evidence against the defenders. But this is not a case of that description ; this is a case in which the sanity of the pursuer was not a matter directly in issue in the present suit. And there is a distinction which has not been sufficiently adverted to at the bar, between the judgment of courts of concurrent and of exclusive jurisdiction. The judgments of the courts of concurrent jurisdiction are evidence only where the very same matter comes directly in issue between the same parties. The judgments of courts of exclusive jurisdiction are evidence where the matter arises incidentally, or is the matter directly in issue. Now your Lordships will observe, that this is the case of the judgment of a court of concurrent jurisdiction, not of exclusive jurisdiction, and the matter, to say the most of it, clearly is not the matter directly in issue in the suit. It is a matter which arises only incidentally if it arises at all, because the question which was in issue in the suit was, whether the defenders wrongfully and unjustly detained the pursuer in the asylum? It might be a matter which incidentally arose in that suit, whether the pursuer was of sound mind at the time or not ; but then, that being a matter merely incidentally arising, and this being a suit in a court of concurrent jurisdiction, according to all the authorities, that decree cannot be admissible in evidence. But I must say, that I think, so far as the defenders are concerned, the matter did not even incidentally arise in this suit. I do not mean to say, that it was not a part, and probably a very important part, of the pursuer's case, but so far as respects the defenders, it did not even incidentally arise so as to affect the defence. Because, supposing that the pursuer was of sound mind at the time he was taken to the asylum of the defenders, if there were the proper medical certificates, and if there was the proper warrant of the Sheriff to the defenders to receive the pursuer into their asylum, and if he was of sound mind, and if it was proved that he was of sound mind, as against them, their detention of him would not be wrongful and illegal, but would be perfectly lawful, and only that which was their bounden duty. Under these circumstances, how can it be said, that such a decree as this becomes evidence in the case, when without adverting again to the circumstance of its being a decree in absence, which I think would be no objection to it, it can only be at the utmost a matter incidentally arising ; and, according to my view of it, so far as the defence is concerned, it is a matter which does not even incidentally arise in the course of this suit.

For these reasons I have never been able to entertain the slightest doubt upon the questions which have been submitted to your Lordships, and I concur in the opinion of my noble and learned friends.

LORD CHANCELLOR.—My Lords, I may say in explanation of what fell from me, that I did not intend to express any surprise at finding the words "wrongfully and illegally" in the issue. But what I did intend to express was, that seeing there was no complaint, that the defenders had offered as to anything prescribed by the Statute, in respect either of the certificate, or the warrant, or the licence, the pursuer not having made any such charge, it was strange that the issue should have been directed in this form.

With regard to the decree in absence, my observation was this, that a decree pronounced in absence cannot be given in evidence as proof of the subject matter of the second action being *res judicata*, although undoubtedly, if it had been material to the issue, it might have been proved in evidence. But we all concur in the opinion, that the question raised in that action of declarator was a question wholly immaterial to the question raised by this suit.

Interlocutors affirmed, and appeal dismissed with costs.

For Appellant, Simpson and Wakeford, Westminster ; Jas. Somerville, S.S.C., Edinburgh.—*For Respondent*, Bircham, Dalrymple, and Co., Westminster ; Jollie, Strong, and Henry, W.S., Edinburgh.

MARCH 21, 1865.

THE TRINITY HOUSE OF LEITH, and the INCORPORATION OF MERCHANTS OF LEITH, *Appellants*, *v.* Rev. H. DUFF, *Respondent*.

Church—Ancient Chapelry—Stipend—Augmentations—Statutory Compromise—*An ancient chapelry came, at the Reformation, into the possession of some corporations, who thereafter jointly appointed the minister, drew the pew rents, paid the stipend of the minister, and from time to time made augmentations. Disputes having latterly arisen as to the liability to repair the church, and as to the amount of stipend exigible, a Statute was passed to provide for the repair and for the administration of the property and revenues of the church.*

HELD (reversing judgment), *That such Statute was a final compromise of all the existing disputes, and relieved the corporations of liability to pay future stipend.*[1]

This action was raised by the Rev. H. Duff, minister of the second charge of South Leith, claiming arrears of stipend ; and the questions raised were, whether the appellants, the Trinity House of Leith, were to any extent liable as corporations for the defender's stipend, and if so, what was the extent of liability ? The defenders contended, that they were not liable at all, and if liable, then only to a limited extent.

