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RENNIE v. TOD, &c.

The Reverend Mr. ROBERT RENNIE, Minister of the Gospel at Borrowstounness, } *Appellant;*

JAMES TOD, ALEX. COWAN, JOHN COWAN, JAMES SMITH, Merchants; ALEX. AITKEN, Feuar; JOHN HARDIE, Baker; and FRANCIS LINDSAY, Barber; all of Borrowstounness, describing themselves as Representatives of the inhabitants of the said town, } *Respondents.*

House of Lords, 21st July 1806.

TRUST USES—MORTIFICATION—MINISTER'S STIPEND—IMMEMORIAL USAGE—RES JUDICATA.—1. A fund had been raised and mortified, and vested in trust for behoof of the minister of the parish of Borrowstounness. At the time, the annual produce of the stock did not amount to the minimum stipend of 800 merks, but power was obtained by act of Parliament to assess the inhabitants to make up this to 800 merks. Afterwards, the value of the stock increased, so as to leave a large surplus over, after paying the minister the 800 merks, and other repairs of the church, &c. The inhabitants sought to appropriate this surplus to other purposes, and pleaded that they had been in the immemorial usage of doing so with the fund; Held that they could not do this, and that the surplus belonged to the minister, reversing the judgment of the Court of Session. 2. Also held that a former decree of the Court of Session, regulating the appropriation of what was then the whole fund, did not bar the present question, which was to determine the right to the annual surplus that had since emerged by the increase of the stock.

Certain funds were raised, from various sources, for the use and behoof of the minister serving the cure of the church of Borrowstounness, at the time when that town was disjoined from the parish of Kinneil, of which it formed a part.

The chief part of the stock consisted of 5000 merks, lent upon wadset to Mr. Hamilton over the lands of Muirhouse; and a bond for the prices of the seats conveyed in the church. These were accumulated into one fund in the seventeenth century, and vested in "four persons, as com-
"missioners for the inhabitants of Borrowstounness, for the
"use, utility, and behoof of the minister and his successors,
"servers of the cure at the kirk of Borrowstounness."

At first, the funds fell short of the minimum allowance to a minister serving the cure of a parish, which was 800 merks, or 8 chalders, but application being made to Parliament for the erection of the church into a separate parish, an act was
1649. passed, granting "power to those whom the supplicants

" (inhabitants of Borrowstounness) have chosen to be assist-
" ing to the kirk session, according to the act of Parliament,
" or some other who shall be nominate, be common consent
" of the town and session, to stent yearly every inhabitant
" and every indweller within the parish, according to their
" abilities, for making up the yearly stipend of 800 merks,
" promised and obliged to be paid by the supplicants to the
" minister and his successors in the said charge."

The obligation of making up the deficiency thus lay on the inhabitants, which was done for many years by an assessment on them. Various changes took place as to the management of the funds. Under a charter from Cromwell, the management was vested in the minister, but afterwards, that act being superseded, it came to be managed not altogether by representatives of the town only, nor by representatives elected by the town and kirk-session jointly, but either by the kirk-session in conjunction with " those whom " the inhabitants had chosen to be assisting to the kirk-ses-" sion," or by some others who were nominated by common consent of town and session.

But, in the year 1756, the funds had arrived at such a state of productiveness, that the whole stock, including the lands of Muirhouse, Duke of Hamilton's bond, bond for the prices of seats in the church, and the seat rents, which were let from year to year, yielded annually a sum rather exceeding 800 merks.

For a long period of years previously, the seat rents had not been dealt with as a part of the common stock for providing the minister's stipend, but had been entirely set apart and appropriated for repairing the church and churchyard dikes, and to some other similar purposes; and the managers had therefore been obliged to levy, by assessment, a sum necessary to make up the 800 merks, independent of the seat rents that were so expended.

But questions arising as to this management, and as to the rights of parties under the improved state of the funds, actions were raised by Ritchie and others, inhabitants of Borrowstounness, and members of the Incorporated Sea Box Company on the one part, and by the minister and kirk session, and the representatives of the town, &c., on the other.

