the said church and rebuild the same when necessary, and to relieve the heritors of all claims on this account, or at the instance of the minister thereof for a manse or glebe, and of the expense of a schoolhouse, school salary, and other parochial burdens, but also to provide the minister of the said church in a competent stipend, with a sufficient sum for furnishing communion elements, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, with interest of each term's payment from the time the same falls due and until payment."

On 8th March 1809 the Court of Teinds pronounced the following interlocutor:—"Decern in the disjunction, erection, and annexation *quoad sacra* as libelled on the Magistrates and Council of Greenock engaging to be answerable for a stipend of £200 sterling per annum, besides communion elements, and appoint them to lodge in process a minute of Council binding themselves in the above terms, and decern, and remit to Lord Robertson to examine the said minute when lodged, and to approve thereof before extract."

The Magistrates thereupon, by act of Council dated 10th March 1809, upon the narrative that decree had been pronounced as libelled in the summons of disjunction and erection referred to in the former minutes of Council, on the Magistrates and Council engaging to be answerable for a stipend of not less than £200 sterling per annum besides communion elements, and lodging in process a minute of Council binding themselves in the above terms, and that the Magistrates and Council were now willing to be answerable for such stipend, bound and obliged them and their successors in office, and the funds of the community, for payment of such stipend accordingly, besides communion elements, and authorised the clerk to give out an extract of this minute to be lodged in the process.

Lord Robertson, on 11th March 1809, by docquet written upon an extract of the foregoing act of Council, approved thereof, and thereupon decreet of disjunction and erection issued. The decreet bore, *inter alia*, that the Lords of Session as Commissioners for Plantation of Kirks "have found and declared, and hereby find and declare, that the said Magistrates and Council of the said burgh of barony of Greenock, and their successors in office, and the Corporation and community of the said town, shall be bound and obliged in all time coming, not only to keep in repair the said church, and rebuild the same when necessary, and to relieve the heritors of all claims on this account, or at the instance of the minister thereof, for a manse and glebe, and of the expense of a schoolhouse, school salary, and other parochial burdens, but also to provide the minister of the said church in a competent stipend, with a sufficient sum for furnishing communion elements, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, with interest of such term's payment from the time the same falls due until payment; and declaring that the minister of the said new erected parish shall not be entitled in any time to come to insist for a manse or glebe; and have found, and hereby find, the Magistrates and Council of Greenock answerable for a stipend to the minister of the said new erected parish of two hundred pounds sterling per annum, besides communion elements, and that conform to their bond and obligation, dated the tenth day of March One thousand eight hundred and nine years, lodged in process."

In 1895 the pursuer the Reverend Thomas Reid Thomson, minister of the East Church and parish of Greenock, with consent of the Presbytery of Greenock, brought the present action against the Provost, Magistrates, and Councillors of Greenock, in which he concluded for declarator that he, "as the minister serving the cure of the East Church and parish of Greenock and district thereof, within the burgh of Greenock, was and is entitled to be furnished and provided by the defenders, and that the defenders were and are bound to furnish and provide the pursuer with a competent stipend, suited to the circumstances of the time, and the position and duties of the benefice, to be paid out of the revenue of the burgh, or out of the other funds, property, and revenues held and enjoyed by the said Magistrates and Town Council for the special use and behoof of the minister serving the cure of the said church, parish, and district, 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 the pursuer, as the minister serving the cure of the said East Church, and parish and district thereof, of the sum of £400 sterling per annum, as a competent stipend for the period from and after the term of Whitsunday 1893; or of such other sum, less or more, as in the circumstances shall appear to our said Lords a competent stipend."

The pursuer pleaded—"(1) According to the terms and meaning of the conclusions of the summons of disjunction and erection of the East Church and parish of Greenock, the decree pronounced in the process following thereon, the extract of said decree, and the usage and prescriptive use and enjoyment following thereon, the defenders, as representing the community of the burgh of Greenock, are liable in payment of a competent stipend to the pursuer as minister of the said church and parish; and decree should accordingly be pronounced in terms of the declaratory conclusions of the present action. (2) The pursuer is entitled to decree for payment of the stipend of £400 concluded for, for the

period from and after Whitsunday 1893, in respect that the same is a competent stipend in the circumstances condescended on."

The defenders pleaded, *inter alia*,—"(2) On a sound construction of the proceedings and decree of the Teind Court, the defenders are not bound to furnish the pursuers with a stipend exceeding £200 (with communion elements). (3) The decree pronounced by the Teind Court not being a decree to furnish the pursuer with a competent and legal stipend, but a decree for a fixed sum of £200, the action cannot be maintained."

