

Saturday, November 26.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MANAGERS OF FORTH CHURCH
 v. DARLING.

(Ante, 10th March 1898, 35 S.L.R. 572;
 25 R. 747.)

Church—*Quoad Sacra* Parish Church—
 Trust—Construction of Trust Deed.

The deed of constitution of a *quoad sacra* parish church nominated certain trustees and provided for the election of a committee of management "to take charge of said church and appurtenances and to keep the same clean and in good order and repair," and directed that the said committee should let certain sittings, and expend and apply the seat rents in terms of the Act 7 and 8 Vict. cap. 44, the surplus revenue to be applied in supplementing the stipend of the minister.

The endowment of the church was provided for by, *inter alia*, a disposition to the said trustees of a feu-duty, with a duplicand every 19 years, over certain subjects, to be held by them for the following purposes, viz., (1) payment of the minister's stipend; (2) payment of the feu-duties exigible for the site of the church and manse; (3) payment of expenses incurred in maintaining and upholding in due repair the fabrics of the church and manse; (4) for payment of the surplus, if any, in defraying the costs of management, and in supplementing the stipend, "or otherwise in improving the condition of the said church and parish as the said trustees shall determine." In a question between the trustees and the committee of management held that the trustees and not the committee of management were entitled to receive and to hold for the trust purposes the feu-duty and duplicand.

By decree of the Court dated 14th March 1881 the church of Forth and adjoining district were disjoined from the parish of Carnwath and erected into a parish church and parish *quoad sacra*, in terms of the Act 7 and 8 Victoria cap. 44. The report of the Clerk of Teinds on the application for disjunction showed that the sum of £5 would suffice for the proper upkeep of the fabrics, and that the minister's stipend had been secured by, *inter alia*, a disposition in favour of the constitution trustees of feu-duty payable from certain subjects in Glasgow to the extent of £42, 17s. 6d., with a duplicand every nineteenth year from Whitsunday 1877.

The deed of constitution of the church, which was in the form invariably used for the constitution of *quoad sacra* parish churches, was executed in February 1881, and began by nominating certain trustees *ex officio* and three other trustees, among

whom were George Erskine Darling and John Darling. The said deed contained the following provisions:—"Third. That when the said church and parish shall have been so erected, the said trustees (other than those *ex officio*) shall take measures for having a portion of the sittings in the said church set apart free for all persons frequenting the same, and another portion allocated by the presbytery, in terms of the statute, at reduced rents; and the committee of management hereinafter mentioned shall let and appropriate the remaining sittings, and expend and apply the seat rents in terms of the foresaid statute, and of any obligations undertaken or imposed in conformity therewith; and the said committee of management shall apply the surplus revenue of the said church in supplementing the stipend of the minister thereof beyond the endowment to be secured as aforesaid. Fourth. That the said trustees (other than those *ex officio*), and their foresaids, shall be members of the committee of management of the said church, and the one whose name first occurs herein, but if absent the other trustees in their order, and their foresaids, shall preside at all meetings of the committee of management; but if none of the said three trustees shall be present the meeting shall elect one of their own number chairman, and at all such meetings the chairman shall have a deliberative as well as a casting vote. Four shall be a quorum of the committee of management. . . . Sixth. That in the first month of January, occurring not sooner than twelve months after the erection of the said church into a parish church, a meeting of qualified electors, viz., males above twenty-one years of age, who are seatholders (*i.e.* persons who have paid for their seats), and also in full communion with said church, whether resident within the bounds of said new parish or not, shall be called by intimation made from the pulpit, in terms of directions by the committee of management, in the forenoon and afternoon (should there be two such services) of the two Sabbaths preceding the day fixed by the said committee for such meeting, and one of the trustees appointed by themselves, or other fit person appointed by said trustees to discharge that duty, shall preside at the meeting, and failing the attendance of such trustee or person appointed to preside at said meeting, the meeting shall elect one of their own number as preses of the meeting, and the electors qualified as aforesaid present at the meeting shall forthwith elect from their own number six persons to act along with the said three trustees, or their successors, as a committee of management, of whom the two whose names shall be at the top of the list of elected members shall retire at the end of one year, the next two at the end of two years, and the last two at the end of three years after their election; and as soon as said election is over, and thereafter annually, the committee of management shall nominate and appoint any one of the said trustees, or any one of the elected members of committee, or some