The objects of Ritchie and others, by their action, were, 1st. To recover that share in the election of the assistants or representatives, which had been given them by the act of parliament 1649; and, 2d. To put an end to the annual assessments, now that the fund was sufficiently productive of

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itself to yield the requisite stipend required by law, and therefore to have it declared that the stock did already yield 800 merks; and that the funds could not be applied to any other purpose than the payment of stipend.

On the other hand, the minister and kirk-session, and their assistants, believing that the seat rents made no part of the stock, brought their action to have it declared, that the assessment should be continued until the proper mortified stock, independent of the seat rents, should yield an annual produce of 800 merks. They raised another action against the Duke of Hamilton, to ascertain (if it should be found that the seat rents could not be so applied) who were the parties liable for the expenses of repairing the church and church yard dikes.

Aug. 16, 1764. These actions being conjoined, a decree was pronounced, finding the management of the funds was vested in the representatives or assistants to be elected by the inhabitants, in conjunction with the minister and kirk-session, and regulating the mode of election, and finding "the following sub-
"jects to be funds falling under the administration of thesaid
"assistants or representatives of Borrowstounness, viz. 200
"pounds Scots, as the victual and money rent of the lands
"of *Muirhouse*; 295 pounds like money, being what is pay-
"able by the mortification bonds granted by the inhabitants
"of Borrowstounness for the arrears of their seats at the
"building of the said kirk; the interest of the Duke of
"Hamilton's bond, being 83 pounds Scots yearly; 89 pounds
"four shillings Scots, being the seat rents in the body of
"the church and range; 60 pounds Scots, as the money
"arising yearly from ringing the great bell, and sales of
"burying places, and the rent of the house called the
"manse; and that the said assistants or representatives are
"to be accountable therefor in the usual manner of admi-
"nistrators: Find that the said assistants or representatives,
"or their successors, have no power to stent or tax the in-
"habitants thereof at present, nor in time coming, except
"in the case of the failure or decrease of the said stock or
"funds, so as the annual produce thereof shall not be suffi-
"cient for answering the said 800 merks of stipend to the
"minister of Borrowstounness, and then allenarly to such
"extent as may make up the deficiency, so as the annual
"proceeds of the stock may yield the said 800 merks Scots
"of stipend: Find that the rents of the lands of *Muirhouse*,
"the annual rents of the bonds, and rents of the seats in
"the church of Borrowstounness, specially appropriated for

" the payment of the said stipend, must, in the first place,
" be applied for that purpose: Find that the said funds,
" after payment of the said stipend, must be applied for
" payment of the repairs of that part of the church possess-
" ed by the inhabitants of Borrowstounness, and for keeping
" the dykes of the lower church yard of Borrowstounness in
" repair: and that the said representatives may make pay-
" ment out of the said funds to the collector thereof, of an
" yearly salary not exceeding £3 Sterling, without preju-
" dice, nevertheless, to the said John Ritchie, and the other
" members of the incorporated Sea Box of Borrowstounness,
" to insist for payment of any debt that may be due to them
" by the assistants, out of the surplus of the said funds,
" after payment of the said stipend only; and reserving all
" defences competent against such debts; and find, that
" none of the funds under the administration of the assist-
" ants, can be applied by them in repairing the kirk yard
" dykes of Borrowstounness, (except the dykes of the lower
" church yards), or for payment of the manse rent, school-
" master's salary, or bellman's salary."

In the year 1768, a lease of the wadset lands of *Muirhouse*, which, in the interval, had become vested in them as an absolute right, was granted for 38 years, with consent of the minister. The granters of the lease were thus described: " John Addison, merchant in Borrowstounness, for himself " and as one of the elders and members of the kirk-session " of the parish of Borrowstounness, and as treasurer for, and " in name and behalf of the minister and hail other mem-" bers of the said kirk-session, and also of their assistants, " trustee, and managers of the funds appropriated for pay-" ment of the stipend to the minister of the said parish of " Borrowstounness, heritable proprietors, &c."

