Act took effect on the previous orders of the Board of Supervision so as to disunite districts which had previously been united, and we are not here criticising or reviewing the proceedings of the Board of Supervision. It is enough that a question of public interest being raised, the Board decided it in the sense of disuniting the parishes. It follows, in my opinion, that as the state of matters contemplated by the 94th and 95th sections no longer existed, the provisions of these sections have ceased to be applicable to the case under consideration, and accordingly that the questions fall to be answered in favour of the County Council.

LORD KINNEAR concurred.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for the County Council—Jamieson—Dundas. Agent—F. J. Martin, W.S.

Counsel for the Water Trust — D.-F. Pearson—Sym. Agents—Cumming & Duff, S.S.C.

Tuesday, December 6.

FIRST DIVISION.

PEARSON AND OTHERS.

Obligation — Real Burden — Negative Prescription—Manse—Special Case.

In 1790 a person by letters expressed his intention of endowing and establishing an Episcopal chapel and manse in the village of Laurencekirk. He bound and obliged himself, his heirs and successors in his lands and estate, to make this establishment a real and perpetual burden on his estates, . . . the manse to be supported in future times by the same rules and regulations as obtain with regard to legal manses in Scotland, and his heirs and successors in the lands of Johnston being bound in the same manner as heritors are in different parishes. A chapel was built, and a manse provided. In 1813, F, a singular successor in the lands of Johnston, granted a deed of mortification in favour of the then incumbent, upon which sasine was taken, in which he declared that "the manse shall be supported in future times by the same rules and regulations which obtain with regard to legal manses in Scotland, the said F and his heirs and successors in the said lands and estate of Johnston being bound in the same manner as heritors are in the different parishes."

No real burden for the support of the manse was ever created, but the manse was kept up by the proprietors of the lands of Johnston, being gratuitous disponees of F, until 1892, when it was *held* (1) that any claim under the letters to have such a real burden created was excluded by the negative prescription, but (2) that a personal obligation rested upon the proprietors of the lands of Johnston, at least so long as they continued to hold them, similar to that which would have lain upon them had the manse been a parish manse and they the sole heritors.

Observations upon the kind of questions the Court will not answer in a special case.

Upon 9th February 1790 the late Francis Garden, one of the Senators of the College of Justice under the title of Lord Gardenstone, and proprietor of the estate of Johnston in Kincardineshire, wrote to the Rev. Dr W. A. Drummond that he had resolved to endow and establish a Scotch Episcopal church in the village of Laurencekirk. The letter proceeded—"For that purpose, by this, my obligatory missive to you, as a leading member of that Church, I oblige and bind myself, my heirs and successors in my lands and estate" (of Johnston) "in the county of Mearns, to make this establishment a real and perpetual burden on my said estates in proper and ample form hereafter, and in substance as follows— . . . *Secondly*, I, my heirs and successors, shall be bound to furnish a competent manse and a moderate glebe, subject to the same rules and regulations in all time coming, with regard to the obligations incumbent on my heirs and successors, and on the successive incumbents, as take place with regard to heritors of parishes and incumbents in the Established Kirk of Scotland."

Upon 4th December 1790 Lord Gardenstone wrote to Rev. Jonathan Watson appointing him first incumbent of the living, *inter alia*, as follows—"You and your successors are to have a commodious manse, with a piece of garden ground adjoining, and a glebe not under three acres of enclosed ground. The manse to be supported in future times by the same rules and regulations which obtain with regard to legal manses in Scotland, my heirs and successors in the lands of Johnston being bound in the same manner as heritors are in different parishes, both for stipend and manse."

Lord Gardenstone died in 1793 without having executed any deed other than the said letters to render the establishment a real burden on his estate of Johnston, but prior to his death a church had been built by subscription, and the Rev. Jonathan Watson had entered upon his incumbency, and Lord Gardenstone had put him in possession of a house and ground for a manse and glebe, and made payment of his stipend until his (Lord Gardenstone's) death. Mr Watson remained in possession of the house and glebe, and his stipend continued to be paid until his death by Lord Gardenstone's successors. Lord Gardenstone was succeeded in said estate by his nephew, the late Colonel Peter Garden, who was again succeeded by his brother Francis Garden, neither of whom took any further steps towards creating Lord Gardenstone's establishment a real burden on the estate.

In the year 1805 Francis Garden sold and conveyed the estate of Johnston to the late James Farquhar, Proctor of Doctors Commons, London, who duly completed a title thereto. It was part of the bargain of sale that the purchaser should relieve the seller of certain obligations undertaken by Lord Gardenstone, including those contained in the said letters, and accordingly the said James Farquhar "became bound to free and relieve" the seller, the said Francis Garden, "of the whole consequences of the establishment created by" Lord Gardenstone's "letters." The disposition granted by the said Francis Garden in favour of the said James Farquhar is dated 5th June 1805.