other competent person, to act as their clerk and treasurer, who shall retire annually, but be eligible for re-election. *Seventh.* That the duties of the committee of management shall be to appoint a precentor, beadle, and doorkeeper, or other officials, and to fix the salaries to be paid to these officers; to take charge of the said church and appurtenances, and to keep the same clean and in good order and repair; to superintend the seat-letting and the collections, and generally to manage the secular affairs of the said church."

The disposition referred to in the report by the Clerk of Teinds conveyed to the trustees nominated by the deed of constitution all and whole certain subjects from which was payable a feu-duty of £105, 7s. 2d., with corresponding duplications. The disposition then proceeded—"And whereas it has been arranged among our said disponees that the above annual feu-duty of £105, 7s. 2d., with corresponding duplications, interest, and penalties, shall be held and applied by our said disponees and their foresaids, in the proportions after mentioned, in implement *pro tanto* of the obligations undertaken by them respectively, and it is therefore hereby at the request of the whole of my said disponees, specially provided and declared, that the foresaid annual feu-duty and others shall be held by our said disponees, as trustees foresaid, and their foresaids, in trust always for the uses, ends, and purposes mentioned herein, and in the deeds of constitution under which the trustees of the individual churches shall be appointed, or shall be acting for the time, and that in the following proportions, viz. . . . (Second) the sum of £42, 17s. 2d. sterling, with corresponding duplications, interest, and penalties, shall belong to the trustees of Forth Church aforesaid, and shall be applied by them for the ends, uses, and purposes mentioned in the deed of constitution of said church, and, in particular, without prejudice thereto, *primo*, for payment, in so far as not otherwise provided, to the minister for the time being of Forth Church and parish *quoad sacra*, of the yearly stipend of £100 sterling, agreed to be secured as aforesaid; *secundo*, for payment of the annual feu-duties of 2s. exigible for the sites of Forth Church and manse connected therewith; *tertio*, for payment of the expenses necessarily incurred in maintaining and upholding in due repair the fabrics of the said church and manse; and *quarto*, for payment of the surplus (if any) of the said sum of £42, 17s. 2d. sterling, with corresponding duplications, in defraying the costs of management, and in supplementing the statutory stipend or endowment of the minister, or otherwise in improving the condition of the said church and parish as the said trustees shall determine, which several trust purposes, conditions, and declarations above written are hereby declared to be real and inherent qualities of this right, and, as such, are appointed to be engrossed in all future conveyances of the steading and ground hereby disposed, or validly referred to therein in terms of law."

The feu-duty was paid regularly to Mr George Erskine Darling, one of the non-official trustees, who applied it to the purposes of the trust. In 1896 a duplicand of £40, 6s. 3d. became due from the vassal, and was paid to Mr Darling. Thereafter the committee of management of Forth Parish Church raised an action against Mr Darling in the Sheriff-Court of Lanarkshire for payment to them of that sum.

The pursuers averred—" (Cond. 4) By the deed of constitution of said parish church, approved of by the said Lords, it is provided that the duties of the committee of management shall be to take charge of said church and appurtenances, and to keep the same clean and in good order and repair, and generally to manage the secular affairs of the church, and the pursuers being the committee of management of said church are entitled to receive payment of the sum sued for."

The defender denied (Cond. 2) that he had received the duplicand as an individual, and averred "That said committee of management have no title, under said deed of constitution or otherwise, to demand payment of or intromit with said duplication or with any other funds forming part of the endowment of said church, but that the whole control and disposal thereof rests with said trustees."