The Lord Ordinary (KYLLACHY), after a hearing in the Procedure Roll, by interlocutor of 7th November 1895 assoilzied the defenders.

Note.—"The question here raised is said to be similar to that lately decided in the case of *Peters* v. *The Magistrates of Greenock*, 19 R. 643; and certainly, as in that case, the controversy relates to the stipend of one of the parish churches of Greenock—churches which were erected during the last and present century, on the foundation of former chapels of ease. As in that case also, the decision depends on the construction of what was in effect a judicial contract, embodied in a decreet of disjunction and erection pronounced by the Court of Teinds.

"The terms, however, of the decreet of the Court of Teinds (which in this case was obtained in the year 1809), and the tenour of the other documents which have to be construed, differ, I think, not immaterially from those which the Court had to construe in the case of *Peters;* and the question I have now to decide is, whether, giving due effect to those differences, I can here pronounce a similar judgment, viz., a judgment to the effect (as claimed by the pursuer) that the defenders, the Magistrates of Greenock, are bound—without prejudice to a bond for £200 per annum, which they granted at the time of the erection, and to which the decreet refers—to provide the pursuer and his successors with a competent and legal stipend suitable to the circumstances of the time and the position and duties of the benefice.

"Now, there is no doubt that up to a certain point the terms of the obligation for stipend, in this case undertaken by or imposed upon the magistrates, bear a considerable resemblance to the terms of the obligation which the Court had to construe in the case of *Peters*, and also in the older case of *Cæsar* v. *The Magistrates of Dundee*, 20 D. 859, to which the judgment in the case of *Peters* refers. In the *Dundee* case the Magistrates were taken bound to provide to the minister 'a competent and legal stipend not under the sum of £1000 Scots money yearly.' In *Peters*' case the obligation was to provide the minister with 'a competent and legal stipend not under 950 merks, with 50 merks for communion elements.' In the present case, the decreet, following the terms of the summons, finds and declares that the Magistrates and Town Council 'shall, *inter alia*, be bound and obliged, in all time coming, to provide the minister of the said church in a competent stipend, with a sufficient sum for furnishing communion elements.' Up to this point there is certainly a close resemblance between the several obligations.

"In the present case, however, the decreet (that is to say, the extract decreet) goes on to add to the above general declaration a special finding in the following terms:—'And (the Commissioners foresaid) have found and hereby find 'the Magistrates and Council of Greenock answerable for a stipend to the minister of said new erected parish of £200 per annum, besides communion elements, and that conform to their bond and obligation, dated 10th March 1809, produced in process.'

"This makes it necessary to look a little more closely into the proceedings the effect of which the extract-decreet purports to set forth. These proceedings are narrated in the decreet itself; and the interlocutors and documents to which the decreet refers are to be found in the process, which has been transmitted from the Register House, and to which both parties appeal.

"Now, it is, I think, clear to begin with, that what was contemplated by the several bodies and persons interested, before they came into Court, was not an obligation for stipend, the extent of which was to vary from time to time, but an obligation the extent of which was to be fixed once for all by the Court. That appears from the documents narrated in the decreet, and indeed from the narrative part of the summons. The agreement of the Magistrates was, as expressed in their minute of 30th January 1809, 'to pay such stipend as the Commissioners for Plantation of Kirks may fix upon, not exceeding £150 a-year, with the usual allowance for communion elements.' And a bond for £150 a-year was in fact prepared and lodged in process prior to the first calling of the cause.

"It is therefore clear enough what was at least contemplated. In the summons, however, the Magistrates' agreement is narrated with the omission of the words 'not exceeding £150'—at least these words appear to have been erased—and the conclusion of the summons, as I have already said, is for declarator simply that the Magistrates shall be bound to provide 'a competent stipend'—the amount being left indefinite, and nothing being at least expressed as to its fixture by the Court. If therefore the Court had decerned *simpliciter* in terms of the conclusion thus expressed, I do not at present see that there could have been much doubt.

"But the interlocutor of Court was in fact as follows:—[*His Lordship quoted the interlocutor*]. In other words, the Court did not decern *simpliciter*, but subject to a condition or qualification, the exact effect of which is, as it seems to me, the point on which the case turns. The pursuer says that the Court's requirement of a bond or minute for £200 was a superadded condition, not derogating from the Magistrates' general obligation to pay a competent stipend, but fixing a minimum, and defining the obligation for the immediate future.