The record being closed, Lord Ordinary Jerviswoode found by his interlocutor, that the Trinity House was still liable in an annual payment of £57 stipend, and the Merchant Company of £77; but that the corporations were not liable jointly and severally; that the augmentations that had been made in 1805 and 1812 were irrevocable, and that their liability was not dependent on, or measured by, their receipt of seat rents, and that the Statute did not extinguish the liability of the corporations. On reclaiming note to the Inner House, the First Division adhered to this interlocutor. There were various other incidental interlocutors, and all these were now included in the appeal to the House of Lords brought by the two incorporations.

The appellants in their *printed case* contended, that the interlocutors ought to be reversed and altered for the following reasons :—1. Because the respondent has not called as defenders in the action the Incorporation of Maltmen, and the Incorporated Trades of Leith ; and therefore he cannot insist against the appellants as conjunctly and severally liable with them. The action cannot proceed without joinder of co-obligants, and alleged co-obligants not being called, the respondent is barred from demanding from each appellant, in any view, more than one fourth of the alleged deficiency. 2. The appellants are not liable for the stipend of the minister of the second charge of South Leith, because the Act 9 and 10 Vict. c. 214, put an end to all liability which attached either to the appellants or to the other incorporations of Leith for the stipend in question, and provided for the payment of the stipend by the constitution of a statutory trust in which the whole funds and revenues from which the stipend had formerly been paid were vested. 3. Even if the appellants are liable to any extent, neither they nor the other incorporations are liable conjunctly and severally with or for each other, and in no view can each incorporation be made liable for more than the proportion of stipend by law or custom imposed upon it. 4. In no view were the appellants liable for a larger proportion of the respondent's stipend than they had been in use respectively to contribute for the prescriptive period prior to 2d January 1844, the date of their formal notarial protests, that they would no longer be liable for the respondent's stipend. 5. The judgments complained of ought to be reversed, because, to a large extent, their effect is to make the appellants liable conjunctly and severally with each other and with the other incorporations for the second minister's stipend, or for the alleged deficiency thereof. 6. The appellants cannot be made liable for the deficiency of stipend due to the respondent so long as there are funds in the hands of the statutory trustees, and in particular, so long as there is a sinking fund unexhausted in the hands of the trustees.

The respondent in his *printed case* contended, that the interlocutors were right, for the following reasons:—1. Because the obligation of the Incorporations of Leith for the stipend of the minister of the second charge of the church and parish of South Leith having never been extinguished or discharged, but, on the contrary, up to the present moment, having been recognized and acted on, the respondent is entitled, when necessary, to have that obligation enforced as against the appellants. 2. Because the augmentations made from time to time by the incorporations, appellants, having been augmentations granted by parties who were the patrons of the benefice, and were under obligation for the stipend of the incumbent, were not revocable at pleasure, but became part of the stipend of the minister filling the incumbency. 3. Because the respondent having accepted the incumbency on the faith of the stipend being continued to him, as it had been enjoyed by his predecessors, cannot now be deprived of any portion of that stipend by the voluntary act of the appellants, more particularly as such augmentations have been enjoyed for the prescriptive period of forty years.

The *Attorney General* (Palmer), and *Anderson* Q.C., for the appellants.

Rolt Q.C., and *Neish*, for the respondent.

The arguments turned entirely on the terms of the local Statute, 9 and 10 Vict. c. 214, the minutes of meetings of the Trinity House, and the decree arbitral and augmentations in former times.

LORD CHANCELLOR WESTBURY.—My Lords, in moving your Lordships to come to a decision upon the present appeal, I must confess, that I should have been better pleased if I could have found grounds for moving your Lordships to affirm the interlocutors of the Court below. But I think, that, upon an examination of all the facts and circumstances of the case, your Lordships will agree with me in thinking, that the whole question which is now agitated was intended to be

[1] See previous report 34 Sc. Jur. 548. S. C. 4 Macq. Ap. 926; 3 Macph. H. L. 15; 37 Sc. Jur. 369.

settled, and was settled in a very equitable and proper manner, by the Act of Parliament, which was passed in the year 1846, and the present difficulty appears to have arisen from a state of circumstances which probably was never contemplated or thought of as likely to occur, but which has occurred, and has, in point of fact, therefore rendered that arrangement less advantageous and beneficial to the present respondent than at the time of the passing of the Act it was supposed that it would certainly be.