The pursuers pleaded—" (1) The sum sued for being the duplicand of a feu-duty or feu-duties set aside by the Court of Teinds for the maintenance of the fabrics of said church and appurtenances, and the duty of attending to said maintenance being vested by the constitution of said church upon the pursuers, decree should be granted as craved."

The defender pleaded—" (2) The action is irrelevant. (3) No title to sue. (7) The defender and his co-trustee having in the whole matters libelled acted in accordance with the trusts under which they received the sum sued for, and they having under said trusts the sole power and discretion as to its disposal, the defender is entitled to absolvitor with expenses."

On 8th April 1897 the Sheriff-Substitute repelled, *inter alia*, pleas 2, 3, and 7 for the defender, and allowed a proof in support of the averments, on which plea 1 was founded, that the action had never been duly authorised by the committee of management.

After a proof the Sheriff-Substitute on 3rd June 1897 repelled the first plea-in-law for the defender, and decerned against him as craved in the petition.

The defender appealed, when the Court on 10th March 1898 (*ut sup.*) repelled the first plea-in-law for the defender, and allowed parties a proof as to the capacity in which Mr Darling had received the duplicand.

Proof having been led before Lord Kinneir, argued for the pursuer—The duplicand of the feu-duty had been paid to the defender, and he was bound to account for the same to the committee of management. The decree of erection appropriated the duplicand to the upkeep of the church

and manse, and as the obligation to keep these in good repair was laid on the committee of management, they were entitled to the money.

Counsel for the defenders were not called upon.

The LORD PRESIDENT—This is an action by the Committee of Management of the *quoad sacra* Parish Church of Forth, and the ground of action as explained in the condescendence is a very plain and simple one. The committee of management aver that the vassal entered under a feu-contract which gives right to a feu-duty and duplicands to the trustees of this church, has paid a duplicand to Mr Darling, and they assert that as committee of management they have right to recover it from anyone to whom the vassal has paid, the moment that payment is made. The theory of the action is that this ought to come, if through the trustees of the church, then through them as a hand which passes the money into the coffers for the committee of management.

Now, the question is whether that theory is sound, and we have to consider the decree of erection of this *quoad sacra* church, and the deeds which are sanctioned by the Court and which settle its rights. Well, now, it is to be observed from what I have said that the committee of management claim as from the outset that the money shall be in their hands, and that the trustees shall finger it merely to the effect of at once handing it over to the committee. I take first the fact that the trustees constituted under the deed of disposition are the superiors, and primarily receive payment of the money. The deed which defines the rights of these trustees is a deed which sets them up as the holders of the heritable property belonging to the church. The church is vested in them, and so is the feu-duty which is acquired for the purpose of securing the maintenance of the fabric of the church and manse, and the payment of certain sums to the minister. This disposition sets out at length certain trusts; and what we have to consider is whether this trust-deed imposes on the trustees the duty of forthwith divesting of the annual feu-duty, and of the duplicand in favour of the committee of management, or whether it does not prescribe to them the duty of holding these moneys and disposing of them for certain specified purposes in their order. It seems to me that on the trust-deed it admits of no doubt that these trust purposes which are here declared are trust purposes which can only be accomplished by the trustees retaining the money in their own hands and paying it, first for the one purpose and then for the other, until the money is exhausted. The words are—“The sum of £42, 17s. 2d., sterling, with corresponding duplications, interest, and penalties, shall belong to the trustees of Forth Church aforesaid, and shall be applied by them for the ends, uses, and purposes mentioned in the deed of constitution of said church, and, in particular, without prejudice thereto, *primo*,” *secundo*, *tertio*,