"The defenders, on the other hand, say that the adjected clause operated as a qualification of the decreet, and was intended as a definition of the obligation which the Court had been asked to declare indefinitely.

"There is, I am bound to admit, much to say for both of these views. The pursuer's construction is perhaps more in accordance with the practice of the Court of Teinds, which is accustomed to fix stipends subject to augmentation from time to time. On the other hand, the defenders' view is, I think, more in accordance with the natural construction of the writings, and is certainly more in accordance with what we may gather, from the course of the process and the writs produced, to have been the true intent and contemplation of parties. What I have to do is to endeavour to balance these considerations as best I may. In doing so, I have hesitated a good deal, and am not confident that I have reached the right conclusion. On the whole, however, I have come to prefer the defenders' construction of the writings, which constitute or express the judicial contract, and accordingly my judgment must be in the defenders' favour. I propose to pronounce an interlocutor sustaining the defences and assoilzieing the defenders from the conclusions of the summons."

The pursuer reclaimed, and argued—The interlocutor is "decerns as libelled," and the summons concludes for a competent stipend. The interlocutor must therefore be taken to have meant "decern for a competent stipend." The provision as to the £200 provided only for what was to be the stipend meantime, and the obligation to pay that sum was collateral merely, and without prejudice to the general obligation to provide a competent stipend. If the interlocutor be ambiguous, the *contemporanea expositio* of the decree, which finds that the Town Council shall be bound and obliged to provide a competent stipend, and of the Town Council's own minute by which they engage to be answerable for not less than £200, shows that the interpretation contended for by the pursuer is the right one. The only possible explanation of the Town Council's using the words "not less than" is, that the Court of Teinds insisted on the amount of the competent stipend being left open for future reconsideration. Such a demand would be only consistent with the usual practice in the Teind Court. This case is ruled by the case of *Peters* v. *Magistrates of Greenock*, 19 R. 643, and 20 R. (H. of L.) 42, from which it does not materially differ. They also referred to *Rainie* v. *Magistrates of Newton-on-Ayr*, 22 R. 633.

Argued for the defenders—The true question in this case is, what was the judicial contract as finally fixed and determined by the interlocutor, for the interlocutor is the only source from which the terms of that contract can be legitimately ascertained, as it is not ambiguous, and so is not subject to interpretation. The words "as libelled" in the interlocutor do not refer to the conclusions for stipend, but to the conclusions for disjunction and erection only. The obligation to pay £200 is not collateral, for it is not to give bond or security for £200, but "to be answerable for" that sum. The case of *Peters* is distinguished from the present, because there the obligation was to pay a competent stipend not under a certain sum, whereas here the obligation is simply to pay a sum fixed.

At advising—

LORD TRAYNER—The case of *Peters* referred to by the Lord Ordinary presents in its general features considerable similarity to the case now before us. But as the judgment in that case proceeded upon the view which the Court took of the construction and import of the judicial contract there in question, it does and can form no necessary precedent for the decision of the present case. Of course, if the contract there construed, and the contract in this case, were the same, the judgment would be repeated. The defenders, however, contend that this is not so; and say that the contracts are materially different. The Lord Ordinary has given effect to the defenders' contention, although, as he says, with hesitation. I have come to the same conclusion as the Lord Ordinary, and without the hesitation he has felt and expressed. In reaching the opinion which I have formed, I have not, however, taken into account, as the Lord Ordinary has done, any writings or other evidence of a date anterior to the contract itself tending to show what the parties intended by their contract. That course may legitimately be resorted to to throw light upon a contract which is ambiguous, but I do not think this contract is of that character. I think it is explicit enough, and that the rights and obligations thence arising must be determined on the contract as expressed, the contract itself being taken as the final expression of the intention of the parties to it.

The contract or obligation now to be considered is contained in the interlocutor of the Court dated 8th March 1809, whereby the Court decerned "in the disjunction, erection, and annexation *quoad sacra* as libelled, on the Magistrates and Council of Greenock engaging to be answerable for a stipend of £200 sterling per annum, besides communion elements," and appointed them to lodge in process "a minute of Council binding themselves in the above terms." Now, it does not appear to me to be open to any doubt that the decree I have just quoted was pronounced on the condition that the defenders should undertake liability for "a stipend of £200 sterling per annum besides communion elements," and nothing more. In *Peters'* case it was different. The condition of the decree and the obligation undertaken by the defenders there was to provide a legal and competent stipend, not less than a certain fixed sum; what was or might be a legal and competent stipend depended on circumstances as they might emerge, but a legal and competent stipend, whatever that might come to be, was the extent of the obligation undertaken. Here the amount of the obligation is fixed