It is not necessary, that one should enter into an examination of the circumstances which existed in early times with regard to this church. It is quite enough to start with the position of the parties as they clearly and unquestionably stood at the time when the Act of Parliament was passed. But although it is unnecessary, your Lordships will forgive me, if out of respect to the argument, I advert for a moment to one or two of the earlier facts.

It appears, that this particular church, as far as we can ascertain, was built by an ancient incorporation by means of a tax or impost which they were authorized to levy upon the port of Leith, and it seems, that, after it was built in Roman Catholic times, and received the denomination of the Church of the Virgin, the incorporation were permitted to erect altars in the church, and to have chapels there dedicated to their particular patron saint, and in that manner to become the owners, or at least the occupiers for the purposes of worship, of a portion of the area of this church. It was not the parish church. The parish church was at Restalrig, but it was in a sense a proprietary chapel.

It appears from some proceedings before us, that the incorporations were bound to supply the minister of this church with a proportionate amount of stipend for his support and maintenance. The next thing that we find is, that at the time of the Reformation, or shortly afterwards, in consequence of the General Assembly having directed, that the parish church should be pulled down, which they regarded as a monument of idolatry, an Act of Parliament was passed in the year 1609, by which this particular church was made the parish church, and about that time the state of things appears to have been established which existed down to the time of the passing of the Act of Parliament in the year 1846, namely, that when seat rents became payable in respect of this church, those seat rents were received by the four incorporations who were bound to contribute to the support of the minister, and therefore we find, from very early times indeed, that the liability to contribute to the support of the minister and ownership of seat rents accompanied one another and were vested in the same persons, namely, in these four incorporations.

The liability to contribute to the support of the minister was settled by a decreet arbitral which was made in the year 1650, but that decreet arbitral proceeded upon the basis of an assumption, that the four incorporations were already bound to contribute to the support of the minister a stipend of 1200 merks, and proceeding upon that basis the controversy, that was determined by that arbitration, was a controversy among the four incorporations themselves, in what proportions they should contribute to that stipend. It is a material thing to mark, that at that time they were in possession of the area of the church, and of the benefits arising therefrom. And it is also a material thing to observe, that their legal liability to contribute to the support of the second minister at the chapel was an admitted fact. And accordingly the decreet arbitral proceeding upon that basis distributes the £1200 among them in equal proportions. Each one of the incorporations, therefore, became liable to contribute, upon the footing of the decreet arbitral, the sum of £300.

At a later date, the incorporations disputed their liability to the £1200 in this sense: they said, that the decreet arbitral assumed the sum of £1200 improperly, and that it was not £1200, but 1200 merks, and they appear to have succeeded in that contention, and their fixed liability, therefore, was to contribute each of them one fourth part of 1200 merks.

So the matter appears to have rested, down to the year 1804, at which time it would seem, that the incorporation made an order, directing the stipend of the minister to be augmented by certain sums of money which they agreed or resolved to pay him, and by means of those augmentations, as to which it is a question whether they were binding or voluntary, the 1200 merks continued to be paid until, at the time of the passing of the Act of Parliament in 1846, the minister, founding himself upon the original stipend and upon those different augmentations which varied in amount, claimed to be entitled to receive from the four incorporations the sum of £247 1*s.* 3*d.*, and contributions to make up this £247 1*s.* 3*d.* were claimed from the four incorporated bodies in different proportions.

