obligation to pay him the sum of 950 merks yearly, with power to them, in their discretion, to withhold any further payment, or to make such additional payment as they may think fit.

The theory of a trust appears to me to be unwarranted by the terms of the decree. The summons of disjunction and erection upon which it proceeded, narrated the fact that £1000 had been subscribed and invested in trust for the purpose of securing a stipend to the minister of the new parish, but it was not represented to be sufficient for that purpose. On the contrary, it was stated that certain persons had bound themselves to pay a yearly contribution for fifteen years, which would be sufficient "to compleat a fund for the stipend." No one conversant with the practice of the Teind Court can suppose that their Lordships would have erected a new parish *quoad omnia* with no better security for the future sustenance of the holder of the benefice. These statements appear to have been introduced with the view of giving the Court some assurance that the municipality would be able to fulfil the obligations which they offered to undertake. No reference was made in the conclusions of the summons, to which they asked the Court to give effect, either to the trust fund or to contributions. The only conclusion relating to stipend was that "the baillie, feuars, and inhabitants of the said burgh" should be bound and obliged "to provide the minister of the kirk so to be erected with a competent and legall stipend not under nine hundred and fifty merks, with fifty merks for the communion elements, payable at two terms in the year —Whitsunday and Martinmas—by equall portions." The operative decree of the Court was in the precise terms of that conclusion. It imposes a direct obligation upon the burgh, which could not be impaired by the loss of the trust fund, or by any deficiency in the expected contributions.

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. I agree with the construction which was put upon a similar clause of obligation by the late Lord Wood in *Cæsar* v. *Magistrates of Dundee*, 20 Court Sess. Cas. 2nd Series (Dunlop) (note) 859, not because it is an authority binding upon the Court, but in respect that it appears to me to be in consonance with the intention and practice of the Court of Teinds.

The authorities relied on by the appellants had really no bearing upon the point arising for decision in this appeal. *Maule* v. *Maule*, 1 Will. & S. App. 266, is the leading authority upon the question to what extent the heir in possession of an entailed estate is bound to aliment his eldest son and heir-apparent, a question involving very different considerations from those upon which the amount of a competent and legal stipend to a minister depend. The ground of decision in that case was, that the allowance made to the pursuer was in full, if not in excess, of what his father was legally bound to give him. But it was neither pleaded nor suggested that the action was excluded, or that the Court was incompetent to determine whether the aliment afforded was sufficient.

I shall say no more, because I fully concur in all the reasons which have already been expressed by the Lord Chancellor.

Lord Field, who is unable to be present, desires me to state that he entirely approves of the judgment proposed.

Lord Ashbourne—My Lords, I concur. I have had an opportunity of reading the opinion which has been delivered by my noble and learned friend on the woolsack, and I entirely concur in the conclusion at which he has arrived, and in the reasons upon which he has based his opinion.

Lord Macnaghten concurred.

The House ordered that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

Counsel for the Appellants—The Lord Advocate (J. B. Balfour, Q.C.)—J. D. Sym. Agents—Durnford & Company, for Cumming & Duff, S.S.C.

Counsel for the Respondent—Graham Murray, Q.C.—J. F. M'Lennan. Agents—Harvey & Capron, for Miller & Murray, S.S.C.

Thursday, June 15.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, Macnaghten, Morris, and Shand.)

CARSWELL *v.* COLLARD.

(*Ante*, vol. xxix. p. 856, and 19 R. 987.)

Ship — Charter-Party — Delay in Taking Delivery—Rescission.

By charter-party dated 3rd July 1891 the owner of a steamer then being fitted out in the Clyde for the summer traffic, agreed to let her to a charterer till 30th September. The charter-party provided that the charterer should "pay for the use and hire of the said vessel at the rate of £425 per month, commencing the day of delivery . . . . whereof notice shall be given to the charterer . . . payment of the hire to be made in cash monthly, in advance, . . . first month's hire to be paid before the steamer leaves the Clyde.

Charterer agrees to give a banker's guarantee for the due payment of the hire money."

