and in these circumstances I think she ought to be allowed to make those plans herself.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I agree with your Lordship that the petitioner is entitled to an order for the delivery of her child into her custody, but I emphatically dissent from the grounds upon which that judgment is to be pronounced. I do not need to express reasons for my dissent, because that sufficiently appeared from the opinion which I formerly delivered.

LORD CULLEN—I agree with the majority of your Lordships.

The Court granted the prayer of the petition.

Counsel for Petitioner—R. M. Mitchell. Agent—Thomas Crow, Solicitor.

Counsel for Respondents—Burnet. Agent—James Gray Reid, Solicitor.

Saturday, March 12.

SECOND DIVISION.

[Lord Hunter, Ordinary.

RATTRAY AND OTHERS *v.* CORPORATION OF GLASGOW.

Burgh — Church — Minister — Stipend — Obligation to Provide a Competent and Legal Stipend.

The ministers of three city churches in Glasgow brought separate actions against the Corporation for declarator that the pursuer, as minister serving the cure of the church in question, "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 in all time coming during his lifetime and serving the said cure," and for "payment to the pursuer as minister serving the cure of the said church of the sum of £900 sterling per annum as a competent and legal stipend, or such other sum as in the circumstances shall appear to our said Lords to be a competent and legal stipend." In each case the pursuer averred that his stipend had ceased to be a competent and legal stipend, and, founding upon the terms of (1) certain grants of land by the Crown, (2) a charter granted by King Charles I, and (3) a bond granted by the Corporation, and also upon certain actings of the Corporation, pleaded that the defenders were bound to provide him with a competent and legal stipend, which he estimated at £900 sterling per annum. Terms of the deeds founded on and circumstances in which the Court *dismissed* the actions.

Burgh — Church — Minister — Stipend — Obligation to Provide "a Competent and Legal Stipend not under" a Certain Sum without Prejudice to an Augmentation.

In three successive actions of erection brought by the Town Council of Glasgow in the Court of Teinds in 1782, 1818, and 1820 respectively, the Court granted decrees of erection of three city churches. Each of the decrees contained a clause binding the Town Council and community to provide the minister with a stipend, which was described in the earliest of the decrees as "a competent and legal stipend not under 2000 merks" and in the two later decrees as "a competent and legal stipend not under the sum of £400 sterling, without prejudice to the said . . . minister receiving such additional stipend as the pursuers may afterwards think fit to confer." Each of the ministers brought a separate action against the Town Council for declarator that under and by virtue of the decree of erection the pursuer, as minister serving the cure of the church in question, "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 in all time coming during his lifetime and serving the said cure," and for "payment to the pursuer as minister serving the cure at the said church and district thereof of the sum of £900 sterling per annum as a competent and legal stipend, or such other sum as in the circumstances shall appear to our said Lords to be a competent and legal stipend," and averred that his stipend had ceased to be a competent and legal stipend. The Court, *following Peters* v. *Magistrates of Greenock*, 1893, 20 R. (H.L.) 42, 30 S.L.R. 937, *granted* the decree concluded for.

Burgh — Church — Minister — Stipend — Obligation to Provide "a Competent and Legal Stipend of" a Certain Sum—Obligation to Provide "a Competent and Legal Stipend to the Same Amount as" Certain Other Ministers.

In 1763 in an action of erection brought by the Town Council of Glasgow in the Court of Teinds the Court granted a decree of erection of a city church, which contained a clause binding the Town Council and community to provide the minister with "a competent and legal stipend of 2000 merks." In 1808, in an action of transportation brought by the Town Council in the Court of Teinds, the Court granted a decree of transportation which contained a clause binding the Town Council to provide the minister "with a competent and legal stipend to the same amount as the ministers in the other parish churches in the said city." The minister was at the date of the decree of erection receiving the same stipend as the other city

ministers then enjoyed. In 1920 the minister brought an action against the Town Council for declarator that under and by virtue of the decree of erection the pursuer, as minister serving the cure of the church, "was and is entitled to be furnished and provided by the defenders, and 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 in all time coming during his lifetime and serving the said cure," and for "payment to the pursuer as minister serving the cure of the said church of the sum of £900 sterling per annum as a competent and legal stipend, or such other sum as in the circumstances shall appear to our said Lords to be a competent and legal stipend," and averred that his stipend had ceased to be a competent and legal stipend. The Court *dismissed* the action, *holding* that the decree of erection taxed the stipend at 2000 merks, and that the decree of transportation did not alter the minister's rights as fixed by the decree of erection.

The Rev. William Rattray, minister of the Tron Church, Glasgow, the Rev. David Fraser Liddle, minister of Blackfriars Church, Glasgow, the Rev. Gordon Quig, minister of St Paul's Church, Glasgow, the Rev. Duncan Alexander Cameron Reid, D.D., minister of St George's Church, Glasgow, the Rev. Archibald Maclaren, minister of St Enoch's Church, Glasgow, the Rev. Andrew James Campbell, minister of St John's Church, Glasgow, and the Rev. John D. Glass, minister of St James' Parish Church, Glasgow, *pursuers*, each brought a separate action against the Corporation of the City of Glasgow, *defenders*, in which the conclusions were as follows—"Therefore it ought and should be found and declared by decree of the Lords of our Council and Session that *under and by virtue of* (*a certain specified decree of erection*)—[the words in italics were absent from the conclusions of the actions at the instance of the Rev. William Rattray, the Rev. David Fraser Liddle, and the Rev. Gordon Quig]—the pursuer as minister serving the cure of [the church in question] was and is entitled to be furnished and provided by the defenders, and 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 in all time coming during his lifetime and serving the said cure: And the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuer as minister serving the cure of the said church and district thereof of the sum of £900 sterling per annum as a competent and legal stipend, or such other sum as in the circumstances shall appear to our said Lords to be a competent and legal stipend, and that at two terms in the year, Whitsunday and Martinmas in equal portions, beginning the first half-yearly payment thereof as at the term of Whitsunday 1920 and the next half-yearly payment at the term of Martinmas following, and so forth half-yearly and termly during the lifetime of the pursuer and while he serves said cure, with the interest of each term's payment at the rate of 5 per cent. per annum from the term at which the same falls due until paid, 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."

The terms of the deeds founded on and the averments of the parties sufficiently appear from the opinion of the Lord Justice-Clerk, *infra*.

The pursuers the ministers of the Tron Church, Blackfriars Church, and St Paul's Church, pleaded—"The defenders being bound to provide the pursuer as minister of said church with a competent and legal stipend, and in the circumstances condescended on a stipend of £900 being a competent and legal stipend, the pursuer is entitled to decree as concluded for."

The pursuers the ministers of St Enoch's Church, St George's Church, St John's Church, and St James' Church pleaded—"1. Under the decree of erection" (*founded on in each case*) "the defenders are liable in payment of a competent and legal stipend to the pursuer as minister of the said church. 2. In the circumstances condescended on the pursuer is entitled to decree for payment of a stipend of £900 as concluded for, as the competent and legal stipend due to him as minister foresaid by the defenders."