Mr Farquhar granted a deed of mortification dated 2nd February 1813, upon which infeftment was duly taken, in favour of the Rev. William Milne, who had succeeded the Rev. Mr Watson in the incumbency of the chapel. The instrument of sasine bore—"The said James Farquhar, for the purpose of rendering the foresaid establishment a real and permanent burden on the lands and others after described, did, by the said deed of mortification, grant, dispone, and convey to and in favour of the said William Milne, and his successors in office, incumbents on the said Episcopal establishment, . . . All and whole that house, offices, and garden ground attached thereto in the village of Laurencekirk, which were occupied by the said deceast Jonathan Watson, as his manse, offices, and garden: . . . And further, these subjects are to be received and possessed by the said William Milne and his foresaids, incumbents on the said establishment, in full of all claim competent to him or them, for a manse, offices, garden and glebe upon the said James Farquhar, or his heirs and successors in the said lands, or upon the heirs of the said deceast Francis Garden Lord Gardenstone, in virtue of the obligations contained in the missives granted by him before mentioned, or of any proceedings which have followed or might follow in consequence thereof: . . . *Septimo*, the manse shall be supported in future times by the same rules and regulations which obtain with regard to legal manses in Scotland, the said James Farquhar, and his heirs and successors in the said lands and estate of Johnston, being bound in the same manner as heritors are in the different parishes, both for stipend and manse; and the said James Farquhar did, by the said deed of mortification, bind and oblige himself and his foresaids accordingly."

In 1892 a special case was presented to the Court by David Alexander Pearson and others, proprietors of the estate of Johnston, who derived their title from the said Mr Farquhar by gratuitous dispositions, of the first part, and by the Rev. W. W. Malachi, incumbent of the said Episcopal chapel, certain members of his congregation, and the Episcopal Bishop of the district or diocese of Brechin, of the second part.

It was stated in the case that "when the deed of mortification was granted the manse and offices were sufficient and suited to the requirements of the time. Various repairs and improvements have from time to time been executed upon them by the proprietors at the request of the incumbents, such as re-roofing, renewing wood-work, painting and papering, erecting a garden wall, and introducing water. Recently the buildings have fallen into such a state of disrepair that either large repairs must be performed to make the fabric habitable, or the buildings must be renewed. If they are to be renewed, the second parties maintain that they ought to be removed to another site. The parties are not agreed either as to the nature or as to the extent of the obligations, if any, incumbent on the first parties, and exigible by the second parties, so far as they relate to the support of the manse and offices, and they have accordingly agreed to present this case in order to obtain the judgment of the Court upon certain questions of law arising out of the circumstances."

The parties agreed that the obligation to support the manse and offices had not been, either by the said deed of mortification or otherwise, created a real burden on the estate of Johnston.

The first parties contended—"(1) That the obligation, if any, resting upon them as proprietors of Johnston is dependent only upon the said deed of mortification, the same having been granted and accepted as in full of all claims competent to the incumbent or his successors upon the proprietors of Johnston for manse, offices, and garden; (2) that the declaration contained in the said deed of mortification (article *Septimo*), with reference to the manner in which the 'manse shall be supported, did not contain an obligation capable of being created a real burden upon the estate of Johnston, and that assuming it did, they are not bound to take steps to create such a real burden; (3) that on the assumption that it is competent notwithstanding said deed of mortification still to construe the letters of Lord Gardenstone, any obligation contained in them is not capable of being created a real burden; (4) that they are not under any personal obligation for the support of the said manse, or, at all events, that such personal obligation, if any, is contingent upon their remaining proprietors of the said estate; (5) that at all events any obligation under which they may be is not binding to the extent of rendering them liable to supply a new manse and offices on a new site, or to rebuild the manse and offices on the present site (even in circumstances where the heritors of a parish would have been bound to do so in the case of a parochial manse), but only to the extent of ordinary repairs; (6) that assuming they are bound to supply a new manse and offices, that obligation will be fulfilled by supplying a new manse and offices equal in point of site and accommodation to the existing manse and offices."

