Wednesday, December 12.

SECOND DIVISION.

CHIVAS' TRUSTEES *v.* DOUGLAS.

Church — Dissenting Church — Bequest to "Clergy" of Diocese of Episcopalian Church in Scotland in Supplement of Stipends—Legacy.

A testatrix by a codicil to her trust-disposition and settlement directed her executor to invest a sum of money in good security, and divide the annual income among the clergy of a diocese of the Episcopalian Church in Scotland in supplement of their stipends.

Held that the bishop, clergymen instituted to charges, clergymen holding licences of the bishop and appointed to independent mission charges, curates or assistants to instituted clergy, and the "supernumerary clergyman" in the diocese, were entitled to participate in the fund, but not the clergymen formerly employed within the diocese and now retired and on the Aged and Infirm Clergy Fund, but still holding licences of the bishop.

Church — Dissenting Church — Bequest to Clergy of "Diocese of Aberdeen" in Episcopal Church in Scotland—United Diocese—Legacy.

A testatrix who died in 1878, by codicil dated in 1872, directed her executor to invest a sum of money, and divide the annual income "among the clergy of the Diocese of Aberdeen" in connection with the Episcopal Church in Scotland, "in supplement of their stipends."

In 1864 the Diocese of Orkney had been united with the Diocese of Aberdeen, and the two Sees had ever since been known and referred to as the United Diocese of Aberdeen and Orkney. The United Diocese was ruled by one bishop, and its affairs were regulated and managed by one set of officials. The whole congregations within the United Diocese were assessed for the diocesan expenses on the same basis.

Held that all the "clergy" of the United Diocese were entitled to share in the benefit of the legacy.

By her trust-disposition and deed of settlement dated 28th June 1872, Mrs Christian Abercrombie or Chivas directed her trustee to lay out and invest on good security, in his own name as trustee, and that at the first term of Whitsunday or Martinmas happening six months after her death, *inter alia,* "(*Fifth*) the sum of £2000 sterling, the interest or revenue whereof shall be divided and paid half-yearly and termly, equally between the Right Reverend Bishop Thomas Suther of Saint Andrew's Church, Aberdeen, and the Reverend Macleod, of the Episcopal Church at Ellon, during all the days of their lives, and on the death of the predeceaser, the whole interest or revenue shall be paid wholly to the survivor during all the days of his life, and on the death of the last survivor, the said principal sum of £2000 shall be paid to the Episcopal Fund in connection with the Saint Andrew's Church, Aberdeen, the said last-mentioned bequest being made by me in name of and as a memorial of my husband, who was much attached to his church." By codicil dated 30th October 1872 the testatrix revoked and recalled the foresaid bequest of £2000, so far as regards the destination of the same after the death of the liferenters, and did thereby "leave and bequeath the said sum of £2000 sterling, upon the death of the said liferenters, to the Scottish Episcopal Church Society in aid of increase of the stipends of the clergy." By codicil dated 6th November 1872 the testatrix recalled the said legacy of £2000, bequeathed by her in liferent to Bishop Thomas Suther and Nicholas Kenneth Macleod of Ellon, and after their death the principal sum to the fund in connection with the Scottish Episcopal Church Society for the increase of the stipends of the clergy, and in lieu thereof she directed her executor "to invest the sum of £4000 on good security and pay the annual income derived therefrom equally between Bishop Suther and the said Mr Macleod during all the days of their life and wholly to the survivor, and after the death of the survivor of them, to hold the said fund and divide the annual income derived therefrom among the clergy of the Diocese of Aberdeen in supplement of their stipends."

The testatrix died on November 14, 1878. Legacy-duty was paid on the legacy, leaving £3600 in the hands of the original and assumed trustees under the trust-disposition and settlement. The annual income thereof was paid to Bishop Suther and the Reverend Mr Macleod, and to Mr Macleod as the survivor of them, down to the dates of their respective deaths on January 23, 1883, and October 3, 1898.

Thereafter a question arose as to what persons were entitled to participate in the annual income of the fund, and a special case was presented for the opinion and judgment of the Court. The parties to the special case were (1) the trustees; (2) the Bishop of the United Diocese of Aberdeen and Orkney in the Episcopal Church in Scotland; (3) thirty-eight clergymen instituted to charges within that portion of the United Diocese of Aberdeen and Orkney at one time known as the Diocese of Aberdeen in connection with the Episcopal Church in Scotland; (4) three clergymen holding licences of the bishop and appointed to independent mission charges within said portion of said United Diocese; (5) two clergymen holding licences of the bishop and acting as curates or assistants to instituted clergymen within said portion of said United Diocese; (6) three clergymen formerly officiating within the Diocese of Aberdeen, and now retired and on the Aged and Infirm Clergy Fund of the Representative Church Council in connection with the Episcopal Church in Scotland, but still holding licences of the bishop; (7) the Bishop for and on behalf of a clergyman performing clerical duties when required

on behalf of other clergymen of the diocese who might be temporarily unable to fulfil the same, and known as the supernumerary clergyman of the diocese (that office being temporarily vacant); (8) two clergymen instituted to charges within that portion of the United Diocese of Aberdeen and Orkney, at one time known as the Diocese of Orkney; and (9) two clergymen holding licences of the bishop appointed to mission charges within said portion of said United Diocese.