The cases were heard together in the procedure roll.

On 25th November the Lord Ordinary (HUNTER) dismissed the actions at the instance of the ministers of the Tron, Blackfriars, St Paul's, and St George's, and in the actions at the instance of the ministers of St Enoch's, St John's, and St James' found and declared in terms of the declaratory conclusions of the summons, appointed the causes to be put to the roll that parties might be heard on the petitory conclusions, and granted leave to reclaim.

Opinion.—"Actions have been raised by the ministers of seven of the churches of Glasgow against the Corporation of that city. In each case the pursuer seeks (*first*) declarator that the defenders are bound to furnish and provide him with a competent and legal stipend suited to the circumstances of the time and the position and duties of the benefice during his lifetime and his serving the cure; and (*second*) decree against the defenders for payment of £900 as a competent and legal stipend, or such other sum as in the circumstances shall appear to be a competent and legal stipend. The churches referred to are the Tron, Blackfriars, St Paul's, St George's, St Enoch's, St John's, and St James'.

"A short account of the history of these and three other churches of the city of Glasgow will be found in a note at p. 175 of Part I of the Charters and other Documents relating to the City of Glasgow, A.D. 1175-

1649, edited by Sir James Marwick, Town Clerk of Glasgow. For the purposes of the present opinion it is not necessary to refer to this note in detail. I quote the following passage—'While the minister of the High Church draws his stipend from the teinds of the entire original parish, the ministers of the other nine parishes *quoad sacra* receive their stipends out of the common good or general property of the burgh, into which the seat rents of all the churches, including the High Church, have been regularly paid since seat rents were first levied.' The High Church is the Cathedral, with which this case is not concerned. The pursuers in the present actions are all receiving stipends of £425, a sum fixed by the defenders for the city ministers in 1830. Their present claim depends upon the nature and extent of the legal obligation, if any, resting upon the defenders towards the pursuers.

"I propose to deal first with the last four mentioned of the seven city churches, as these four were all erected by decree of the Court of Teinds on application made to that Court by the Corporation, on whom the patronage of the churches and the right to levy the seat rents were conferred.

"In the decree relative to St George's it appears that the summons had proceeded on the narrative that the Old Wynd Church of Glasgow had been condemned as insufficient and a new church had been built by the Corporation, and that as the endowing of the minister with a competent stipend out of the town's revenues would be a public benefit they had by Act of Council allocated to the minister a yearly stipend of 2000 merks Scots money, being the legal stipend or annuity settled by the Magistrates and Town Council on their other stipendiary ministers in the city, without prejudice to the said minister receiving such additional stipend over and above the legal stipend as the Council by their Act should please to confer and bestow on him to make him equal to the town's other ministers. The Court of Teinds found and declared that a seventh church should be planted and erected in the city of Glasgow under the burden, *inter alia*, imposed upon the Town Council and community of providing the ministers who should serve said church with a competent and legal stipend of 2000 merks.

"In the decree of erection of St Enoch's, dated 17th July 1782, the Magistrates, Town Council, and community are taken bound to furnish and provide the ministers who should serve at the church with a competent and legal stipend not under 2000 merks.

"From an extract from the decreet of erection of St John's dated 18th February 1818 it appears that the Corporation were taken bound to furnish and provide the ministers who should serve the cure at said church with a competent and legal stipend not under £400 sterling without prejudice to the said ninth minister receiving such additional stipend as the pursuers (*i.e.*, the Lord Provost and others . . . for themselves and as representing the whole body and community of the city) might afterwards think fit to confer.

"In the case of St James the decreet of erection was dated 7th June 1820. From the extract it appears that the decerniture was in terms of the libel, and the obligation imposed upon the Corporation was to provide the minister with a competent and legal stipend not under the sum of £400 sterling, without prejudice to the said tenth minister receiving such additional stipend as the pursuers might afterwards think fit to confer. It may be noted that by this decreet of the Court of Teinds the city and parish of Glasgow was divided into ten separate parishes *quoad sacra*.

"In the case of *Peters* v. *The Magistrates of Greenock*, 1892, 19 R. 643, and 1893, 20 R. (H.L.) 42, the minister of one of the churches in Greenock brought an action similar to the present against the Magistrates of that town. He founded upon a decree pronounced by the Court of Teinds in 1741 that the bailies, feuars, and inhabitants of the town were bound to provide the minister of the new church to be erected with a competent and legal stipend not under 950 merks. The House of Lords held that the decree of the disjunction and erection embodied a judicial contract, to which the predecessors of the defenders were parties, and that on a just construction thereof the defenders were bound to provide the pursuer and his successors in office with a 'legal and competent stipend suited to the circumstances of the time and the position and duties of the benefice.'

"The Lord Chancellor in the course of his opinion said—'It was argued that the authorities of the burgh could not in the year 1741 lawfully undertake such an obligation as this so as to bind their successors. I cannot concur in this view. The town could not of itself have erected the new parish. It was necessary for that purpose to resort to the Court of Teinds, and that Court was, I think, entitled to make it a condition of the decree of disjunction and erection that proper provision should be made for the stipend of the minister.' Lord Watson said—'The language in which the obligation is expressed does not favour the suggestion that the minister's stipend was to consist of 950 merks, it being left to the burgh managers to determine whether they would or would not make a further allowance. 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; or that the Court meant to give the seat rents to the burgh without any obligation to apply the surplus towards augmenting the stipend, which is the contention of the appellants.'

"The only case previous to the *Greenock* case dealing with the construction of similar language in a decreet of the Court of Teinds is *Caesar* v. *Magistrates of Dundee*, reported in a footnote to the *Presbytery of Dundee* v. *The Magistrates of Dundee*, 20 D., at p. 859. The decision was by Lord Wood, who said—'It appears to the Lord Ordinary that the terms of the decreet, according to their natural or *prima facie* meaning, do not import that a stipend being once regularly

fixed, which in amount was a competent and legal one at the time, it was thereby to become the permanent and unchangeable stipend in all time coming, the obligation in the decreet upon the burgh as regards the extent of stipend exigible being thereby exhausted. It is thought that the obligation to provide "a competent and legal stipend" out of the revenue of the burgh, not under the sum of 1000 pounds Scots money "yearly," had in view not merely that when the decree was first given effect to the minister should be supplied with a sum of stipend at that date sufficient for his suitable aliment and support, but the imposing upon the burgh a continuous obligation to supply such stipend in future according to existing circumstances at the time.'

"A similar result was reached in the case of *Rainie* v. *Magistrates of Newton-on-Ayr*, 1895, 22 R. 633, an argument being rejected that the true reading of the decree was that the minister was not entitled to get more than £60 unless the seat rents, which constituted the contingent fund referred to in the decree, were sufficient to allow of an augmentation being made, and unless the committee in charge of those funds resolved to make such augmentation.

