Thursday, March 10.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

MANAGERS OF FORTH CHURCH *v.* DARLING.

Trust — Trustees — Committee of Management of Church — Notice of Meeting — Whether Meeting Authorising Action Duly Called.

In an action raised by the committee of management of a church against one of their members, who was also one of the trustees of the church, for payment of a sum of money which they alleged should be paid to themselves and not to the trustees, the defender pleaded that the action had not been duly authorised by the committee of management, inasmuch as neither he nor his brother had been "present at nor convened to any meeting to consider" the subject. The pursuers stated that the meeting authorising the action had been called in the customary way, viz., by intimation from the pulpit, and it was proved that this was the customary way of calling meetings of the committee, there being no special mode authorised in the constitution of the church.

The Court, while of opinion that in the circumstances it would have been more becoming to send special notice to the defender, *repelled* the plea in respect that he had not averred that he was in ignorance of the meeting, and that if he knew of the intention to hold it, it was his duty to attend.

Wyse v. *Abbott*, July 18, 1881, 8 R. 983, *discussed* and *approved.*

An action was raised in the Sheriff Court of Lanarkshire by the committee of management of the parish church of Forth against Mr George Erskine Darling, coalmaster, Glasgow, one of their number, who was also one of the trustees of the church, for payment of the sum of £40, being the amount of a duplicand received by the defender as trustee, of which the pursuers averred they were entitled to receive payment.

The pursuers stated that after they had applied to the defender through their clerk for payment of the sum, the action was authorised by a meeting of the committee held on 9th December 1896. They alleged that the meeting in question was called in the ordinary way by intimation from the pulpit.

The defender maintained that the disposal of funds forming part of the endowment of the church lay with the trustees, and that the committee of management were not entitled to demand payment.

He averred "that the present action had not been authorised by said committee. The said George Erskine Darling and William Darling were never present at or convened to any meeting to consider same, and have given no authority whatever for the use of their names as pursuers. Averred further that the said action has been authorised and instructed at their own hands by the other pursuers only."

He pleaded—"(1) The action never having been duly authorised by said committee, ought to be dismissed, and the pursuers, other than George Erskine Darling and William Darling, found liable personally to the defender in expenses."

By the sixth article of the constitution of the church it was provided that there should be an annual meeting of seatholders to elect a committee of management, which should be called by intimation from the pulpit on the two preceding Sundays, and it further provided that as soon as the election was made the committee of management should elect a clerk and treasurer.

There were no other provisions as to the mode of convening the committee of management.

The Sheriff-Substitute (BALFOUR) on 8th April 1897 pronounced an interlocutor whereby he repelled the defender's other pleas-in-law and allowed parties a proof as to his first.

On 3rd June the Sheriff-Substitute pronounced the following interlocutor:—"Finds that the meeting of 9th December 1896, at which the raising of this action was authorised, was called in the usual manner by intimation from the pulpit: Finds that this has been the regular way of calling meetings of the committee of management, and it is so far sanctioned by the sixth article of the deed of constitution: Finds that, although the defender's brother avers that he and his brother sometimes received notices or circulars calling such meetings, there is no distinct evidence on the subject, and the proof for the pursuer establishes that the meetings have been called, particularly during the incumbency of the present minister, by intimation from the pulpit, and not by special circulars, and that the defender often attended meetings called by intimation from the pulpit, and did not complain of such intimation or request any more special intimation: Finds, under these circumstances, that the meeting in question was duly and regularly called: Therefore repels the first plea-in-law for defender: Decerns against him as craved in the petition," &c.

Note.—"The only regulation in the deed of constitution which bears on the mode of calling meetings of the committee of management is to be found in the sixth article. That article provides for the calling of annual meetings of seatholders to elect a committee of management, and it provides that as soon as the election is over the committee of management is to nominate their clerk and treasurer. The meaning of this apparently is that the meeting is first to be one of seatholders to elect a committee of management, and it is then to be a meeting of committee of management to elect a clerk and treasurer. The meeting of seatholders is to be called by

intimation from the pulpit, and this mode of calling applies not only to the meeting of seatholders but to the subsequent meeting of the committee of management. But apart from this it has been the regular practice in the church to call meetings of committee of management by intimation from the pulpit, and this was the recognised way to call meetings of kirk-session. The defender and his brother have attended meetings called in that manner, and it is not proved that they ever complained of the manner of calling the meeting or desired that special circulars should be sent to them."

