Guild Court for warrant to erect stables and an office on the ground in question; and that he was ordered to call the conterminous proprietors as respondents. Thereafter these appeared and stated the objections referred to in the minute of amendment.

Argued for the defender—The defender should be allowed to amend his record as proposed unconditionally. He had a written assurance by his landlord to start with, that the ground was his and that it was unrestricted. It was no part of the defender's duty to investigate closely that statement of his landlord's; and he only became aware of the objections to the landlord's title, and of the restrictions and servitudes over the ground, when the conterminous proprietors lodged answers in the Dean of Guild Court. It was therefore no fault of his that in his original defences he did not take up his present position; the fault lay with the pursuer. The question of expenses should at all events be reserved till the event proved whether the defender's new defence was well founded.

Argued for the pursuer—The defender should be allowed to amend his record as proposed only upon condition of paying the whole expenses of the cause from the closing of the record. *Keith* v. *Outram & Company*, June 27, 1877, 4 R. 958; *Morgan, Gellibrand, & Company* v. *Dundee Gem Line Steam Shipping Company*, December 9, 1890, 18 R. 205; *Guinness, Mahon, & Company* v. *Coats Iron and Steel Company*, January 21, 1891, 18 R. 441, referred to.

LORD PRESIDENT—It was not, I think, seriously maintained by the respondent that these new statements contained in the minute of amendment are irrelevant, and accordingly counsel for the respondent very properly did not seriously resist the motion that the record should be amended in this sense. The real difficulty is as to the terms.

Now, the case made by the appellant upon this head is this. He took the ground in question on the express condition that it was unrestricted, and he says that, receiving a responsible and authoritative statement to that effect, he was not bound to make sceptical inquiry into that statement. He has only in the course of exercising his rights as tenant found out that there are restrictions, and accordingly he maintains that he is excusable for having omitted to state as his original defence what was not within his knowledge. That may turn out to be well founded in fact or it may not; and according as the one or the other event happens would seem to depend the question whether the appellant is to pay for the costs which have, according to the hypothesis, been thrown away.

Now, we might make the appellant pay the whole costs of the case as hitherto conducted. If he then turned out to be right, he would seem to be very grievously treated by our award. On the other hand, if we were to allow him to put on his amendment on nominal terms, I must say I cannot think that would be logical. It would be either too much or too little. Under the Act of Parliament we have a free hand to determine the terms on which an amendment should be allowed, and I think in the present case the proper course is to make the appellant find caution for some sum which one would estimate as being the possible amount of the expense which will have been lost. I am not an auditor, but perhaps £30 would express that view, and I would therefore propose that this course should be taken. I am conscious that there is no precedent for this, but it is certainly within the terms of the statute, and seems the most logical way for giving it effect.

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

The Court pronounced this interlocutor:—

"Open up the record, allow the proposed amendment upon the appellant's finding caution for expenses to the extent of £30 to the satisfaction of the Clerk of Court; upon such caution being found and amendment made, allow the respondent to lodge answers to such amendment."

Counsel for the Pursuer—J. Wilson—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C.—Hunter. Agent—James F. Macdonald, S.S.C.

Friday, February 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

RAINIE *v.* MAGISTRATES OF NEWTON-ON-AYR.

(*Ante*, June 6, 1895, 32 S.L.R. 501; 22 R. 633.)

Church—Minister—Stipend—Amount of Competent and Legal Stipend.

Circumstances in which, having regard to the numbers and character of the population of the parish, the duties incumbent on the minister, and the emoluments of neighbouring ministers, the Court (*aff.* judgment of Lord Stormonth Darling) *fixed* the sum of £300 per annum as the amount of "a competent and legal stipend" with which the magistrates of a burgh were bound, under a decree of disjunction and erection, to provide the minister of a parish.

This was an action raised by the Reverend William Rainie, minister of the parish of Newton-on-Ayr, against the Magistrates, Councillors, and Freemen of the burgh of Newton-on Ayr, concluding for declarator that the defenders were bound to provide him with a competent and legal stipend, suited to the circumstances of the time and the position and duties of the benefice. There was further a petitory conclusion

for payment to him of £400 a-year as a competent and legal stipend, or of such other sum as in the circumstances should appear to the Court to be a competent and legal stipend during the pursuer's lifetime and his serving the cure.