"In contrast to the decisions to which I have referred, the case of *Thomson* v. *Magistrates of Greenock*, 1896, 23 R. 405, may be noted. In this case the magistrates of a burgh had brought a summons in the Court of Teinds concluding for disjunction and erection, and also concluding that they should be bound to provide the minister of the new parish in a 'competent stipend.' The Court pronounced an interlocutor 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 a year. It was held by the Second Division, affirming the judgment of Lord Kyllachy, that the Court of Teinds had decerned 'as libelled' only in regard to the conclusion for disjunction, erection, and annexation *quoad sacra*, and that the Magistrates were liable for a stipend of £200 a-year only.

"The cases before me, so far as the churches erected under decree of the Court of Teinds are concerned, fall to be decided upon the principles of interpretation recognised in the decisions mentioned. So far as St John's and St James' are concerned, the obligation imposed upon the Corporation is similar to that in the case of the *Magistrates of Greenock*, except that there is a provision that the Magistrates may increase the stipends as they may see fit. The addition of these words, it was maintained for the defenders, left the periodical augmentation of the stipends of the ministers of these churches entirely in the discretion of the Magistrates. This does not appear to me to be a sound argument. What is conferred upon the Magistrates is a right to make a supplementary allowance over and above the legal and competent stipend. There is no qualification of the obligation to provide such a stipend, and the determination of that matter rests not with the Magistrates but with the Court.

"St Enoch's appears to me to be in a similar position. In fact, in the excerpt from the extract decree with which I was provided, there is nothing to indicate any qualification of the obligation or to afford any distinction between this case and *Peters'* case.

"St George's is in a different position. The obligation imposed in that case is to provide a competent and legal stipend of 2000 merks. These words appear to me to fix at a certain amount the extent of the obligation. The words 'not under' are left out, and there does not therefore appear to be any ground for increasing the amount on a change of circumstances. In this case the grant of any additional stipend to put the minister on a footing of equality with the other ministers of the city is left to the discretion of the Magistrates. It may appear anomalous that there should be this distinction between the rights of different ministers in the city, but the decision in the two Greenock cases, which are both binding upon me, show that such differences in the position of different ministers in the same town occurred in other burghs.

"The situation as regard the three earlier churches, *i,e.*, the Tron, Blackfriars, and St Paul's, which were erected before the establishment of the Court of Teinds in 1707, remains to be considered. In the records in the actions relative to these churches the pursuers state—'Prior to the year 1636 several gifts of lands were made by the Crown to the defenders' predecessors in office on consideration of maintaining and upholding certain churches then erected in Glasgow. On 16th October 1636 King Charles I confirmed all the charters, writings, rights, and privileges previously granted to the defenders' predecessors in office, and that, *inter alia*, on consideration of their paying yearly to the ministers of these churches of a competent and sufficient stipend.' They also found upon a bond, dated 21st April 1649, granted by the Corporation in favour of the pursuer's predecessors in office under which the former undertook payment of reasonable and competent stipends to the ministers of these churches. The reference in the charter to a competent stipend occurs in the narrative, and there is nothing to show that a continuing obligation of a varying amount was undertaken or imposed. So far as the bond is concerned the obligation is of fixed amount. These points are practically admitted by the pursuer's counsel at the debate. They maintained, however, that all the city churches had in the past been treated by the Magistrates as on a footing of equality, and that I ought therefore to find in favour of the existence of an obligation similar in character to that imposed by the Court of Teinds proved from the actings of the defenders and their predecessors in office. Proof was not asked upon any question of fact, and I gather from the statement made to me that it was admitted that an allowance of proof would not assist the pursuers' case. I do not think that I am entitled to assume in the pursuers' favour that the defenders were under

legal obligation to make the different augmentations of stipend which were given. Their actings are equally consistent with their having in their discretion made allowances in excess of what they could have been forced in a court of law to make.

"As a result of the foregoing opinion I shall, in the actions at the instance of the ministers of St Enoch's, St John's, and St James', give decree in terms of the declaratory conclusions of the summonses, and appoint the causes to be enrolled that the parties may be heard on the petitory conclusions. The other four actions will be dismissed."

In the actions at the instance of the ministers of the Tron, Blackfriars, St Paul's, and St George's the pursuers reclaimed, and in the actions at the instance of the ministers of St Enoch's, St John's, and St James' the defenders reclaimed.

Argued for the pursuers—(1) With regard to the Tron Church, Blackfriars Church, and St Paul's Church, the judgment of the Lord Ordinary was wrong. The Acts of the Privy Council, the grants of land by the Crown, the charter of King Charles I, the legislation of the period, and the bond by the Corporation instructed a right to a competent and legal stipend, and the augmentations given in the past by the Corporation were a recognition of the right. The following authority was referred to—*Wishart* v. *Edinburgh Magistrates*, 1766, 2 Pat. Ap. 118. (2) With regard to St George's Church the judgment of the Lord Ordinary was wrong. The decision in *Peters* v. *Greenock Magistrates*, 1892, 19 R. 643, 29 S.L.R. 507, 1893, 20 R. (H.L.) 42, 30 S.L.R. 937, did not turn on the use of the words "not under." (3) With regard to St Enoch's Church, St John's Church, and St James' Parish Church, the judgment of the Lord Ordinary was right. The following authorities were referred to—*Peters* v. *Greenock Magistrates*; *Thomson* v. *Greenock Magistrates*, 1896, 23 R. 405, 33 S.L.R. 293; *Rainie* v. *Magistrates of Newton-on-Ayr*, 1895, 22 R. 633, 32 S.L.R. 501; *Caesar* v. *Magistrates of Dundee*, 1848, 20 D. 859; Erskine i, 5, 23.

Argued for the defenders—(1) With regard to the Tron Church, Blackfriars Church, and St Paul's Church, the judgment of the Lord Ordinary was right. The grants of land, &c., founded on by the pursuers did not instruct an obligation, contractual or otherwise, on the Corporation to augment the original stipends, and, moreover, the statutory validity of the Acts of the Privy Council was doubtful. The following authorities were referred to — *Clapperton* v. *Edinburgh Magistrates*, 1840, 2 D. 1385; Duncan, Parochial Ecclesiastical Law, p. 297; Erskine, i, 5, 23. (2) With regard to St George's Church, the judgment of the Lord Ordinary was right. (3) With regard to St Enoch's Church, St John's Church, and St James' Parish Church, the judgment of the Lord Ordinary was wrong. The following authorities were referred to — *Peters* v. *Greenock Magistrates*, *cit.*; *Thomson* v. *Greenock Magistrates*, *cit.*, *per* Lord Kyllachy (Ordinary) at 23 R. 409, 33 S.L.R. 295; *Kilmarnock Magistrates* v. *Aitken*, 1849, 11 D. 1089.