From the decree of 1764, till the year 1786, the funds were managed by assistants chosen in terms of it, who consulted with the minister as a joint administrator. During that period, there was no surplus beyond the 800 merks, except what was exhausted by the several objects provided by the decree 1764. The repairs of the church, church yard dikes, collector's salary, and John Ritchie's expenses in the process, amounting to £200, exhausted the funds produced beyond the minimum of the minister's stipend.

In 1786, however, a considerable increase arose in the stock. There was a surplus in the managers' hands of £300; and, as the lease was to expire in a few years, there was a certain prospect of a still farther increase. In the meantime,

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the respondents had been in the practice of applying the surplus of these funds to other public uses in the town.

But the appellant, as minister of the church, conceiving that he was entitled to the whole surplus produce of the funds so provided, and particularly to the whole rents of the lands of Muirhouse, raised action to have it found and declared accordingly. The defence pleaded to this action was, *First*, That by immemorial usage these funds had been appropriated to other uses than the payment of the minister's stipend; and, *Second*, That the matter was *res judicata* by the former decree.

Jan. 13, 1801. Lord Hermand, Ordinary, held the minister entitled to the whole surplus. On reclaiming petition, the Lords pronounc-
Jan. 14, 1802. ed this interlocutor:—"Alter the interlocutors reclaimed "against, find the respondent, the minister (appellant) has "no right to the surplus fund in question, claimed by him; "therefore assoilzie the petitioners, and decern." On fur-
Feb. 12, 1802. ther petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded by the Appellant.*—From the original deeds, it is clear that the funds raised by the inhabitants of Borrowstounness, to make up a stock for to pay the "minister and his suc-"cessors their stipends," were laid out upon certain securities, in the names of trustees or administrators, and that those trustees had the power of administration of the funds, but the trusts were, in these deeds, specially declared, and bore expressly to be, "*for the use, utility, and behoof of a minister and his* "*successors, servers of the cure* at the kirk of Borrowstoun-"ness." In particular, the lands of Muirhouse having been held upon these trusts, on feudal titles, for 130 years, the minister's right in the use thereof, is now settled by positive prescription, even though he had no other title to found on.

In addition to the funds so absolutely settled, "for the "use, utility, and behoof of the minister," which did not at the time produce the necessary yearly income of 800 merks, being the minimum of the stipend, on which, by the act of Parliament of Scotland 1633, c. 8, a minister could be settled, the inhabitants came under an additional obligation to stent or assess themselves annually in a sum sufficient to make up this minimum of stipend, or 800 merks per annum; but there is nothing in this original transaction, from which it can be shown or inferred, that the inhabitants of Borrowstounness meant to restrict the stipend to the minimum in all time coming, and to reserve to themselves the surplus of

the mortified funds, to be appropriated to any purpose that they might think proper. There is no such restriction in the deed, and such restriction would have been quite inconsistent with its nature, and unprecedented in mortification for such objects. The minimum is only a point *a quo* is calculated a stipend, until it reaches the *maximum*. This *maximum* is implied in the *minimum*, and it is of the very nature of mortification itself, that the stipend drawn thence does increase with the stock, which is wholly mortified and set apart for that particular purpose. The fund from which this increase solely arises is the wadset right of the lands of Muirhouse, and it bears expressly to be for the "use, utility, "and behoof of a minister and his successors." The decree in 1764 is not a *res judicata* to bar the present action. That decree decided quite different matters. It is true, it directs the stipend of 800 merks to be paid in the first place, then directs the repairs of the church and church yard dikes, collector's salary, &c., to be paid. But as to what remained, after completing all these purposes, the decree is silent. And it is precisely as to this surplus, after completing all these purposes, that the present question is raised, and which, it is maintained, belongs to the minister. And no usage, however inveterate, and no expediency, however urgent, can sanction an appropriation of this fund to other and different purposes.