As soon as the charter-party was signed the owner began, through his broker, to press the charterer for the bank guarantee. The charterer replied that he was not bound to give the guarantee until the vessel was ready to be handed over. The broker assented to this, but continued from 6th to 10th July to press the charterer daily to give the guarantee. The charterer made no answer to any of these communications until the 10th, when he replied that he was prepared to give the guarantee on delivery of the vessel. On 13th July the broker telegraphed that the vessel would be delivered in Glasgow on the 15th. The charterer replied that he would leave Hastings for Glasgow on the night of the 15th to take delivery, but without notifying the owner he postponed his departure for a day, and did not reach Glasgow until the morning of the 17th, when he found that the owner had chartered the vessel to someone else.

Held (*aff.* the judgment of the First Division) (1) that the charterer had not committed a breach of contract by failing to take delivery on the day fixed; (2) that the charterer's conduct had not been such as to justify the owner in believing that he did not intend to fulfil his contract; and therefore found the charterer entitled to damages.

This case is reported *ante*, vol. xxix. p. 856, and 19 R. 987.

Carswell appealed.

At delivering judgment—

LORD CHANCELLOR—I do not think any question of law really arises upon this appeal. The respondent, when on his way from Hastings to Glasgow to take delivery, was detained in London, and did not arrive in Glasgow till the morning of 17th July. The shipowner and his brother did not receive any communication from him till shortly after mid-day on the 17th. He had gone to the vessel, and attempted to telephone from there, but was unable to get into communication with the office. He sent a telegram shortly after one o'clock. Meantime, about an hour and a-half earlier, the shipowner had entered into a charter-party with other persons, and refused to carry out the arrangements with the pursuer, on the ground that the charter was at an end by reason of the pursuer having failed to implement his obligations. The charter-party did not stipulate any time for the vessel being ready; it stipulated for the payment of the money in advance, but the first payment was only to be made before the vessel left the Clyde. The charter-party did not contain any provision enabling the shipowners to put an end to the charter-party in case the banker's guarantee was not delivered at any particular time, or indeed if it was not delivered at all. There was an express stipulation entitling the shipowner to put an end to the charter-party if any of the instalments were not paid at the time provided for. It was quite clear there was not any breach relating to the payment of those instalments, and therefore there was no power to put an end to the charter. No doubt it was true that if the charterer was not ready and willing to carry out his contract, then the shipowner was entitled to refuse to carry out the contract on his part. But it could not be contended that in this case the charterer was not ready and willing to carry out his part of the contract. The only question really raised was whether he had, by his conduct, precluded himself from insisting that he was ready and willing to carry out the charter, and had therefore justified the other party in acting on the assumption that he was not. I do not think that the defender did really act upon a conclusion derived merely from the conduct of the pursuer after he received notice that the vessel was ready for delivery. It was rather upon his conduct in that respect, coupled with his conduct prior to that date, that the defender really acted. Of course, the question was not what actually influenced the defender, but what effect the conduct of the pursuer would be reasonably calculated to have upon a reasonable person. The defender thought from the outset that the pursuer was not willing to be the bankers' guarantee, and that led to his regarding the pursuer as a person likely to back out of his obligations. Therefore when the pursuer did not arrive on the morning of the 16th, the defender jumped somewhat readily to the conclusion that the pursuer was not in a position to carry out the contract, and the sooner he entered into a contract with somebody else the better. But was there enough in the conduct of the pursuer to justify the course? I can find nothing more in the pursuer's conduct than this, that having announced he was intending to arrive on the morning of the 16th, he did not arrive till the morning of the 17th, and he gave during the interval no explanation of why he did not arrive. To my mind it would be a very dangerous thing to say that those circumstances were sufficient to justify a party to a contract to say—"I have therefore come to the conclusion that the other party to the contract does not intend to carry it out. The contract is at an end, and I will deal with anyone else." It would not be safe, looking at matters of business from a business point of view, to draw any such conclusions. It might lead to contracts being got rid of under circumstances where really there was on the part of the other party to them a thoroughly honest intention of carrying them into effect. I move that the judgment appealed from be affirmed, and the appeal dismissed.

LORD MORRIS said he was inclined to the view that the appellant was justified in the course he had taken.

LORD WATSON, LORD ASHBOURNE, LORD

MACNAGHTEN, and LORD SHAND concurred in the opinion of the Lord Chancellor.