At advising—

LORD JUSTICE-CLERK — These actions, seven in number, may be divided into two main groups.

The first group includes the three oldest churches, viz., the Tron, Blackfriars, and St Paul's, as to which no decrees of erection are produced or founded on.

The second group includes the other four churches, viz., St George's, St Enoch's, St John's, and St James', as to which decrees of erection are produced and founded on, though there are differences between the several decrees which require to be taken notice of.

In the first group the pursuers are the incumbents of the three churches named, and they ask that the present stipend of £425 should be increased to £900, payable to the pursuers so long as they remain incumbents of these churches, beginning as from Whitsunday 1920, with right to apply for an increase if need be. As regards this group the case made on the record, so far as documents are concerned, is based on (*a*) a charter of Charles I dated 16th October 1636, and (*b*) a bond by the defenders' predecessors in favour of the pursuers' predecessor dated 21st April 1649. It is also averred in each of the actions that prior to 1636 certain grants of lands were made by the Crown to the defenders' predecessors, under obligation to maintain "and uphold certain churches then erected in Glasgow." This latter averment appears to me *ex facie* to be irrelevant and wanting in sufficient specification, and the argument addressed to us has not changed my opinion on this point. It went no further indeed than this, that the pursuers maintained that certain lands had been granted as above stated without, however, being able to condescend on any particulars as to what the specific lands were, or what was the extent of the obligation which was imposed on or undertaken by the defenders as regards any of the three churches I am now dealing with in respect of the grants. I am unable to find any sufficient support for a decree in terms of the conclusions of any of the actions I am now dealing with based on these alleged grants.

As regards the charter and the bond specially referred to, on a fair and proper reading of them they are not in my opinion sufficient to support the pursuers' conclusions. There is only one plea put forward by each of the pursuers in these actions. That plea is based on this proposition that the defenders are bound to provide the pursuers with a competent and sufficient stipend, or "a competent and legal stipend," which is the language used in the conclusions of the summons.

The question at present to be dealt with then seems to me to be—"Have the pursuers fixed on the defenders an obligation to pay to each of the pursuers a competent and sufficient, or competent and legal, stipend, increasing from time to time as the circumstances of the day require?" It

was decided by cases raised in the last century, and notably by the case of *Peters*, that such an obligation may be imposed on and undertaken by a municipal corporation, and is enforceable by the incumbent for the time against the corporation. But that case, and the subsequent case of *Thomson*, show that such a question falls to be determined on the ordinary principles of contract law and legal construction.

Are then the charter and bond founded on sufficient by their terms to prove that the defenders are under such an obligation as the pursuers contend for?

The charter of 1636 narrates the many and varied enterprises, works, and duties which the Corporation of Glasgow has entered upon, performed, and undertaken for the public benefit. It also contains in its narrative this clause—"And taking into consideration their care and charges in providing a minister to that church within the said burgh of Glasgow, called the Black Friar Kirk, and their heedful concern for the repair and enlargement thereof, and provision of a constant local stipend to the minister serving the cure thereat, and in building and repairing that other church called the New Church of Glasgow situated in the Trongate thereof [the Tron Church] with a tower corresponding thereto." It then confirms prior charters, gifts, grants, "right of patronages" made and granted to the burgh of Glasgow, and the rights enjoyed by the churches within the said burgh of Glasgow, and a charter and gift of the church called Black Friar Church, beside the College of Glasgow, and of the right of patronage of the same, dated 1st July 1636. It further narrates that "it is well known to our Lords of Council and Exchequer that the provosts, bailies, and councillors of our said burgh have not only built and enlarged the foresaid church called the New Church of Glasgow, but have also provided the same with a minister, to whom they pay yearly a competent and sufficient stipend for his service; and we being mindful of their zeal and piety in that behalf, Therefore we, with advice and consent foresaid, have made and appointed, and by the tenor of our present charter make and appoint, the bailies, councillors, and community of our said burgh, and their successors for ever, undoubted and irrevocable hereditary patrons of the said church called the New Church, situated in the Tronegait of said burgh, with free power to them and their successors to present fit and qualified persons to the Archbishop of Glasgow that now is, and who shall be for the time, for serving of the cure at the said church." It also incorporates the burgh of Glasgow and all churches and rights of patronage, &c., above specified into one free royal burgh "for payment to the Crown of 20 merks in name of burgh mail with services of burgh used and wont, and payment to the Archbishop of Glasgow of 16 merks due under a former charter." The charter of 1st July 1636 above referred to deals expressly with the Blackfriars Church. In particular it sets out that the inhabitants of the said burgh have contributed sums of money to be laid out on heritable securities by the provost, bailies, and councillors of the said burgh for the supply and maintenance of a minister and rector serving the cure of the said church, and that the burgh of Glasgow means to provide the same with a minister, and to "make him and his successors secure in a constant annual stipend of 1000 merks over and above the sustaining of a reader to serve in the said church." It further narrates that it had been agreed to surrender the said church called Blackfriars Kirk to the Crown, "that we and our successors should erect" the same into a parish church and give the patronage thereof to the burgh of Glasgow, part of the counter obligation by the burgh being to pay to "the ministers serving the cure of the said church" and their successors "the sum of 1000 merks money of Scotland for their sustenance and stipend, and also providing the same church with a sufficient and qualified reader, to whom there shall be paid by them (the burgh) a competent stipend and maintenance for his service only."

In my opinion these two charters make these points clear—the former (that of 1st July 1636) that the only obligation undertaken by the burgh, so far as stipend was concerned, was to pay 1000 merks Scots, the latter (the charter of October) that this sum was payable as "a competent and sufficient stipend" paid "yearly." I cannot construe these charters or any of them as imposing on the burgh any obligation to pay a varying sum in name of stipend liable to be increased from time to time. That was the nature of the obligation the Courts had to deal with in the case of *Peters*, and the pursuers maintained that the obligation we are now considering was of the same character and effect. In my opinion the pursuers cannot successfully maintain this contention. The obligation in the charters is in my opinion to pay a fixed and constant sum; it is taxative, and is not liable to augmentation as the circumstances of the time vary. Even as to Blackfriars Church therefore the pursuers' case fails, and I can find no warrant in the charters for extending the obligation to the Tron Church or to any predecessor of St Paul's. In any case the obligation would not affect the cases we are now dealing with, for it is matter of admission that each of the ministers of these churches is in the enjoyment of a stipend of £425 sterling, which far exceeds 1000 merks Scots money, the only dispute now being whether they are to be paid £900 or some other sum in excess of £425.