*Pleaded for the Respondents.*—At the erection of the town of Borrowstounness into a separate parish, in the middle of the 17th century, it was stipulated, by the terms of the foundation, or original contract entered into between the parties, that there should be paid to the minister, by the inhabitants of the town, a specific and fixed stipend of 800 merks only; as appears from the act of parliament 1649, which is the foundation, and must be the measure, both of the right it bestows on the minister, and the obligation it imposes on the inhabitants. This statute being the *regula regulans*, entitles the minister to no more than 800 merks; and whatever surplus there is over, the inhabitants are entitled, after satisfying their obligation to the minister, to appropriate these funds to town purposes; because, when the nature of these funds, and the right taken thereto, are considered, it is perfectly clear that the property of them was never vested in the minister, but that it remained with the inhabitants, subject only to payment of the minister's stipend. The funds from which the increase chiefly arises was originally a wadset, purchased by the inhabitants' money; it was afterwards converted into an absolute right

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of landed property, consisting of the lands of Muirhouse, devoted to the payment of 800 merks only to the minister. But the future increase of this, or of the Duke of Hamilton's bond, or the bond for the seats and the seat rents, were not conveyed to the minister, whatever they might amount to, but only in so far as they guaranteed to him payment of 800 merks, and no further. Accordingly, the immemorial usage and practice, ever since the erection of the church, has been conformable thereto. At no time has the minister drawn a penny from these funds more than his 800 merks; and the surplus, when there was any, was always applied to other public uses. This usage, supported by the most obvious expediency, is of itself decisive of the question. Besides, the decree in 1764, in its import and substance, is a *res judicata* foreclosing entirely the present question. It "found and declared that the rents of the lands of *Muir-*
"*house*, the interest of the bonds, and the rents of the "seats in the church of Borrowstounness, specially ap-"propriated for payment of the said stipend, must, *in* "*the first place*, be applied for that purpose." These words, "*in the first place*," are decisive, and necessarily imply that the funds *quoad ultra* are applicable to other purposes, under the power of those intrusted to manage them.

After hearing counsel,

THE LORD CHANCELLOR ERSKINE said,—

"My Lords,

"To make the present cause intelligible, I must state briefly the circumstances which have given rise to it.

"In 1632, the inhabitants of Bo'ness resolved to have their town disjoined from the parish of Kinneil. In 1638, the church was built, and a stock was raised by contribution, but in what manner does not appear, for the support of a minister and his successors. It was strongly insisted for the respondents, that the parties never meant that this provision to the minister should exceed 800 merks per annum: but, at that time, it is to be noticed that there was no fixed minimum of 800 merks. The probability is, that the parties never imagined that their stock could produce more than 800 merks per annum.

"In 1648, it appears that 5000 merks of this stock were lent out to a gentleman of the name of Hamilton, who, with his wife, granted a wadset for the same, over certain lands therein mentioned, to certain persons, as commissioners for the inhabitants of Bo'ness and their successors, "for the use, utility, and behoof of ane minister "and his successors, servers of the cure at the kirk of Bo'ness." After this follow all the usual clauses of form. This contract was followed with charters in the same terms.

" In 1649, an act of the Scots Parliament was obtained, in which, after disjoining the parish of Bo'ness, power was given to certain persons therein pointed out, to stent every inhabitant of the parish, for making up the yearly stipend of 800 merks, promised and obliged to be paid to the minister and his successors, " ay and while the an- " nual rent of the supplicants, their stock, extend to the sum of 800 " merks yearly."

" The respondents strongly insisted that, under this act of Parliament, it appeared, that only 800 merks a year in all, was to be paid to the minister. But it must be recollected, that the minimum by law at that time came up to that amount, and that the act of Parliament gave right to tax the inhabitants till the annual rent of the stock provided for the sustenance of the minister should come up to the minimum; but the power of taxing would not alter the character of the original trust.