In the special case the following facts were stated:—"In 1864, prior to the date of the testatrix's trust-disposition and deed of settlement, the northern Diocese of Orkney was united with the Diocese of Aberdeen, and the two Sees have ever since been known and referred to as the United Diocese of Aberdeen and Orkney. Before the union the said Diocese of Aberdeen included the whole county of Aberdeen and a portion of the county of Banff. The said United Diocese is ruled by one bishop, and the affairs of the United Diocese are regulated and managed by one set of officials. The diocesan expenses of the United Diocese are annually ascertained by the Diocesan Council, and the whole congregations, including missions, within the United Diocese are assessed in respect thereof upon the same basis. The third and eighth parties are appointed to their incumbencies by the members of the congregation, unless the appointment happens to be within the patronage of one or more private individuals, and the fourth and ninth parties are similarly appointed. The fifth parties are generally appointed by the instituted clergymen whom they assist, and are paid by them or by their congregations as may be arranged. The said fifth, sixth, and seventh parties are, along with the second, third, fourth, eighth, and ninth parties, members of the Representative Church Council of the Episcopal Church in Scotland, which under the said Canons [*i.e.*, the Code of Canons of the Episcopal Church in Scotland] is recognised as the organ of the Church in matters of finance."

In the appendix to the special case the following letter, dated 12th September 1874, by the testatrix to her law-agent, was printed:—"I wish the sum of £500 to be set apart for a memorial window to Mr Chivas in our church of St Andrew's as it now is, or in a church that may be built hereafter. I may not look to see this, but the sum on demand must be paid to Dr Suther, the Rt. Revd. Bishop of Aberdeen and Orkney. Should he also have passed away ere the work is completed, you will please pay the said sum for the above-ment'd purpose to the Rt. Revd. the Bishop of Aberdeen in the Scottish Episcopal Church for the time being."

The second party maintained that he was entitled to share in the income with such of the clergy as might be found entitled to participate.

The third parties maintained that the annual income of the said bequest fell to be divided among the second and third parties only.

The fourth parties maintained that the said income fell to be divided between the bishop and such of the clergy of the Diocese of Aberdeen as were licensed to the charge of independent congregations—that is to say, between the second, third, and fourth parties only.

The fifth, sixth, and seventh parties maintained that they were entitled to participate in the income of said fund, in respect that they held the licence of the bishop of the diocese, and had the full status of clergy therein.

The eighth and ninth parties maintained that the clergy of the district which formed the original Diocese of Orkney were entitled to take equally, share and share alike, along with the clergy of the district which formed the original Diocese of Aberdeen, the benefit conferred by the said trust-disposition and settlement upon "the clergy of the Diocese of Aberdeen," the two dioceses having been united prior to the death of the truster. Upon the question whether the term "clergy" included those appointed to the charge of independent missions, those acting as assistants to instituted clergy, retired clergy still holding the bishop's licence, and the supernumerary clergyman of the diocese, as well as those instituted to incumbencies, the eighth and ninth parties adopted the contentions of the third and fourth parties respectively.

The question of law was—"Are the second, third, fourth, fifth, sixth, seventh, eighth, and ninth parties, or any and which of them, entitled under said bequest to participate in the annual income to be derived from the said trust fund?"

LORD JUSTICE-CLERK—What the testatrix in the present case desired was that the proceeds of this fund should be divided among the clergy of the diocese in supplement of their stipends. I am of opinion that this term is wide enough to include the bishop, clergy having incumbencies, those appointed to independent missions, curates or assistants to instituted clergy, and the person holding the office of supernumerary clergyman. But the sixth parties are in a different position. They formerly officiated within the diocese, but they have now retired on pensions, and although they still hold licences they have no stipends. They have no rights or obligations as acting clergymen, and I therefore think that the sixth parties are not entitled to share in the proceeds of the legacy.