The bond of 1649 seems to have followed on the minute of council dated 6th December 1649, which is as follows:—"Item, it is inacted and concludit be all in ane voyce that eache of the ministers should have of yearlie stipend in all tyme comeing the sowme of one thousand punds money, and that the way therof be advysit heirefter." The bond narrates that the town council find it incumbent on them that "an effectual course be taken for settling and securing of competent stipends of our ministers

who are not yet so provided," especially the ministers of Blackfriars and the two ministers at the New Kirk in Trongate. It then refers to an annual rent of £10,000 money provided to the minister of Blackfriars which has hitherto been uncertain, and is now at a lower rate than it was formerly, and proceeds to provide for each of said three ministers and their successors a stipend of £1000 money yearly, and further on it declares that the foresaid sum of £1000 money yearly shall be in full satisfaction to ilk ane of the said three ministers of all prior obligements or conditions made by us or our predecessors in office to them, or any one or other of them, for their stipends, by word or writ, "Attour becaus we intend that all our ministers sall be alyk weell provydet, incaice that Maister Robert Ramsay sall raither desyre to have ane thowsand pundis money yeirlie over heid for his stipend then the victuall and silver tack dewtie with the manse and gleib quhairvnto he is presented, then and in that cais wpon thair dispositioune and renunciatioune to be made be thame to ws of thair saidis provisiones, dureing thair lyftymes and serveing of the cuire, we bind and obleiss ws and our successoris in office to thankfullie content and pay to ilk ane of them yeirlie and ilk yeire dureing all the days of thair saids lyftymes and serveing the cuire all and haill the sowme of ane thousand pundis vsuall Scottis money at the foirnameit twa terms in the yeir, beginnand the first termes payment thairof at Whitsunday nixttocome, and swa furth to continow in thankfull payment." In my opinion what I have said as to any obligation derivable from the charters referred to applies with still greater force to the obligation in this bond. It is a perfectly definite obligation as to its amount, and in my opinion it cannot, consistently with legal principle, be construed as imposing an obligation liable to be augmented from time to time as the pursuers contend.

What I have now said is sufficient to dispose of the three actions I am now dealing with, so far as the case stated on record is concerned, adversely to the pursuers. But the Lord Ordinary's note shows that a further point was argued before him, and as it was very anxiously argued before us it is right that I should deal with it.

The Lord Ordinary refers to it thus—The pursuers maintain, he says, "that all the city churches had in the past been treated by the magistrates as on a footing of equality, and that I ought therefore to find in favour of the existence of an obligation similar in character to that imposed by the Court of Teinds in the case of *Peters*, proved by the actings of the defenders and their predecessors in office." I confess, even after hearing the pursuers' argument, I have considerable difficulty in formulating precisely what the pursuers' contention in this respect was, but I think the Lord Ordinary may be taken as having very fairly given expression to it as it was urged before us. At present all the churches receive the same stipend. It seems to me that this contention I am dealing with is an entire afterthought on the pursuers' part. It would involve this proposition, that if and because certain of the churches in Glasgow have got obligations of the character for which the pursuers contend, therefore all the Glasgow churches must be held to have in their favour similar obligations. In my opinion no such case is sufficiently averred on the record we are now dealing with. No proof was asked in support of it, nor was any amendment of the record proposed in order to make relevant averments on the matter.

In St Paul's case, indeed, it is said (condescendence 4) the stipend has been augmented from time to time along "*with the stipends of the other city ministers.*" But in the record of the cases of Tron and Blackfriars the words I have italicised do not appear. There is, in my opinion, no record for any such case as that which I am now considering, and I do not think we could deal with it adversely to the defenders without having it clearly and specifically put forward on the record. But if I understand it rightly I agree with the Lord Ordinary in thinking that this contention fails on its merits. I do not think we can hold that if by certain decrees of erection granted in favour of other churches certain provisions were made as to the stipends thereof, the other city churches, and especially those who have no decrees of erection, and particularly the three churches now in question, could maintain successfully that by the actings of the Corporation they have obtained similar obligations. Decrees of erection—as is shown by the two Greenock cases and also by the instances in Glasgow now before us—vary in most important respects from one another. I cannot find as regards the churches I am now dealing with anything which in my opinion would justify me in holding that the defenders are bound, as matter of legal obligation, to pay to each of their ministers an equal stipend to what others of the city ministers receive. There are passages in the documents relied on which might be founded on on either side, but I can find nothing amounting to a legal obligation, or evidence of such an obligation, in favour of the three pursuers whose cases I am now considering, even if the record had been sufficient to allow of the point being raised.

In order to show that I have not overlooked it, I refer to an argument which the pursuers presented to us, founded on certain Acts of the Privy Council in 1566 and 1567. These Acts—whatever be their legal effect—seem to be mainly machinery Acts, and except in so far as the latter of them provided that "four score pundis money of this realm" was to be paid by the provost and bailies of the city "to their minister resident within the city," nothing seems to have followed on them. There is no question, however, that all of the ministers now receive far more than the sum there provided for in said Acts.

I am therefore of opinion that as to the three churches—the Tron, Blackfriars, and St Paul's—the Lord Ordinary has reached

the right result in dismissing the actions, and that the reclaiming-notes in these cases should be refused.

St George's. — With reference to St George's, the case as originally made on the record was founded on the decree of 3rd August 1763, which is in the summons made the basis of the declaratory conclusion, and the Lord Ordinary dealt with it as depending entirely on the construction of that document. If that had still been the state of the record and argument, I see no reason whatever for differing from the conclusion at which the Lord Ordinary has arrived. But there was founded on before us, very strongly, a decree of transportation of 1808, and after the case had been taken to avizandum a further document was lodged by the pursuers and an amendment was made on the condescendence pointing to the case which the pursuer in the case of St George's now desires to make upon that decree of transportation, viz., that a clause in that decree bears that the burgh of Glasgow "shall furnish and provide the ministers who shall serve at the said new church with a competent and legal stipend to the same amount as the ministers in the other parish churches in the said city." No amendment was made, however, either on the conclusions of the summons or on the pleas-in-law. In my opinion the amendment which has been made is altogether insufficient to support this new case for the pursuers.

It has to be noticed that, so far as the seven cases before us are concerned, the only church which at that time (February 1808) had a clause similar to that in the case of *Peters* was St Enoch's, the two other churches — St John's and St James' — not having been erected until after the decree of transportation I am dealing with. But the plea which is specially urged now, and which apparently was not urged before the Lord Ordinary, was founded on the clause above quoted. There was some difficulty in following exactly what was narrative or preliminary and what was the actual language of the decree, but that seems to have been cleared up by the further document which was lodged yesterday. The conclusions of the summons of erection referred to "a competent and legal stipend not under the sum of 2000 merks yearly," but the decree itself provides for "a competent and legal stipend of 2000 merks." The decree therefore rejects the words "not under," and taxes the stipend by the language it employs at the sum of 2000 merks. It may be that the full significance of this difference involved in the use of the word "of" instead of the words "not under," was not appreciated at the time, but in my opinion we must deal with the language used in the decree. In his condescendence the pursuer fails to note this difference and erroneously recites the decree in condescendence 4 as if the words "not under" had been used in it.