" If I give an estate to my eldest son, as trustee for a younger brother, and add an obligation on the eldest son to make up the estate to £1000 a year, nothing can show more clearly my intention than that my second son was to possess £1000 a year; and though, perhaps, it might not be in my contemplation that the estate would ever produce so much, yet if the estate came to be of greater annual value than £1000 a year, could it be said that the eldest son was not still a trustee in that specific estate for his brother?

" It is not necessary, at present, to mention any other of the funds except the wadset; what other funds there were, appears from the decree in 1764, to be afterwards mentioned.

" I may here mention the instrument said to have been found among the papers of the town of Bo'ness, namely, the copy of the contract 1655. This is argued on by the respondents as much in their favour. I lay this instrument altogether out of sight, as ruling the right to the wadset. Mr. Wauch, the minister at that period, thought that he, though the *cestui qui* trust, had a right to infeftment in the lands, which had, by an apprizing obtained in 1653, become irredeemably vested in the trustees. Mr. Wauch accordingly obtained a charter from Cromwell, and was infeft in his own absolute right for himself and his successors, ministers of Bo'ness.

" Afterwards, those entitled to the administration, and who certainly had an interest to take the management into their own hands, on account of the assessment which still continued, applied to and obtained from King Charles the II. a charter restoring to them the possession and administration.

" A circumstance in this transaction makes an impression on my mind; when they expeded (as it is termed) this charter, they knew they were contending with an usurpation; and if they then conceived that they had a right to the surplus of the funds, after producing the 800 merks, they might have qualified the trust on the face of the instruments. The minister considered the trust as abso-

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lute. The whole matter was before them; they were actors, and yet take the charter in these terms, 'for the use and behoof of the 'minister of the gospel, serving the cure at the kirk of Borrowstoun-'ness,' &c., without qualification or limitation, but absolute and unlimited. The sasine was in similar terms, being a corollary from the charter. Thus, we see a complete instrument taken out by themselves, and taken precisely in the language of the original wadset.

"I was nevertheless at first impressed with the argument of the respondents, drawn from the decree 1764. If it had been decided at that time that the minister had only a right to the 800 merks, it must now have so stood; but that was not the case. That action was brought for the purpose of ascertaining what funds were applicable to the payment of the minister's stipend. At that time it was not in the contemplation of the Court to consider if the minister had a right to the surplus or not. No question of that kind was agitated till the present question arose.

"The appellant became minister in 1795; he brought an action upon this point before the Court of Session. The conclusions of his summons were. (Here his Lordship read the same).

"When the action came before Lord Hermand, as Ordinary, his Lordship, on the 31st of January 1801, pronounced this interlocutor. (Here his Lordship read the same).

"This interlocutor was in favour of the minister; and I think that in a case of this kind, one judge was as competent to form an opinion as several. I think that his judgment was what was sound and just in this case. Unquestionably, in this country, a court cannot look off the face of the instruments constituting the trust right. I speak, subject to the opinion of my noble and learned friend.

Lord Eldon.

"But it became necessary to see if some other rule of law on this subject did not obtain in Scotland. I find that it is quite the contrary, and that, in a recent case, Duggan *v.* Wight, in a case of alleged trust, the Court refused to look off the face of the instruments, or to listen to anything short of the statutory proof of trust. This case, though on a different point from the present, shows me that the rule of law is the same in both countries.

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"Upon the whole, my opinion is, that the interlocutors of the Court here appealed from should be reversed."

Lord Eldon said.—"His Lordship having done me the honour of referring this question to me, my opinion has been formed on the perusal of the printed papers in this cause.

"It is a question of some doubt on the evidence, whether certain funds, appropriated for payment of the minister's stipend, were so appropriated in security of a fixed stipend of 800 merks; or, whether these funds, which did not then, but now do, produce 800 merks and more, were not absolutely settled on the minister.