The defender appealed against both interlocutors.

Argued for reclaimer — The proof only showed that ordinary meetings were called by intimation from the pulpit, but in such a case as this, where the trustees were not resident in the parish, and when it was known that there was to be a controversial matter discussed at the meeting, intimation should have been specially made to them. They were the members who above all others should have been given notice. The real question was what was reasonable in the circumstances and it was certainly only right that they should have special notice, and in the absence of such notice the action was not duly authorised—*Wyse* v. *Abbott*, July 18, 1881, 8 R. 983.

Argued for respondents—This was the regular mode of calling the meetings, and the defender had been in the habit of attending meetings thus called without making objection or desiring that special circulars should be sent. The committee would naturally assume when the defender and his brother did not appear at this meeting that they thought it more becoming to stay away.

LORD PRESIDENT — It does not appear from anything in the constitution of this church, or in any of the writings which regulate the proceedings of the committee of management, that there was provision made for the mode of calling meetings. In practice the mode adopted at Forth was intimation in the church, and if that intimation reached, or was adequately calculated to reach, all the members of the committee, there is nothing in the form which is inapplicable, and there is no positive law requiring that there should be a circular sent to each member of the committee. Now, in this instance intimation was given from the pulpit, and I observe that the defender does not allege upon record that he did not know of the meeting having been convened, and he was not examined as a witness upon this point. He merely stands upon the quality of the intimation itself and not upon any failure of the news to reach himself that the meeting was about to be held. I do not think that a sufficient statement of failure duly to call the meeting. If in point of fact, and this may very well be, the meeting was called in the usual way, and the defender knew that it was to be held on a stated day, and stayed away, then it seems to me that his objection is bad, and there is nothing in the proof or record to exclude this view of the situation.

On this ground I am disposed to think that the judgment of the Sheriff upon this point should be affirmed, and the plea repelled.

I wish, however, to add that I should be sorry if our judgment on this point were misconstrued as giving any sanction to the idea that it was not the duty of the committee, as it is certainly the duty of a body of trustees, to adopt adequate means for convening all the members, especially persons who are likely to be dissentients from the prevailing policy, or the policy of the promoters of the meeting. It seems to me that the case of *Wyse*, 8 R. 953, is a very important one, as showing that no action ought to be taken by a mere majority of trustees acting at their own hand without consultation with the minority, or the persons who are expected to form the minority. The duty of trustees and of the committee is to act collectively and to adopt the proper and necessary means of promoting collective and unanimous action, which is by conference and reasoning. Accordingly, if it were shown that the means adopted for convening this meeting were inadequate to certify Mr Darling that the meeting was about to be held, I should have great hesitation about the soundness of this judgment, and I say this all the more because this was not a merely routine meeting for consideration of ordinary business, for passing the annual accounts, or for matters of that description, but it was called to consider a sharply controversial and critical matter, and one probably involving litigation. Now, it seems to me that just because the ground of the litigation was an opinion by the majority as to a constitutional question about this church—the relative rights of the committee on the one hand and the trustees on the other—it was indispensable that those trustees who were members of the committee should be apprised of the meeting, and that their presence should be procured by those who were resolved to take action against them. Who knows but that the reasoning advanced by the trustees, if they had been present, might not have induced a different course to be taken than that which has resulted from the meeting held in their absence. Therefore, as I have said, so far as my judgment is concerned, I do not give countenance to the idea that this would have been a good meeting if Mr Darling had not known of it, and if adequate means had not been taken in the way of personal communication with him, inasmuch as he did not attend the church. But my judgment is based upon this much narrower ground, that it was Mr Darling's duty to attend if he knew that the meeting was to be held, and *non constat* that he did not know.