Now, bearing in mind that state of things, and remembering, that the right of the minister to that augmented stipend was matter of controversy, I beg of your Lordships to observe the exact status of the several parties, and also the facts of the case as we collect them from the preamble of the Act of Parliament of 1846. It would appear, that the four incorporations were entitled to receive, and did receive, all the rents and revenues resulting from the sittings in the church, as their own proper funds and estate. It appears also, that they derived some benefit from the burial fees, in portions of the churchyard, and for the use of mortcloths, and dues in respect of the same, with reference to the burials which took place in that churchyard. It also appears

from the preamble, that the incorporations stood in this position, that they were entitled to the patronage or right of presentation of the second minister of the church, and it also appears, that they were subject to the obligation of paying the stipend of that minister. It is also to be collected from the Act of Parliament, that the church at that time was in a state of great decay and want of repair. The dilapidations of the church must have been very considerable, because it appears, that the expense of restoring it is estimated by the Act of Parliament as amounting to £3500. I think, therefore, that your Lordships are warranted in inferring, that the church had gone very much into a state of decay.

There is also another fact which is material, to be collected from the preamble, and it is, that the corporations themselves, as corporate bodies, were likely to fall into decay. That is a fact stated in the preamble of the Act of Parliament, and unquestionably it was a circumstance of great importance for the second minister to consider with reference to the security of his stipend.

It appears, that there were great controversies as to who were liable to the repair of the church—whether heritors were liable, or whether the incorporations were liable. And in that state of things the Legislature had to determine what was best to be done with reference to the interests of all parties—with reference to the interest and the liability of the incorporation, and also the interest of heritors with respect to this parish church. The fact is particularly mentioned, that the minister was likely to be in the position, that he would be compelled to take legal proceedings for the purpose of having it determined what amount of stipend was legally exigible by him from the incorporations.

Now what the Legislature did was this: They appear to have required the heritors to agree to a complete restoration and repair of the church, and they laid upon them the necessary burthen for that purpose, namely, the sum of £3500. By the fulfilment of that obligation, the parish church was placed in a state of complete repair, and of course the amount of revenue derivable from it by the letting of seat rents was likely to be greatly augmented. The Legislature then took away from the incorporations the right of patronage for the church, which they vested in the male communicants of the parish. That was in effect, I suppose, giving it to the parishioners. The Legislature also took away from the incorporations their ownership of the church, their title to exclusive possession of the sittings therein, and their right to the rents and revenues which they had been in the habit of deriving therefrom. And then the Legislature did this: They took the restored church and vested it in the possession of trustees, upon which trustees they imposed this duty, namely, that they shall let the seats and receive all the pew rents, and deduct from the amount the necessary expenses of keeping in repair, and insuring it against fire, and then they burthened the income, which the trustees would receive, with the payment of the stipend of the second minister, fixing that stipend at £247 1*s.* 3*d.* And there follows a material provision, as indicating what were the views, probably the sanguine views, at that time entertained. It is provided further, that the whole of the surplus pew rents should be invested and accumulated in order to raise a sinking fund, until the same was found equal to yield an income sufficient to pay the amount of stipend, that is, an income equal to £247 1*s.* 3*d.*; and contemplating the probability, and almost certainty, that that would take place, the Legislature, by a subsequent section, namely, the 11th section, provided, that on the fulfilment of that purpose, when the trust was thereby completed, the property and ownership of the church should vest in and belong to the heritors of the parish, but that the right to levy seat rents should be limited to that sum of money which the necessity of keeping the church in repair might require.

We have here, therefore, I think, all the evidence which constitutes a final arrangement and settlement of this matter. The property is taken away from the incorporations absolutely. The property is placed in the best possible state of repair at the expense of the heritors. It is handed over to the trustees, in order to provide for the minister out of the proceeds the stipend which he claims. It is then subjected to a trust, in order to afford security that the minister's stipend shall be independent of the revenue derived from the seat rents; and by way of compensation to the heritors, the patronage is disposed of for their benefit, and the ownership of the church is given to them, and the trust is to be determined when and as soon as the fund shall be adequate for that purpose.

If the matter rested there, therefore, the reasonable presumption undoubtedly would have been, that inasmuch as the incorporations were divested of the whole of their property, and their rights and interest in the church, it would be reasonable to infer, that their liability, in respect of that property, was also intended to be determined. But we are not left, I think, to conjecture merely upon that subject, because your Lordships will find, that, by the 10th section, the amount of the liability of the incorporations is expressly declared, that they shall be bound, (your Lordships will be good enough to observe the futurity of the expressions,) and they are hereby taken bound to pay the stipend up to the term of Martinmas 1846, and they are also placed under the obligation of paying all the arrears or bygone demands at that date.