Coming now to the decree of transportation, the only decree founded on in the conclusions of the summons or in the pleas for St George's still remains the decree of erection. In my opinion the summons of transportation and the decree pronounced thereon, even if contrary to my opinion a case founded on it had been stated on the amended record, do not alter, as regards the present action, the pursuers' rights as to stipend as fixed by the decree of erection. The minister of St George's was at the date of the decree of erection receiving the same stipend as the other city ministers then enjoyed, and no decree was pronounced which in my judgment authorises or affects future alterations or augmentations, and he still receives the same stipend as the other city ministers.

The seven churches the actions in relation to which are now before us, apart from St George's, are in this position—that three of them had no contractual rights which would enable them to get a competent and legal stipend from time to time as the circumstances of the time required, whatever the amount might be. The only incumbent who had a clause entitling him to such an augmentation was the minister of St Enoch's —the other two churches of St John's and St James', as I have already explained, not being erected until a later date. I cannot see, although the question is not free from difficulty, that the effect of the decree of transportation, the result of which was that the congregation and the minister (Dr Porteous) were transferred from the Wynd Church *via* St Andrew's to St George's, was to increase the stipend, or that the terms of the decree entitled the incumbent of St George's to say that the obligation upon the Corporation was changed. The object of this process of transportation was not to affect the obligations as to stipend; it was intended merely to deal with the fabric and *locus* of the church, and I see nothing to suggest that the question of stipend was ever competently dealt with in that process which was alien to a process as to stipend. I think in the present state of the record there has been no cause shown by virtue of the decree of transportation for altering the judgment which the Lord Ordinary pronounced, although that decree of transportation was not founded on before him as it was before us. Further, the pursuer avers that since his induction he has received a stipend of £425, the stipend paid to "all city ministers." What his rights may be if some of the city ministers hereafter receive a larger stipend is, in my opinion, not competently raised in this action.

As to St Enoch's, this case seems to me to be in all material respects covered by the case of *Peters*. The clause as to additional stipend, which is narrated in his process, does not appear in the decree, and even if it did would not in my opinion affect the result.

I agree therefore with the Lord Ordinary as to this case, and am for refusing the reclaiming note.

With regard to the cases of St John's and St James', the argument addressed to us endeavoured to distinguish these from the *Peters'* case because of what was called "the salvo" clause, which is to the same

effect as the clause I have just referred to in dealing with St Enoch's. In my opinion that clause, no matter where it occurs, cannot receive the construction which is sought to be put upon it. The result is that I see no reason for differing from the Lord Ordinary in regard to these churches.

In my judgment the Lord Ordinary has arrived at the correct result in regard to all the summonses before us.

LORD DUNDAS—Having given the best consideration I can to the four excellent speeches addressed to us by counsel and studied the documents produced and the authorities referred to, I have come to the conclusion that the interlocutors reclaimed against are right, and I agree with the reasons assigned for that conclusion in the judgment of the Lord Ordinary.

We have seven actions before us. In four of these, viz., St George's, St Enoch's, St John's, and St James', our decision must depend (unless indeed a specialty exists in the case of St George's) upon the proper construction of the decrees of the Court of Teinds by which these churches were erected, the decree in each case embodying a judicial contract as regards, *inter alia*, the defenders' liability for payment of the minister's stipend. In three of these actions, viz., St Enoch's, St John's, and St James', the Lord Ordinary decided against the Corporation. I think he was right. In my judgment these cases are substantially ruled by that of *Peters*, 1893, 20 R. (H.L.) 42. The defenders' counsel endeavoured to distinguish the cases from that of *Peters* on the ground that the Court's decerniture for "a competent and legal stipend not under the sum of £400" was qualified by the addition (in the cases of St John's and St James') of the words "without prejudice to the said. . . minister receiving such additional stipend as the pursuers may afterwards think fit to confer"; and (in the case of St Enoch's) by similar words which, however, do not occur in the actual decerniture but only in the narrative of the decreet. I agree with the Lord Ordinary that the words founded on import no qualification of the obligation on the defenders to provide a competent and legal stipend, the assessment of which must be for the Court and not for the Corporation. The *Newton-on-Ayr* case (*Rainie*, 1895, 22 R. 633), though not directly in point, lends support to this view. An argument based upon a somewhat similar clause was there rejected by the Court. The Lord Ordinary (Stormonth Darling), whose judgment was adhered to by the Inner House, said—"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."

In the case of St George's the Lord Ordinary decided against the minister because of the difference in the language used in the decree of erection from that employed in the three decrees already dealt with and in *Peters'* case. The words in the decree anent St George's are "a competent and legal stipend of two thousand merks." The question is narrow but I think the Lord Ordinary was right. The words are in my judgment taxative. The case of *Thomson* (1896, 23 R. 405), where the decree was for a competent "stipend . . . of £200 sterling per annum," though not conclusively in point, favours this view. It was represented to us and appears to be the case that the attention of the Lord Ordinary was not specifically drawn to the decree of transportation of St George's in 1808, in which references to the stipend occur, both in the libel and the actual decerniture, couched in somewhat different terms from those of the decree of erection in 1763. I am unable to see that the terms of the decree of transportation have much relevancy to the matter in hand. The Court of Teinds was not then concerned, primarily at least, with stipend but with a case — apparently unique in its circumstances (see Connell on Parishes, p. 239)— of transportation. In any view I do not find anything in the decree of transportation at all sufficient to warrant this pursuer's present demand. The Lord Ordinary's interlocutor anent St George's must in my judgment be adhered to.

There remain for consideration the cases of the Tron, Blackfriars, and St Paul's. These stand in quite a different position from those already dealt with. In none of them is there any express decree or other contract upon the construction of which the Court can determine the extent of the defenders' liability to pay stipend to the minister. The pursuers' case is that from the various documents produced and the actings of the Corporation the Court can and ought to spell out a legal obligation on the defenders, for implement of which the pursuers sue as for a debt due by law, to furnish and provide each of the ministers with "a competent and legal stipend suited to the circumstances of the time and the position and duties of the benefice in all time coming during his lifetime and serving the said cure." A formidable consideration adverse to these pursuers seems to me to arise *in limine* before one turns to look at the various documents. The authorities demonstrate that even a slight difference in the language of a decree of the Court of Teinds embodying a judicial contract may be sufficient to turn the scale, as a matter of construction, in favour of one or other contending party. It is difficult, therefore, to see how the Court can, without having before it the definite words of any decree or other contract for the purpose of construction, determine the precise nature and limits of any obligation on the part of the defenders, or can pronounce as a matter of legal right the decree craved by the pursuers.