The second parties contended—"(1) That

the obligation regarding the support of the manse, &c., which Lord Gardenstone created by his letters of 9th February and 4th December 1790, was capable of being created a real burden upon the lands and estate of Johnston, and that the said Colonel Peter Garden and Francis Garden as representing him, and the said James Farquhar as having undertaken to relieve them of their obligations thereanent, were taken bound to make it a real burden upon the said lands and estate; (2) that it being admitted that the said deed of mortification of 2nd February 1813 was insufficient and ineffectual to create the said obligation a real burden upon the lands and estate of Johnston, the first parties are now bound, on demand of the second parties, to take the necessary steps to create it such real burden; (3) that in the event of its being found that the said obligation is incapable of being created a real burden, or that the first parties are not bound to make it a real burden upon the lands and estate of Johnston, the first parties are personally bound to implement said obligation as fully as though it had been made a real burden; (4) that the said deed of mortification though probably intended to give does not in fact give complete implement of the obligations contained in Lord Gardenstone's letters; (5) that the acceptance of the said deed of mortification by the said Rev. William Milne did not and could not supersede Lord Gardenstone's letters, or effect any permanent limitation or restriction of the obligation therein contained, as the Rev. William Milne had no power or authority to bind his successors in the incumbency, but only himself for his own right and interest; (6) that the extent of the said obligation is precisely the same as that of the obligation which lies upon the heritors of a parish with regard to the manse of the parish, the first parties being regarded as filling the position of the whole heritors of a parish, the Rev. William West Malachi, one of the second parties, that of the minister of the parish, and his manse that of the manse of the parish, so that if, assuming that were the said manse a parish manse (*a*) it is in such condition that the heritors would be bound not merely to repair it but to rebuild it; (*b*) its accommodation is so inadequate that the heritors would be bound to increase the accommodation to make it adequate to the requirements of the present day; (*c*) the heritors would, in rebuilding it, be bound to provide a new site. The first parties are bound (*a*) to rebuild the said manse; (*b*) to increase its accommodation; (*c*) to provide a new site (receiving always a reconveyance of the existing site); and they further maintain (7) that the amount of the stipend received by the said Rev. William West Malachi from the first parties as proprietors of the lands and estate of Johnston is not an element to be taken into consideration in determining the amount of the manse accommodation which, if the second parties are well fonnded in their contention, the first parties are bound to afford."

The questions submitted were as follows:—"(1) Was the said obligation, so far as regards the support of a manse, &c., contained in Lord Gardenstone's letters of 9th February and 4th December 1790, capable of being created a real burden upon the lands and estate of Johnston? In the event of the first question being answered in the affirmative, (2) Are the parties of the first part now bound to create a real burden over said lands and estate for the support of a manse in pursuance of Lord Gardenstone's said letters? In the event of either the first and second questions being answered in the negative, (3) Are the parties of the first part under any personal obligation as regards the support of the said manse, and is such obligation, if any, contingent upon their remaining proprietors in liferent and fee respectively of the estate of Johnston? In the event of either of the second or third questions being answered in the affirmative, (4) Is the obligation of the parties of the first part as regards the said manse the same in extent and effect as that of heritors of parishes in Scotland as regards the manse of the parish, so that, in the circumstances in which the heritors of a parish would be bound (*a*) to rebuild the manse of the parish, (*b*) to increase its accommodation, or (*c*) to alter its site, the parties of the first part are bound (*a*) to rebuild the said manse, (*b*) to increase its accommodation, or (*c*) to alter its site respectively, or are they bound to repair it only? (5) Is the amount of the stipend received under Lord Gardenstone's establishment from the estate of Johnston an element for consideration in determining the adequacy of the manse accommodation?"

Argued for first parties—(1) It was admitted no real burden had been created for the upkeep of the manse. Was there an obligation to create such a burden? No; and if any obligation arose from Lord Gardenstone's letters it had been implemented by the deed of mortification of 1813. But if any such obligation arose under that deed or under the letters, if it was possible to go behind the deed, it had been worked off by the negative prescription—Act 1617, c. 12; Bell's Prin., sec. 2017; *Barns* v. *Barns' Trustees*, March 5, 1857, 19 D. 626 (Lord Curriehill, p. 646). (2) The obligation was too vague to be made the subject of a real burden. There was here no measure which could be applied as in the case of a parish manse, which must be suitable for the special needs of the particular parish—*Carmichael* v. *M'Lean*, May 25, 1837, 15 Sh. 1029. There was no parish here to be served. (3) There was not even a personal obligation upon them here. If there was, it could only exist while they remained proprietors of Johnston, and its measure was to "support," *i.e.*, to repair the manse, and could not be to rebuild. In the case of *Clark*, relied on by the other side, the obligation was to maintain, uphold, and keep insured the subject in question.

[By the Court—There seemed no reason why half-a-dozen more hypothetical questions might not have been put.]