Now, here is a definite declaration of the extent of their liability, because, from and after Martinmas, the income of the trust fund was to be handed over to the minister if it did not

exceed his stipend; and, accordingly, the first halfyearly payment to the minister is directed to be made on Whitsunday 1847.

I forgot to observe, that it is not an immaterial thing, that, for the benefit of the minister, this further thing is done, namely, that the Legislature found a sum of £570 in the possession of the kirk session of South Leith, and they hand over that sum to the trustees of the fund as the commencement of a fund to be derived from the accumulation of the seat rents for the benefit of the minister.

Then the 10th section following what I have already at some length stated to your Lordships, appears to me, with submission, to be a declaration of the future extent and limits of the liability of the incorporations, but that conclusion is very much strengthened, if your Lordships will only observe the effect of the 16th section, and also, as incidental to the 16th, the 6th section, for both are to be taken together. Now the 16th section has this operation: the Legislature found, that the proportionate parts in which the incorporated bodies contributed to the payment of the stipend were unequal, and they also found, that the income derivable from the seat rents by those four incorporated bodies was unequal. One or two of them who paid a considerable portion of the stipend received less than their payments from the seat rents; others paying a certain proportion of the stipend received from the seat rents a greater amount; and therefore the Legislature having emancipated the companies, according to my construction of the Act, determined to wind up the account of the matter by settling the whole question as between the companies themselves. The machinery of the 16th section, though somewhat obscurely expressed, is a machinery plainly designed for the purpose of producing equality of burthen among the companies. The Legislature, reasoning in this way, addressing itself to one company, would say—"You contribute to the minister so much, but you receive from the seat rents a much greater proportion. You therefore now will lose by this arrangement, because you will be deprived of the surplus income." But addressing itself to another of the four incorporations, it would say—"You receive from the seat rents less than what you are bound to pay, therefore you shall be relieved from that excess of liability." And in that way the matter is settled by taking the ratio in which each incorporation stands with respect to the amount of the seat rents received, and the amount of contribution paid to the minister's stipend.

That was the arrangement in the 16th section, and there was a similar arrangement in the 6th section with respect to the minor incorporations which constituted the one aggregate incorporation. This arrangement for the purpose of winding up the accounts among the incorporations seems to me to prove most plainly, that it was the intention of the Legislature, by this Act of Parliament, to close the account once and for ever. For it is impossible to arrive at the conclusion, for which the respondent contends, that the incorporations were still to continue liable as before. If they were to continue liable as previously to the passing of that Act, they were liable in unequal proportions, but that amount of liability in unequal proportions could not possibly be claimed as continuing after the 16th section came into operation, for there is nowhere the slightest indication of an intention that the incorporations are, after the passing of the Act of 1846, to remain liable upon the different basis which existed previously to the Act of 1846.

With a great desire to support the decision of the Court below, and with a natural desire, that the minister should not be deprived of his stipend, I yet find it impossible to accede to the view taken by the Court below, without entirely running counter to what appears to have been the spirit and object of the Legislature in this final adjustment effected by the Act of 1846—an adjustment which I think was intended to be beneficial to the minister, and was highly beneficial to the minister, and which all parties were willing to accept, and did accept as the final settlement of that painful state of controversy and litigation which previously existed, and which all parties appear to have thought would answer their reasonable hopes and expectations, and which the accident of subsequent events alone has unfortunately disturbed. I am compelled, therefore, to move your Lordships, that the interlocutors of the Court below be reversed, and that in lieu thereof a decree of absolvitor of the defenders be substituted.