The minister of the Tron avers on record (condescendence 2) that "prior to the year 1636 several gifts of land were made by the Crown to the defenders' predecessors in office on consideration of maintaining and upholding certain churches in Glasgow. On 16th October 1636 King Charles I confirmed

all the charters, writings, rights, and privileges previously granted to the defenders' predecessors in office, and that, *inter alia*, on consideration of their paying yearly to the minister of the New church (now the Tron) of a competent and sufficient stipend. (Condescendence 3) From that date to the present time the defenders have paid the stipend to the minister serving said church, and have by their actings recognised their obligation to pay him a competent stipend. Further, under a bond dated 21st April 1649, granted by the defenders in favour of the pursuer's predecessor in office, the former undertook payment of a reasonable and competent stipend to the minister of the Tron church, *inter alios*. The stipend originally granted has been augmented from time to time, the last augmentation being in 1830, and the stipend paid thereafter has been £425 per annum." The averments for the ministers of Blackfriars and of St Paul's are in substantially similar terms *mutatis mutandis*. In regard to the gifts of lands prior to 1636 we were referred mainly to the Acts of Queen Mary's Privy Council of 1566-67. It is unnecessary to consider how far these Acts may have possessed the force of Acts of Parliament, because at the best they seem to carry the pursuer's argument but a very little way. The decerniture of the Council that the Provost and Bailies of Glasgow should content and pay "to thair minister resident within the samyn" (*i.e.*, I apprehend, the Cathedral) four-score pounds Scots money in time to come does not affect the questions now in dispute. Nor do I think that the clause in Queen Mary's charter advances the matter. The charter of King Charles I, dated 16th October 1636, is a confirmation of all previous charters, including one of date 1st July 1636, and uniting and incorporating the burgh of Glasgow with all lands, "churches, rights of patronage," &c., into one free royal burgh. It proceeds on the narrative that the Corporation had "taken in hand not a few great undertakings," among which are enumerated their expenditure in making the river Clyde navigable; their provision of a minister to "the Black Friar Kirk," and "their heedful concern for the repair and enlargement thereof, and provision of a constant local stipend to the minister serving the cure thereat"; their expenses "in the building of a tolbooth for the administration of justice and other business"; and in building and repairing "that other church called the New Church of Glasgow, situated in the Trongait thereof," to whose minister "they pay yearly a competent and sufficient stipend for his services." Nothing in all this seems to impose any obligation on the Corporation such as we are now in search of. In the earlier charter referred to it is narrated that the city of Glasgow "now means" to make the minister of Blackfriars and his successors "secure in a constant annual stipend of One thousand merks"; and that payment does appear in the *reddendo* of the same deed. Even this, however, seems to carry the pursuers a very small, if indeed any, way towards their present demand. A similar observation must, it seems to me, be made with reference to the "bond" of 21st April 1649. This bond was probably executed in accordance with the Council's minute of 9th December 1648. It narrates that the Corporation "find it necessarlie incumbent to us that ane effectual course be taken for settling and secureing of competent stipends to suche of our ministers who are not yet so provydeit, especiallie the ministers serveing at the Blackfreir Kirk and the twa ministers at the New Kirk in Trongait"; and that efter mature deliberatioune had by us anent the premisses, we have unanimouslie aggreit that thair sall be ane thowsand pounds money of Scotland secureit to be payit yierly to ilk ane of them furth of the teynds of the lands efter mentionat, as ane reasonable and competent stipend for ilk ane of the forsaidis thrie ministers." Certain teinds were therefore allocated and disponed in favour of the ministers in security of the said stipends; but it was expressly declared that the foresaid sum of One thousand pounds Scots yearly should be in full satisfaction to each of the three ministers "of all prior obleisments or conditionnes maid be us or our predicessors in office to them [or] ony ane or uther of them for thair stipends be word or writt." As to the various augmentations which the Corporation have from time to time granted to the ministers I agree with the Lord Ordinary in thinking that there is no good ground for assuming that these were made under legal obligation. The defenders' actings were in my judgment at least equally consistent with the view now maintained by their counsel, viz., that they were payments purely at discretion and of goodwill, and the minutes seem to me to support this contention.

It appears to me that the three actions now under consideration must fail. I have studied all the documents produced and endeavoured to assign to each and all their proper weight. I confess I am quite unable to discover in them anything approaching to the constitution of an obligation upon the defenders to pay to these ministers stipend on the footing demanded by their summonses. On the other hand, I do not doubt that when legal controversy is laid to rest the Corporation will give due consideration to the proper requirements of all their city ministers, and will treat them in the matter of stipend as their positions and their services deserve.

It is not, I think, at all necessary to attempt to deal with or even to inquire into certain topics more or less connected with the subject-matter of these actions, *e.g.*, as to the actual basis upon which churches were erected and endowed by municipalities in olden days, or as to the methods by which the patronage of these was created and maintained. On the former topic I observe that my brother Lord Sands in his edition of Duncan's Parochial Ecclesiastical Law, states (p. 297)—"It is probably vain now to inquire whether this action on the part of the municipal authorities is to be regarded as voluntary, or as was indicated by some of

the judges in the case of *Clapperton*, 1840, 2 D. 1385, as a necessary compliance with the public law, which in days when Dissent was not recognised and Voluntaryism was not understood was regarded as imposing upon the municipality as representing the community the duty of making provision for the supply of religious ordinances to the whole population."

For these reasons I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to in each of the seven actions now before us. The cases of St Enoch's, St John's, and St James' will have to go back to the Outer House for further procedure.

LORD ORMIDALE — In each of the seven actions now before us the pursuer asks for declarator that the Corporation of Glasgow are 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 in all time coming during his lifetime and his serving the cure.

Of the seven churches concerned, three, viz., the Tron, Blackfriars, and St Paul's, were erected before the establishment of the Court of Teinds. The remaining four, viz., St John's, St James', St Enoch's, and St George's, were erected by decree of the Court of Teinds on a summons presented by the Corporation. In the case of the latter group the question which has been raised is to be determined according to the construction to be put on the several decreets of erection, these falling to be read as expressing the judicial contract between the parties, of whom the predecessors of the defenders were one. In the case of the earlier group there are no such constituent documents, but we are asked to hold that the obligation of which the pursuers seek declarator is to be inferred from or discovered in and evidenced by certain writs. The defenders, it is further said, have by their actings recognised their obligation to provide such a competent and legal stipend.

Dealing with the earlier group first, it appears from the records in the several actions that the writs chiefly founded on are a charter by Charles I dated 16th October 1636 and a bond dated 21st April 1649 granted by the Corporation in favour of the ministers of the burgh churches then erected in Glasgow. Before considering these it is right to refer to certain other writs earlier in date than 1636, viz., two Acts of the Privy Council and a charter of Queen Mary. None of these disclose the imposition on or the undertaking by the Corporation of any such obligation as the pursuers seek to establish. What they do disclose is an evident and earnest endeavour to make provision for the maintenance and upholding of certain churches in Glasgow and the sustentation of the "ministrie." Whether the Acts of the Privy Council had binding effect it is not necessary to consider, for the only order on the Corporation to be found in them is to the effect that they are to content and pay to their minister resident within their city the sum of four-score pounds. It is by no means clear to what minister this order refers, but in any event the order cannot, it seems to me, be held to suggest much less to instruct any such obligation as the pursuers contend for. The same may be said of the charter of Queen Mary, 15th March 1566, which is very general in its terms. It recites, *inter alia*, that the provost, baillies, &c., shall be holden obliged out of certain annual rents, profits, and duties conveyed to them to support the ministers, readers, and other ecclesiastical charges. Provision is also made for the incorporation of all the lands, tenements, houses, buildings, churches, and many other subjects into one body to be called our Foundation of the Ministry and Hospitality of Glasgow. This Foundation does not appear to be afterwards referred to in any of the writings and documents founded on.