LORD ADAM—I am of the same opinion. The plea which we are asked to sustain is the first. It is said that this action was not duly authorised by the committee,

because the meeting was not duly called, being only intimated from the pulpit. I should be of opinion that if the meeting was held for the purpose of the ordinary administration of church business, such intimation would be sufficient, but as your Lordship has pointed out, that was not the purpose of the meeting, but it was for the determination of a very critical matter—whether or not this money could be claimed by the committee of management, and whether, if the trustees or Mr Darling, in whose hands the money was, were not disposed to give it up, there should be an action raised against him to determine the point.

That was a very important meeting, and care should have been taken to bring knowledge of it to all the parties interested. Now, the parties most concerned, to whom intimation should have been made, were the Darlings. Who can say that, if there had been a moderate statement of Mr Darling's position, there might not have been an amicable arrangement? Accordingly if it were maintained that intimation was never made to him, or that knowledge that the meeting was to take place was never brought home to him, there would be a great deal to say against the competency of the proceedings or the due authorisation of the action. But we are entitled to assume that he did know that it was intended to hold a meeting, for he does not deny it and was not examined on this point, and that being so it was his duty to attend it. I am of opinion, therefore, in the circumstances, that the intimation given was sufficient, and that this plea should be repelled.

LORD M'LAREN—When trustees, a committee, directors, or members of a public body, are to be called together, the question whether a meeting is properly convened must be determined primarily by the terms of the constitution of the trust. But if there is nothing written on the subject, then custom must prevail, and for all ordinary purposes I should say that if it is the custom to call together a body concerned with the administration of ecclesiastical affairs by intimation from the pulpit, then, on proof being given of the existence of such a custom, such intimation would be sufficient.

In the case of public bodies which meet on stated days, no intimation is required. But of course where there are no stated days intimation of some kind must be made, and in the present case the meeting was properly called.

Now, looking to the case of *Wyse*, 8 R. 983, this must be regarded as an authority not only on the formal question as to what is necessary to constitute a meeting of trustees, but also on the more important question as to what is the fair relation of trustees towards one of their number who may be expected to be a dissentient from the course which the general body propose to adopt. I cannot help thinking in the present case that when it appeared that Mr Darling was not attending the meeting, and especially if the committee had reason to believe that he was in ignorance of it, the proper course would have been to adjourn, and to give him notice of the intention to take action against him in respect of the sum of money held by him. If he had attended the meeting, it is not unreasonable to expect that there would have been an attempt to settle the dispute in a less controversial manner than by a legal action to try the question whether the money was to be administered by the managers or by the trustees. But Mr Darling is not said to have been in ignorance of the meeting, or to have been excluded from the deliberations of his colleagues. That would have made his case very different, but all that he says is that the committee are not entitled to succeed because the action was not duly authorised.

I agree with your Lordships that the Sheriff has rightly disposed of this plea by repelling it.

LORD KINNEAR was absent.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuers—Sol.-Gen. Dickson, Q.C.—Purves Smith. Agent—T. C. Smith, S.S.C.

Counsel for Defender—C. N. Johnston—A. S. D. Thomson. Agent—J. B. M'Intosh, S.S.C.

Friday, March 11.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACKIN *v.* LORD ADVOCATE.

Crown—War Department—Jurisdiction of Civil Courts—Military Pension—Chelsea and Kilmainham Hospitals Act 1826 (7 *Geo. IV. c.* 16), *secs.* 10 *and* 13.

In an action against the Lord Advocate, as representing the War Department, brought by a former soldier and non-commissioned officer who had served in the army for such a period as entitled him, under the Chelsea and Kilmainham Hospitals Act 1826, sec. 10, and relative regulations, to a pension for life, and who had been awarded, and had for a number of years received, payment of such a pension, the pursuer concluded for declarator that he was entitled to the pension, and that he had not committed any act subjecting him to forfeiture of the said pension. The summons also contained a conclusion for payment of the pension. By the statute above referred to (sec. 13) the Chelsea Commissioners are empowered, upon complaint and proof to their satisfaction of gross misconduct on the part of a pensioner, to take away his pension. The defender averred that the pursuer had been deprived of his pension by the Chelsea Commissioners in respect of gross misconduct. The pursuer stated that no proof of misconduct