once for all. I do not understand that the pursuer objects to this view if there was no other consideration in the case. But he thinks he can assimilate this case to *Peters'* case in respect of two circumstances to which I shall now advert. The first of these is, that the interlocutor of the Court in which the obligation is expressed "decerns in the disjunction, erection, and annexation *quoad sacra* as libelled." These last words, according to the pursuers' contention, import into the interlocutor the conclusions of the summons, and among the conclusions there is one that the defenders should be bound and obliged "to provide the minister of the said church in a competent stipend," &c. But that conclusion is not one of those for which decree was given. The decree of disjunction, erection, and annexation "as libelled" does not cover the conclusion as to stipend at all. The decerniture as libelled only applied to the conclusions (1) that certain lands should be disjoined from an existing parish; (2) that these lands should be erected into a new parish; and (3) that the disjoined lands should be annexed *quoad sacra* to the new parish. Decree as libelled was certainly pronounced so far as these conclusions went, but no further. With reference to the conclusion as to stipend, quite separate from the three I have alluded to, no decree was pronounced by the interlocutor of 8th March 1809. If there had been—if, as the pursuer says, there was then pronounced a decree against the defenders for payment of a "competent stipend"—it would have been superfluous to stipulate, as the interlocutor does, that the interlocutor creating the new parish should only become operative on the defenders engaging to be answerable for a fixed stipend of £200 per annum. But, as I have said, the words as libelled have only reference to the conclusions of the summons relative to disjunction, erection, and annexation. The interlocutor is so limited in distinct terms. The Lords "decern in the disjunction, erection, and annexation *quoad sacra* as libelled,"—they decern as libelled in nothing else.

The second matter on which the pursuer specially relies is this, that in the minute of Council lodged by the defenders in compliance with the order contained in the interlocutor above quoted, the defenders undertook to be "answerable for a stipend of not less than £200 sterling per annum," &c. This, he says, shows that the stipend for which the defenders became answerable was a competent stipend, and not less than £200 a-year. I think this is not an admissible reading of the defenders' undertaking. The words "not less" were certainly unnecessary as matter of compliance with the order of Court, and I think the undertaking should be read in connection with the order in obedience to which it was lodged. The defenders were only ordered to lodge a minute in which they undertook to be answerable for £200 a-year. That they undertook to be answerable for not less than £200 a-year cannot in any reason be read as an undertaking that they undertook to be liable for more. The words "not less" had a different signification in the case of *Peters*, but they were there used in a very different connection.

I think the pursuer has failed to show that the defenders are liable to him in any stipend beyond £200 a-year, and that therefore the interlocutor of the Lord Ordinary assoilzieing the defenders should be adhered to.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer—Dean of Faculty, Q.C. — M'Lennan. Agents — Duncan & Black, W.S.

Counsel for the Defenders—Ure—Sym. Agents—Cumming & Duff, S.S.C.

Wednesday, January 22.

SECOND DIVISION.

STEWART'S TRUSTEES *v.* STEWART.

Succession — Fee and Liferent — Fee with Protected Succession—Intestacy.

A testator by his trust-disposition and settlement directed his trustees to convey to the children of his marriage his whole means and estate, heritable and moveable, share and share alike, subject in the case of daughters to the proviso, that upon their severally attaining majority, the trustees were to reinvest their shares, "taking the conveyances or securities thereof in favour of my said daughter or daughters in liferent for their liferent use allenarly, and to the child or children to be lawfully procreated of her or their bodies in fee." By a supplementary deed of settlement the trustees were directed, "upon my daughters attaining majority or being married, . . . to denude themselves of their, my said daughters' . . . respective portions of my estate in terms of" the above proviso of the trust-disposition and settlement. The trustees conveyed the share of a daughter to trustees nominated by her, the destinations being taken in the terms above quoted. She died without issue, leaving a settlement by which she bequeathed her share to certain beneficiaries. *Held* (following *Lindsay's Trustees* v. *Lindsay*, 8 R. 281; *Dalglish's Trustees* v. *Bannerman's Executors*, 16 R. 559; and *Logan's Trustees* v. *Ellis*, 17 R. 425) that under the destination in her father's settlement the fee of her share had vested in her, defeasible only in the event of her having issue, and was consequently carried by her will.

Mr James Stewart of Clydebank, Greenock, died on 11th November 1837, leaving a trust-