"In all human probability, neither the inhabitants nor the minister at the time thought that the produce of the funds would ever amount to more than 800 merks; but this can never decide the rights of parties. If an estate of only £40 a year value is settled for the support of a minister, and an obligation entered into to make this estate worth £80 a year to him, even though the deed was so framed that the understanding of the parties was apparent, that the estate would never amount to more than £80 a year, yet, if it ever did, in such a case, the increase would go to the minister.

"In this case, the bonds for the first rents were taken 'to make up 'a stock for the minister and his successors, their stipends.' Five thousand merks, which had been raised, were lent to Mr. Alexander Hamilton, for which a wadset over the lands of Muirhouse was granted to certain persons, 'for the use, utility, and be-'hoof of a minister,' &c. On this wadset, a decree of apprizing was obtained in 1653, which was never redeemed, and the wadset has now become an absolute right. It cannot be maintained for a single moment, that where the wadset was granted in the terms I have stated, that a decree obtained thereon for apprizing the lands, could alter the nature of the rights, so as to give that to the trustees for other uses, which had been settled to the use of the minister.

"It is to be noticed, that this wadset was taken before the act of Parliament was passed, stating a minimum of stipend. The difficulty is, that it was clearly the intention of parties to provide the minister in a salary of 800 merks a-year, but as the funds did not produce so much, it was contended that the wadset and decree of apprizing were merely in security of this stipend of 800 merks.

"In 1649, an act of Parliament was passed for erecting the new parish. It appears to have been the object of that act that the minister should be secured in his minimum of 800 merks; and it gives power to the inhabitants to stent themselves till the stock should produce so much; but I see nothing in this act of Parliament, in the law, or in the state of the titles at that time, to authorize me to say, that if the funds at that time had produced more than 800 merks, then the surplus should not go to the minister. The power of stenting was to cease when the produce of the stock amounted to 800 merks a year; but the act of Parliament says no more.

"When I look at the contract in 1655, the charter of Cromwell thereon, and the last charter in 1676, with regard to the lands over which the wadset had been originally granted, it appears to me that the fair construction to be drawn from these is, that the funds were, if not mortified to the minister, yet appropriated to his use and benefit, in terms so clear on the face of the instruments, that we cannot, at this distance of time, look off these instruments, to speculate with regard to the original intention of the parties.

"It was said, that as the minister could not lose by any dilapidation of the funds, he ought not to gain by any rise therein; but

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this is not a case of bargain, but of conveyance, and the true construction of the instruments in question.

"My chief difficulty is on the decree 1764; it was contended that this was a *res judicata*—a decision how the surplus was to be disposed of. But, on the best consideration I can give this matter, I think the decree will not bear this construction. At the time the charter 1676 was granted, it is very remarkable, if the inhabitants thought this a trust for themselves, and while they were contesting in whom the right of administration should be, that they should have taken the charter absolutely 'for the use and behoof of the minister.' Though, by the decree in 1764, the minister suffered some part of the produce to be applied to other purposes, how came they not therein to declare the ultimate use of the fund, after paying the 800 merks to the minister, and other purposes therein specially stated?

"With respect to the right of administration, there is no dispute here. It appears, that while there was no surplus, the administration was sometimes in one party, sometimes in another, sometimes one object of regard, sometimes of none; but when it was an object of regard, it was merely to keep from stenting improperly the inhabitants. This decree must now be of force as far as it has adjudged; but as it has said nothing of the ultimate disposal of the surplus of the funds, I see no way of disposing of it but as the Lord Ordinary did, by looking back to the original deeds."

(His Lordship here read the form in which he proposed that the judgment should be, which was ordered accordingly).

It was ordered and adjudged that the interlocutors complained of be reversed; and find, that the pursuer is entitled to the annual surplus of the funds in question, after answering the purposes mentioned in the decree of the Court, dated 10th August 1764. And it is further ordered that the cause be remitted to the Court of Session.

For Appellant, *Wm. Adam*, *Wm. Robertson*, *James Moncrieff*.

For Respondents, *Wm. Alexander*, *Ad. Gillies*.

NOTE.—Unreported in the Court of Session.