The only question remaining is, whether the clergymen within that portion of the United Diocese of Aberdeen and Orkney at one time known as the Diocese of Orkney are entitled to share in the bequest. It appears that in 1864 it was thought advisable to amalgamate the Diocese of Orkney and the Diocese of Aberdeen, and ever since they have been known as the United Diocese of Aberdeen and Orkney. They are under one bishop, whose official title is the Bishop of the United Diocese of Aberdeen and Orkney. But it seems quite plain that the United Diocese is popularly described as the Diocese of Aberdeen, and th

bishop as the Bishop of Aberdeen. Aberdeen is the seat of the bishop. I am of opinion that the testator used the words Diocese of Aberdeen in that sense, and intended all the clergy of the United Diocese to have a share in the bequest. I am confirmed in this view by her letter of 12th September 1874, in which the testatrix uses the terms "Bishop of Aberdeen and Orkney" and "Bishop of Aberdeen" as synonymous.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court answered the question of law by declaring that the second, third, fourth, fifth, seventh, eighth, and ninth parties were those entitled under the bequest to participate in the annual income to be derived from the fund.

Counsel for the First Parties—J. A. Reid. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for the Second Party—Spens. Agents—Henry & Scott, W.S.

Counsel for the Third Parties—Cook. Agents—Henry & Scott, W.S.

Counsel for the Fourth Parties—Blackburn. Agents—Roberton & Wood, W.S.

Counsel for the Fifth, Sixth, and Seventh Parties—J. A. Reid. Agents—Roberton & Wood, W.S.

Counsel for the Eighth and Ninth Parties—Pitman. Agents—J. & F. Anderson, W.S.

Thursday, December 13.

FIRST DIVISION.

[Lord Pearson, Ordinary.

JOHN G. STEIN & COMPANY *v.* ROBEY & COMPANY, LIMITED.

Sale — Sale of Moveables — Warranty — Breach of Warranty in Extinction of Price — Innocent Misrepresentation — Right to Rescind — Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *secs.* 53 *and* 62.

Section 53 of the Sale of Goods Act 1893 enacts—"Where there is a breach of warranty by the seller . . . the buyer . . . may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price." By section 62 it is provided—"As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material condition of the contract."

A brickmaker obtained from the agent of a firm of engineers a specification and estimate for an engine which they were prepared to supply. In the letter enclosing them the agent set forth a series of calculations based upon (1) the steam producing capacity of coal; (2) the power producing capacity of the engine to be supplied by his principals; (3) the power required to drive the brickmaker's brickmaking machines; (4) the brickmaking capacity of these machines; and (5) the price of coal. The result arrived at was that with the brickmaker's boiler and brickmaking machines and the engine to be supplied, 30,000 bricks would be produced with an expenditure of 22 cwt. of coal of a kind which could at that date be purchased at 4s. per ton. These calculations began with the statement "1½ lbs. of coal develop 15 lbs. of steam." Thereafter the brickmaker wrote to the engineers ordering an engine "subject to your guarantees of fuel consumption being fulfilled." On the engine being supplied, it appeared that although admittedly a good one it required three tons of coal of the kind above mentioned to make 30,000 bricks, the reason for the discrepancy being that the agent in his calculations had taken the amount of steam developed by the best Welsh coal instead of the amount developed by coal of the kind used by the brickmaker. In defence to an action for the price the brickmaker maintained that the sellers had warranted the coal consumption referred to in the letter, and, under the section quoted above, claimed to set up in extinction of the price the breach of the warranty founded on. *Held* (*aff.* judgment of Lord Low, Ordinary) that the letter of the agent did not contain any warranty as to coal consumption within the meaning of section 53 of the Sale of Goods Act as interpreted by section 62.

Opinion (*per* Lord M'Laren) that a statement in the letter of the sellers' agent with regard to the amount of steam required to develop 1 horse power with the engine to be supplied amounted to a warranty within the meaning of the Sale of Goods Act.

Opinion (*per* Lord M'Laren) that the statement as to coal consumption in the letter of the seller's agent amounted to a representation intended to induce a contract, which being untrue in fact would have entitled the purchaser, while matters were entire, to rescind the contract.

In 1898 John G. Stein & Company, fireclay manufacturers at Bonnybridge, entered into negotiations with Messrs Robey & Company, Limited, engineers, Lincoln, with a view to the purchase of a new engine for their works. These negotiations were mainly carried on with one Dunkerton, who was agent for Robey & Company in Glasgow.

On 1st October 1898 Dunkerton wrote to Stein & Company enclosing a specification and estimate for an engine which his firm were prepared to supply. This letter was in the following terms:—"Dear Sirs—We now have pleasure in enclosing herewith specification and estimate of our coupled compound condensing engine, class E, having cylinders 13½ in. and 21½ in. by 30 in. stroke, and, as an alternative, one of the same type, but having cylinders 15 in. and 23½ in. by 33 in. stroke—the former running at 100 revolutions per minute, the latter running at 90 revolutions per minute.