Argued for second parties—(1) The questions were not purely hypothetical. The house had become uninhabitable. In the interests of the benefice the nature and extent of the obligation had to be ascertained. The obligation, even if merely personal, must be to do what the heritors would require to do in the case of a parish manse, and to rebuild if necessary. (2) There was not such vagueness as prevented this obligation being made a real burden. There was no reason why the law as to parish manses should not be made applicable to an Episcopal clergyman's house. Their upkeep was so far an indefinite quantity but none the less a burden on lands. The manses of the neighbourhood could be considered. Lord Gardenstone clearly intended this obligation to be, if not a real burden in the strictest sense of the term, a condition running with the lands. It was to be a "competent" manse. "Competent" was a statutory word in connection with stipends, and was not considered too vague. The stipend here was no standard, just as the size of a parish was no standard. It must be a house fit for a clergyman and his family to live in, and to exercise a certain amount of hospitality. All the requisites laid down by the House of Lords in the case of *The Tailors of Aberdeen* v. *Coutts*, 1840, 2 S. & M'L. 609, and 1 Rob. 269, were here complied with; *cf. Johnstone* v. *Ramsay*, May 20, 1824, 3 Sh. 22. In the case of *Clark* v. *City of Glasgow Life Assurance Company*, June 19, 1850, 12 D. 1047, and 1 Macq. 668, the upkeep of a mill was held to be an essential condition of the grant—*Stewart* v. *Duke of Montrose*, July 15, 1860, 22 D. 755. (3) Negative prescription did not apply here. That implied abandonment, whereas here the obligation had been continuously kept up. The case of *Barns* was special, and ran into the law of taciturnity and *mora* rather than of prescription. Nor was the obligation contained in the letters superseded by the deed of mortification. The then incumbent could not restrict the obligation to the prejudice of his successors in the incumbency—*Magistrates of Aberdeen* v. *University of Aberdeen*, July 18, 1876, 3 R. 1087, and March 23, 1877, 4 R. (H. of L.) 48.

At advising—

LORD PRESIDENT — The first question which has to be considered under this special case is whether the first parties are bound to constitute as a real burden over their lands of Johnston an obligation regarding the support of the manse of the Episcopal clergyman at Laurencekirk. The obligation is said to have been created by two letters of Lord Gardenstone, both granted in the year 1790.

Now, of the several answers made by the first parties, that which seems to me to be conclusive is, that assuming the obligation to be contained in the writings in question, and to have been in its nature effectual, the claim is excluded by the negative prescription. The obligation does not appear in the sasine of the first parties.

On the showing of the second parties the obligation in question might have been enforced by action at any time from 1790 downwards, and therefore if this be an obligation it has not been followed for forty years, and is therefore now prescribed and of no avail. The case seems to me to be clear, and I do not discuss it further, because I did not hear any substantial answer to the plea of prescription, and I do not think that any was available to the second parties. In this view it is therefore unnecessary to consider the question raised in the first query.

The next question is, whether there is a personal obligation incumbent on the first parties, and I think that there is. As succeeding to the lands under the gratuitous disposition of Mr Farquhar they are liable in the obligations for which he was liable in relation thereto, and in particular they are liable in the obligation expressed in the clause headed "*Septimo*" in the deed of mortification of 2nd February 1813. Accordingly it is my opinion that they are bound to do in relation to this manse all that they would have been required to do had it been the manse of a parish and they the sole heritors.

Whether in the event of their selling the estate they would become free, or could free themselves from the obligation, is a question which may never arise, and which therefore, according to settled practice, the Court cannot decide on a special case any more than in an ordinary action. Accordingly I should propose that only the first branch of the third query should be answered, the finding being that the first parties for their several interests are bound to implement the obligations expressed in the head "*Septimo*" of the deed of mortification of 1813.

The fourth and fifth queries put questions which we have not the occasion or the means of answering. All our information of the existing condition of the house in question is what is said on the middle of page 9 of the case—"Recently the buildings have fallen into such a state of disrepair that either large repairs must be performed to make the fabric habitable, or the buildings must be renewed." All I can say upon that statement is, that the first parties are at least liable for the repairs, whatever they are, which are required to make the house habitable, but it does not appear whether a new house is required.

I therefore propose that we should in answer to the second query find that the claim of the second parties that the first parties shall create a real burden over the lands of Johnston for the support of the manse, in pursuance of Lord Gardenstone's letter, is excluded by the negative prescription; that it is therefore unnecessary to answer the first query; that on the third query we find that the first parties are personally bound for their several interests to implement the obligations contained in the article "*Septimo*" of the deed of mortification of 2nd February 1813, and that we find that the 4th and 5th queries do not arise on the facts stated.