At the previous stage of the case the Court pronounced a finding in terms of the declaratory conclusion of the summons; and the case was subsequently enrolled before the Lord Ordinary to hear parties on the petitory conclusion.

The decree of disjunction and erection whereby in 1779 Newton-on-Ayr was erected into a separate parish, besides binding the magistrates to provide the minister with a competent and legal stipend, bound the community to furnish the minister with a house, a cow's grass, and an allowance for communion elements and expenses.

The pursuer lodged a minute in which he made the following statements:—(1) The whole emoluments of the benefice, including a small endowment of £9, 10s. per annum from the "Cowfaulds" bond, fell from £307 in 1882, the year after he became minister of the parish, to £283 in 1891, and from that to £197 in 1895. Up to 1892 the defenders had been in the habit of paying the minister the minimum stipend (£60) fixed by the decree of erection, and a gratuity of £90 or thereby per annum, the balance of the emoluments being made up principally by an Exchequer grant of £90. In 1892 the gratuity was withdrawn. (2) The population of the parish rose from 6511 in 1881 to 8564 in 1891. It was mostly a working-class population, with a considerable number of poor, and fluctuated to a considerable extent from time to time. The number on the communion roll was 919 in October 1895. Besides holding two services on Sunday, the pursuer had much work in the way of visiting the sick and attending to the necessities of the poor. The average annual number of baptisms, marriages, and funerals at which he officiated amounted respectively to 12, 20, and 10 per cent. of the births, marriages, and deaths registered in the burgh and parish of Ayr. (3) The average stipend throughout the Presbytery was £294, while the number on the Newton communion roll was double the average number in the Presbytery, and the population of the parish more than three times the average in the Presbytery. The average annual emoluments of the parish ministers of Ayr were £382. Of the other parishes in the Presbytery which most closely resembled Newton none had a stipend of less than £335. The ministers of the Free and United Presbyterian Churches in Newton-on-Ayr received respectively £300 a-year and a manse, with all taxes paid, and £360 a-year and a manse. (4) The cost of living had greatly increased; the pursuer was married and had a family; and the calls upon his purse for the poor of the parish were heavy. (5) The value of the manse, £36 a-year, should not be taken into account in fixing the stipend.

The defenders lodged answers to the pursuer's minute, in which they stated:—(1) The gratuity was only withdrawn temporarily to meet the expense of repairing the manse (£600). All sums received by the minister from other sources (*e.g.* the Exchequer grant of £90 per annum, the value of the glebe, the cow's grass, the communion allowance, the Cowfaulds bond, and the value of the manse) should be computed *pro tanto* towards any stipend that might be decerned for. (2) The parish was amply provided with places of worship. A large proportion of the communicants paid no seat rents, and the seat rents actually raised only amounted to about £160 per annum.

The defenders further compared certain parishes in the Presbytery with Newton-on-Ayr, to show that the amount of stipend sought by the pursuer was excessive. They also maintained that the value of the manse, it being an unusual part of the emoluments in a burghal parish, and Kilmarnock being the only burgh in the county where the minister had one, should be taken into account in fixing the stipend.

On 6th November 1896 the Lord Ordinary (STORMONTH DARLING) found the pursuer entitled to receive from the defenders stipend at the rate of £300 a-year, as a competent and legal stipend, from and after the term of Whitsunday 1894, so long as he should serve the cure of Newton-on-Ayr, and that in addition to the communion allowance, allowance for cow's grass, and interest payable under Cowfaulds bond, and granted decree accordingly, reserving to the pursuers and his successors in the cure right to apply for an increase of the said stipend, and the right of the defenders and their successors in office to apply for a reduction of the said stipend.

Opinion.—"I have carefully considered the circumstances of this benefice as set out in the minute and answers on which the arguments of counsel proceeded. In particular, I have had regard to the allowances made down to 1892, by a committee representing the defenders, in supplement of the regular stipend. These allowances were made in the knowledge that owing to the fixed stipend being only £60, the minister received a grant of £90 from Exchequer, which will now of course, be discontinued, and that his average receipts from all sources for ten years prior to 1892 were thus brought up to close on £300 a year. I have accordingly taken that sum as a fair estimate of what his regular stipend ought to be, but he will also be entitled to receive from the defenders the communion allowance and the allowance for cow's grass, which form separate obligations in the decree of erection, and likewise a sum of £9, 10s., arising from a sale of part of the glebe. The return from the glebe itself is small, and would hardly affect the result, even if, contrary to the practice of the Teind Court, it were taken into account in fixing the amount of a competent stipend. The income of the Wood bequest cannot, of course, be taken into account as a means of diminishing the burden resting on the defenders (late Lord President in *Kilmalcolm* case, 3 R. 32)."