Passing to the charter of Charles I, dated 16th October 1636, it recites in the narrative many great and good works of a very miscellaneous order undertaken and performed by the Corporation, and among them "their care and charges in providing a minister to that church within the said burgh of Glasgow called the Black Friar Kirk, and their heedful concern for the repair and enlargement thereof, and provision of a constant local stipend to the minister serving the cure thereof." Later on it also recites that the Corporation have not only built and enlarged the New Church of Glasgow, *i.e.*, the Tron, but have also provided the same with a minister "to whom they pay yearly a competent and sufficient stipend for his service."

The reference to the constant local stipend of the minister of Blackfriars has, no doubt, in view the provision in the earlier charter of King Charles dated 1st July 1636, which, proceeding on the narrative of a contract between the Archbishop of Glasgow and the Corporation, constitutes the Corporation the patrons of the church, the Corporation on the other hand paying to the ministers of the church the sum of 1000 merks money of Scotland for their sustenance and stipend. This is the earliest reference to the money value of the minister's stipend, and it seems to me to strike a note which is sounded right on through all the documents which deal with the same matter —a note indicative of an undertaking by the Corporation to pay a sum of a particular and specified amount, and not of an obligation to be responsible for a stipend varying in amount according to the circumstances of the times. This is what we find in the bond of date 21st April 1649. I need not again recite its terms. It is sufficient to note that after narrating that they have unanimously agreed that a sum of £1000 Scots shall be paid yearly to each of the ministers as a reasonable and competent stipend, the Corporation bind themselves and their successors to pay the said sum of £1000 Scots to each of the three ministers in the first place out of a special source which they had at their disposal, and if that should come short of the requisite amount, then out of other funds. It seems to me impossible to spell out of this carefully expressed obligation to pay £1000 Scots an obligation

at any time to pay a larger sum. No doubt the defenders' predecessors did in fact in later years pay larger sums than £1000 Scots. They granted augmentations from time to time down to 1830, but in not one of the records which deal with or instruct these augmentations does it appear that they did so as matter of legal obligation. It was maintained, as I understood the argument, that underlying the grant of an augmentation, and forming the true source and reason of it, was an admission or recognition of a binding duty to provide a reasonable stipend according to the requirements of the times. But the tenor of the minutes directly contradicts that contention, making it plain that any increase was of goodwill and according to the discretion of the Corporation. In regard to what I may call the plea of identity of stipends as affecting the older churches, I concur entirely with the opinion expressed thereanent by the Lord Ordinary.

With reference to the other four churches —St George's, St Enoch's, St John's, and St James'—the question falls to be determined by the construction to be put upon the decrees of erection pronounced by the Court of Teinds.

In regard to St Enoch's, the decision in the case of *Peters* v. *The Magistrates of Greenock* (19 R. 643, and 20 R. (H.L.) 42) is directly in point in favour of the pursuers' contention.

The words "not under" occur also in the decrees of erection of St John's and St James', but there are added the words "without prejudice to the minister receiving such additional stipend as the pursuers may afterwards think fit to confer." This clause does not, however, it seems to me, have the effect of qualifying in any way the legal significance of the earlier words as ascertained by the House of Lords in *Peters* case—*cf. Rainie* v. *Magistrates of Newton-on-Ayr*, 22 R. 633.

By the decree of erection of the Wynd Church, afterwards St George's, dated 3rd August 1763, the defenders are bound to provide the ministers who shall serve at such church "with a competent and legal stipend of 2000 merks." Before considering this decree I should say here that the terms of it are not in my opinion affected by the decree of transportation dated 24th February 1808, according to which the Corporation are to furnish the ministers who shall serve at the church with a competent and legal stipend to the same amount as the ministers in the other parish churches in the city. The primary purpose of the summons was not to furnish a stipend but to effect the substitution in all respects of St George's in a new locality for the Wynd Church, which had become ruinous and unhealthy, and the settlement in the new church of Dr Porteous, the then minister of the Wynd Church, and I read the clause as to stipend as simply meaning that the minister when settled in the new church was to have the same stipend as he had been receiving when settled in the Wynd Church, which was at the date of the transportation equal in amount to the stipend which the ministers in the other city parishes were at that date being paid. It is in the decree of erection that the true measure of the Corporation's obligation in the matter of stipend is to be found, and that was, as already stated, to provide the minister "with a competent and legal stipend of 2000 merks." On the construction of this obligation the pursuer argued with much force that the all-important words are "competent and legal," and that the sum named was of little importance except to ascertain what was at the date of the decreet a competent and legal stipend. Now it is true that great weight was given to those words "competent and legal" in the case of *Peters*, while the words "not under" are not once referred to in the opinions of the noble Lords. The judgment, however, was pronounced with reference to a decreet which contained these words "not under," and both the Lord Chancellor and Lord Watson approved of Lord Wood's opinion in the case of *Cæsar* v. *Magistrates of Dundee* (20 D. 859, note) on the construction of a decreet in similar terms. *Cf.* also *Thomson* v. *Magistrates of Greenock*. The question is a narrow one in my judgment, but the words "of 2000 merks" must, I think, be read as taxative, and intended to fix once and for all what was the competent and legal stipend which the Corporation came under obligation to pay to the minister of the church.

I concur in thinking that the reclaiming notes should be refused.

LORD SALVESEN did not hear the cases.

In each case the Court adhered to the interlocutor of the Lord Ordinary, and in the actions at the instance of the Rev. Archibald Maclaren, the Rev. Andrew James Campbell, and the Rev. John D. Glass, remitted the cause back to the Lord Ordinary to proceed therein as accords.

Counsel for the Pursuers—Mackay, K.C.—J. Stevenson. Agents—Auld & Macdonald, W.S.

Counsel for the Defenders — Macmillan, K.C. — Fleming. Agents — Campbell & Smith, S.S.C.

Saturday, March 19.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

BOOKLESS BROTHERS *v.* GUDMUNDSSON.

Expenses—Abandonment of Action at Common Law—Right of Defender to Expenses—Discretion of Lord Ordinary—Desirability of Obtaining Opinion of Lord Ordinary when Party Dissatisfied with his Decision.

A firm of fish merchants who had chartered the freight of a vessel which was on time-charter to a general merchant, brought an action against the merchant for damages for short delivery of a cargo of cod, and in their pleadings