The appeal was accordingly dismissed, with costs.

Counsel for the Appellant—Bigham, Q.C. —Orr. Agents—Deacon, Gibson, & Medcalf, for Simpson & Marwick, W.S.

Counsel for the Respondent—Salvesen—Crole. Agents—Learoyd, James, & Mellor, for W. B. Rainnie, S.S.C.

Friday, June 16.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, Macnaghten, Morris, and Shand.)

M'INTYRE BROTHERS *v.* M'GAVIN.

(*Ante*, vol. xxvii. 678, 17 R. 818.)

River—Pollution—Prescriptive Right.

The proprietors of bleachfields bounded by the *medium filum* of the Dighty, a sluggish polluted stream, used from time immemorial for manufacturing purposes, sank a tank into the bed of that stream at its junction with the Fithie, a quickly flowing stream of pure water, in order to obtain for their works some of the pure water of the Fithie. After being impounded and used in the works the water was returned to the Dighty undiminished in quantity. Before the water was abstracted in this way the riparian proprietors below the junction of the two rivers were able to use the water for agricultural and bleaching purposes, but the result of the operations was that the flow became more irregular, and the water was sometimes so polluted as to be unfit for these uses.

Held (*aff.* judgment of the Second Division) that the proprietors of the bleachfield were not entitled to take the water of the Dighty in any other way or place than those sanctioned by their prescriptive right, and could not use it so as to add to the pollution of the stream.

This case is reported *ante*, vol. xxvii., p. 678, and 17 R. 818.

M'Intyre Brothers appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL)—My Lords, this is an appeal from a judgment of the Court of Session affirming a judgment of the Lord Ordinary. The action is brought by certain persons, who are the owners of land bordering upon a stream called the Dighty, to obtain an interdict against the pursuers to prevent their abstracting water from a point where the Fithie flows into the Dighty, and taking it to their works by means of an aqueduct and then returning it into the Dighty in a polluted state, the result being, as the pursuers say, prejudicial to them.

Now, the appellants would, of course, have no right to take pure water from the stream and return it in a polluted state unless they could make out that by prescription, or in some other lawful manner, they had acquired that right. The works which were put down by the appellants two or three years ago were new works. They placed a box, on their side, I will assume, of the stream, but at the point at which the Fithie flowed into that stream from the north (the stream of the Dighty running west and east), so as to catch in this box as much as they could of the pure water of the Fithie, and take it by means of an aqueduct into their premises for their bleaching purposes. The water of the Fithie was preferable to the water of the Dighty for those purposes, inasmuch as the Dighty water always comes down more or less polluted, while the Fithie water is pure. There is no controversy about the object which they had in view, nor as to the works executed or their effect, though there has been controversy as to the proportion which the water abstracted bore to the total water of the Fithie, and as to the effect upon the combined streams below their junction, of the operations of the appellants.

Prima facie, what the defenders in the action, the appellants here, have done was a violation of the rights of the proprietors lower down the river. They took from the river at this point pure water and returned it in an impure condition. Apart from any prescriptive right which they may have to pollute the river, there would be an end of the case. But they say that they have acquired by prescription the right to send polluted water into the river; that they were in the habit of taking in water from the Dighty some distance higher up the river (I believe somewhere about three-quarters of a mile) at times when it was running pure, such as Sunday or Saturday afternoons, and filling their reservoirs with it for bleaching purposes, and that such water they had been in the habit, for a period giving them a prescriptive right, of taking and returning into the stream in a polluted condition; and their case is that although it is true that what they now do or seek to do had not been done by them before, yet the effect upon the lower proprietors is no greater than that which was produced by their doing what they had acquired a prescriptive right to do.

I will assume that this would be a sufficient answer to the pursuers' case if it could be established by evidence. But I desire emphatically to say that even assuming that, it appears to me that the onus of proving it rests with those who are seeking to justify the pollution, who are seeking to justify the act of abstracting water which was pure and sending it back in an impure condition. The question is, Have the defenders in the present case discharged themselves of that onus and established that the heritors lower down the river (I will deal with the case of Mr M'Gavin presently) have no right to complain inasmuch as their condition now is