The defenders reclaimed.

The arguments of the parties are sufficiently indicated in the foregoing abstract of the pursuer's minute and the defenders' answers thereto. On the point whether the value of the manse should be taken into account, the defenders cited *Stewart* v. *Glenlyon*, May, 20, 1835, 13 S. 787.

LORD PRESIDENT—At this stage of the case the question to determine is, what is a competent and legal stipend computed upon the footing that the minister is, as the decree bears, to have over and above it a house and a cow's grass and communion elements. Now, that is a question to be determined with reference to the circumstances of the incumbency, and light doubtless is to be derived from similar or nearly similar cases, especially in the neighbourhood, and from what may be called the general payment in the profession. Now, the Lord Ordinary who decided the case happens to have had considerable experience in determining, I will not say the same question, but the similar question which arises when augmentations are asked for in the Court of Teinds, and though he has specifically mentioned a set of considerations as to the previous practice in this parish, which perhaps have less bearing, his primary proposition is that he has carefully considered the circumstances of this benefice as set out in the appendix containing the minute and answers. Now, the minute and answers carefully go over the whole range of considerations which seem to be relevant to the determination of this question. I shall only say that looking to the population of this place, to the duties which the local circumstances seem to give rise to, to the character of the population, and having regard also to the emoluments of neighbouring ministers, it seems to me that the Lord Ordinary's figure is a very fair one.

I should perhaps consider it legitimate in the present case to take into account the existence of the glebe. As I have already mentioned, the manse and the cow's grass are expressly declared in the decree to be over and above the stipend, and therefore they cannot be taken into account. But suppose you do take into account the fact that this benefice has the advantage of a glebe, that would not substantially displace the legitimacy of the Lord Ordinary's conclusion, and I say that having regard to the other and similar cases noted in the various papers. Doubtless this is a question which might strike different minds differently, but upon the whole I am satisfied with the Lord Ordinary's decision.

LORD ADAM—So am I. I think the true question is whether this is a competent and legal stipend, giving effect to the considerations your Lordship has mentioned. I think the most material consideration to look to is the circumstances of the benefice itself, and what is the sort of average stipend in the surrounding and neighbouring parishes. Looking at the statements here, I do not think that the sum fixed by the Lord Ordinary is anything else than a competent stipend.

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.

Friday, February 26.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BRINGLOE (FERRIE'S *CURATOR BONIS*) *v.* COWAN'S TRUSTEES.

Judicial Factor—Curator Bonis—Investment of Funds—Harbour Trust Bonds—Real or Heritable Security—Security of Rates Levied by Municipal Corporation—Trusts (Scotland) Amendment Act 1884 (47 *and* 48 *Vict. cap.* 63), *sec.* 6.

A harbour trust, composed of the magistrates and town council of a burgh and of certain members elected by shipowners and others, was authorised to borrow money on mortgage by a private Act of Parliament, which enacted that upon the application of any creditor the payment of whose principal and interest should be in arrear to the extent of £5000, a judicial factor should be appointed to receive the whole or part of the rates, duties, and other revenues of the trust until all arrears were paid off.

A *curator bonis* lent £1700 of the curatorial estate to the harbour trust on a bond by which the trustees assigned to him all and sundry the rates, duties, and other revenues of the trust, subject to the provisions of the said Act, until the said sum should be paid.

Held (*rev.* judgment of Lord Pearson) that this was not a legitimate investment of curatorial funds either at common law or under the Trusts (Scotland) Amendment Act 1884, and that the *curator bonis* was therefore liable for any loss incurred on the investment, on the ground (1) that it was not an investment in real or heritable security, and (2) that it was not an investment in bonds or debentures secured on rates or taxes levied by a municipal corporation.

Greenock Harbour Trustees, January 31, 1888, 15 R. 343, *followed.*

Breatcliff v. *Bransby's Trustees*, January 11, 1887, 14 R. 307; *Grainger's Curator*, February 23, 1876, 3 R. 479; and *Lloyd's Curator*, December 1, 1877, 5 R. 289, *distinguished.*

Haldane v. *Girvan and Portpatrick and Junction Railway Company*, March