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

The Court pronounced the following interlocutor:—

"Find and declare, in answer to the second query, that the claim of the second parties that the first parties shall make a real burden over the lands of Johnston for the support of the manse, in pursuance of Lord Gardenstone's letter, is excluded by the negative prescription, and that it is unnecessary to answer the first query; and upon the third query find and declare that the first parties are personally bound for their several interests to implement the obligations ordained in the article "*Septimo*" of the deed of mortification of 2nd February 1813; and find and declare that the fourth and fifth queries do not arise on the facts stated; and decern."

Counsel for First Parties—Guthrie—Sym. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Second Parties—H. Johnston—Rankine. Agents—Bell & Bannerman, W.S.

Saturday, December 10.

SECOND DIVISION.

MASSON *v.* NICOLSON.

Reparation—Fishings—Trawler—Injury by Trawler to Fishing-Line—Sea Fisheries Act 1883 (46 *and* 47 *Vict. cap.* 22), *Sched., Art.* 19.

On a clear April morning a trawler was fishing round a "dan" or fixed buoy which the crew had put down to guide them while fishing. A fishing-boat came out from port, and while in sight of the trawler the fishermen laid down their lines near the "dan." The trawler thereafter sailed across the place where the lines were laid and damaged them.

Held that the trawlers were liable to the fishermen at common law for the damage sustained by them.

Opinion (by Lord Young) that art. 19 of the convention annexed to the Sea Fisheries Act of 1883 is simply an expression of the common law.

Article 19 of the convention annexed to the Sea Fisheries Act of 1883 (46 and 47 Vict. c. 22), and incorporated in section 2 of that Act, provides—"When trawl-fishermen are in sight of drift-net or of long-line fishermen they shall take all necessary steps in order to avoid doing injury to the latter. Where damage is caused, the responsibility shall lie on the trawlers, unless they can prove that they were under stress of compulsory circumstances, or that the loss sustained did not result from their fault."

On the morning of 22nd April 1892 the fishermen in the fishing-boat "Welcome Home," which had sailed from Port Errol, shot their lines at a distance of from six to ten miles off shore in a south-eastern direction from Buchanness close to a fixed "dan," round which the steam-trawlers "Stephenson" and "Royal Duke" were fishing. A trawlers' dan is an anchored buoy with a stick on the top of it. At the end of the stick, which is from 6 to 14 feet above the water, are placed flags and at night a lighted lantern. When trawlers are engaged in fishing, their practice is to fix a "dan" as a mark to prevent their wandering, and then fish round and round the "dan" within a radius of half-a-mile till the supply of fish is exhausted.

The morning in question was bright and clear, and while the fishermen were shooting their lines the trawlers were engaged in fishing at a distance at which they could easily see what the fishermen were doing if a proper look-out was being kept on board the trawlers' vessels.

Soon after the fishermen had shot their lines, the steam-trawlers trawled over the ground where the lines were laid, and broke and seriously damaged them.

The crew of the fishing-boat raised an action in the Sheriff Court at Aberdeen against the masters as representing the owners of the two steam-trawlers. The sum sued for as the amount of damage was £24.

The defenders lodged defences, in which they alleged that they did not know that the pursuers had shot their lines in that place, and further averred "that if the pursuers shot their lines on the morning of 22nd April, they did so directly in the courses and in the way of the said steam-trawlers, and if any damage was caused to the pursuers' lines, it was caused by the pursuers' fault in so shooting their lines, and also in not indicating sufficiently and correctly both where the lines lay, and also that they had shot or were shooting them."

A proof was led before the Sheriff-Substitute (ROBERTSON). The evidence was very conflicting, but brought out the facts above stated.

On 21st March 1892 the Sheriff-Substitute pronounced the following interlocutor—"Finds (1) that on the morning of 22nd April 1892 the pursuers shot their lines in the North Sea at a distance of from 6 to 10 miles off shore in a S.E. direction from Buchanness; (2) that the lines were so shot close to a "dan" or buoy, which had been fixed by the defender Masson; (3) that while the pursuers were so shooting their lines the defenders' respective vessels were engaged in fishing at a distance at which the defenders could easily see what pursuers were doing if a proper look-out was being kept on board defenders' vessel, it being broad daylight and the morning bright; (4) that soon after the pursuers' lines were shot the defenders' vessels trawled over the ground where pursuers' lines were, and broke and seriously damaged them; (5) that the defenders or those in charge of their vessels failed to take proper precautions to avoid injuring the defenders' lines in terms of Act 19 of the con-