Lord Cranworth.—My Lords, after the very full manner in which my noble and learned friend has gone into this case, it is unnecesssary for me to trouble your Lordships with more than one or two short observations. In the first place, there is another advantage which I think the minister gains beyond those which have been adverted to by my noble and learned friend, namely, that the amount of his salary was fixed. The preamble of the Act states, that the amount of the minister's stipend was a matter in controversy at the time of the passing of the Act. It was fixed by the Statute at the highest sum that had ever been demanded. Therefore, that was one benefit which he got. The other observation which occurs to me is, with reference to the argument of the respondent, that the 16th clause was not a part of what the Legislature did, but an arrangement of the parties *inter se*. I cannot assent to such a proposition, but I think, that if it were so, it would be almost stronger in favour of the appellant, because to suppose that these parties, not being forced so to do by the Legislature, voluntarily entered into an agreement which they were not bound to enter into, that those who derived more benefit from the change than others should make good the difference in respect of bygone transactions, and bygone trans-

actions only, seems to me to impute to them an intention which is as absurd as it is undiscoverable upon the face of the proceedings. On the whole, therefore, I quite think with my noble and learned friend, that these interlocutors cannot stand, and that the defenders in the action ought to have been absolved.

LORD KINGSDOWN.—My Lords, I am of the same opinion as my two noble and learned friends, and I think that it is unnecessary to say anything further.

Mr. Anderson.—My Lords, we have paid money over under an *ad interim* execution. We shall get an order that the money so paid shall be returned, so that we may get back what we have paid? I do not ask the expenses.

LORD CHANCELLOR.—You cannot have expenses, but you will get back what you have paid.

Interlocutors reversed.

Appellants' Agents, Loch and Maclaurin, Westminster; Scarth and Scott, W.S., Leith.—*Respondent's Agents,* Dodds and Greig, Westminster; W. Peacock, S.S.C., Edinburgh.

MARCH 24, 1865.

JOHN PURSELL and Others, *Appellants,* *v.* WILLIAM ELDER and Others, *Respondents.*

Trust—Undisposed of Income—Trust for Accumulation—*W., by trust settlement, gave his whole estate, heritable and movable, to trustees on trust to pay debts and annuities, and at a certain event, which occurred 25 years after his death, disponed the residue to P. There was no express disposition of the intermediate income.*

HELD (affirming judgment), *That the testator having united the whole property in one mass, the income was to be accumulated and to go with the residue as an accessory thereof.*

HELD (further), *That the Thelusson Act having restricted the power of accumulation to 21 years, the income for four years was undisposed of, and went to the next of kin.*

Liferent by Implication—Trust—Construction—*W., by trust disposition, gave the interest of £3000 to G., and the residue of his estate to P., and then said, "and failing G. and P., without children of one or other of them, the property hereby conveyed to them shall devolve on S."*

HELD, *That the words "property hereby conveyed to them" did not confer by implication a liferent upon G. in the residue given to P.*

Faculty—Liferent with Power of Disposal—Ownership—Married Woman—*W., in his trust disposition, gave to G., then unmarried, the liferent of £2000; whom failing, to her children at her death; whom failing, to P. Some years afterwards G. having then been married, but having no issue nor the prospect of any, W., by codicil, said, "I reverse that clause, and commit to G.'s discretion the sole and ultimate disposal of the £2000."*

HELD, *That though, if G. had been* sui juris, *this would have been an absolute gift of the ownership, yet as she was a married woman, and the alteration was made to meet the case of her having no children, she did not acquire the ownership, but merely had the faculty of appointing the £2000.*

Appeal—Competency—Appeal without Reclaiming to Inner House—*Certain interlocutors pronounced by the Lord Ordinary not having been reclaimed to the Inner House:*

HELD *incompetent to appeal against them to the House of Lords.*

Expenses—Success of Appeal on Small Point—*An appeal to the House by the claimant on a trust estate was successful in one small point not raised in the Court below; but as the appellant was indebted to the trust estate, and in any event this debt must have exceeded the claim, and the Court below had ordered the claimant to pay expenses,*

HELD, *The order of the Court below as to expenses ought not to be disturbed.*[1]

This was an appeal from various interlocutors of the Second Division as to the construction of the trust disposition of James Warroch.

The trust disposition and settlement, dated 1805, (after giving all his estate, heritable and

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[1] See previous reports 19 D. 71: 29 Sc. Jur. 34. S. C. 4 Macq. Ap. 992: 3 Macph. H. L. 59: 37 Sc. Jur. 394.