and *quarto*. Now, the first purpose is to pay to the minister the minimum stipend which is provided by the decree. The next purpose is payment of the annual feu-duty of 2s. for the site of Forth Church and manse; and the third is for payment of the expenses necessarily incurred in maintaining and upholding in due repair the church and manse. Now, it is said—and I think quite properly—that the duty of maintaining the fabric of the church and incurring expense under that head is vested not in the trustees but in the committee of management, and of course, as the deed of constitution is mentioned in this trust-disposition as forming part of the purposes of the trust, we must refer to it. But then when we turn to it it seems to me that its provisions are entirely reconcilable with the literal fulfilment by the trustees of their duties and of those which the deed of constitution sets upon the committee of management. It says that the duties of the committee of management shall be “to take charge of the said church and appurtenances and to keep the same clean and in good order and repair.” These are their duties and they are empowered to superintend the seat-letting and the collections, and the revenues which they have in their own hands to administer are the seat-rents and the collections. And the thirteenth article is careful in saying—“The committee of management shall expend and apply the moneys arising therefrom in accordance with said statute.” Now, no question arises in this case as to the order in which the two funds—the feu-duty and duplicands on the one hand, and the collections on the other hand—shall bear the burden of keeping the fabric in repair, but I am perfectly willing to assume that sooner or later the committee do require money from the trustees. Their duty is to send in their account to the trustees. The trustees will honour it if it is an account for necessary expenses or repairs, and if it is not otherwise provided for. But the mere fact that the committee have the duty of incurring the accounts, and the trustees have the duty—sooner or later, as I say—and I do not ask whether it is sooner or later—of paying these accounts, does not in the least derogate from the trustees keeping the money in their hands till the account of the committee is sent in, when they will be prepared to meet it under article *tertio*. But I observe that article *quarto* proceeds on the hypothesis that after the liabilities of the trustees for the debts of the committee of management have been discharged there may still remain some of the feu-duty and of the duplicand in their hand, and the trustees are to exercise discretion as to the disposal of the surplus—they may defray the costs of management, or supplement the statutory stipend of the minister, or improve the condition of the church and parish, as the trustees shall determine. It seems to me impossible for the trustees to exercise that discretion unless they have the surplus in their hands, and accordingly, in my view, that negatives the contention of the com-

mittee that from the outset the money is to be parted with by the trustees and placed in the hands of the committee.

What I have said applies primarily to the case of feu-duty, and the case of the annual feu-duty is the simplest case. The duplication is to follow the same course as the feu-duty and is to be subject to the same trustees. Now, on the question of the application of the duplicand I have no occasion to enlarge. Suppose Mr Campbell to be right—that when the first duplicand comes in—that is to say, at the end of nineteen years, that you are then to treat it not as annual income but as a fund which has to be husbanded over the next nineteen years, then your trust not the less applies to the fraction of the duplicand which effeirs to each year. The same reasoning requires that it shall remain in the hands of the trustees till the various trust purposes have been considered and fulfilled and cannot be parted with at the outset.

Now, that leads me to the conclusion that the committee have not right to their present demand. This, let it be observed, is not an action in which they say—“Your first purpose and your second purpose have been considered by you and do not require at present a part of this duplicand; our term has come; we have expended money on necessary repairs and you have declined to pay over to us.” That is not the case of the committee nor of the trustees. The committee do not assert that in the circumstances of this year the third purpose has come to be fulfilled by the trustees. Accordingly, on this ground I hold the committee have no right to this money in the stage at which they have made the claim. I think their right would arise only if they had presented a bill for necessary repairs, and the trustees, having satisfied the first and second purposes, had funds in their hands but refused to honour the committee's order.

When the case was last before your Lordships the previous proceedings in the Sheriff Court had not resulted in the ascertainment of the facts as to who had got this money—whether it was in the hands of Mr Darling as an individual or in the hands of a body of trustees of whom he was one of the acting trustees. It does not appear to me that that question is of importance if your Lordships are of opinion that the committee's action is untenable, but if it were necessary to express an opinion it would rather appear to me that Mr Darling received it as one of the acting trustees, because it would appear that the official trustees did not either meddle or intromit with the fund, and that the practical duties of the trust devolved on these one or two local and resident gentlemen. Accordingly, were it necessary to decide the question of fact, I think the case is made out that payment was made to the trustees. But, on the other hand, I think the antecedent question admits of more decisive judgment, and on that ground the action falls.

LORD ADAM concurred.

LORD M'LAREN—When we consider that there are hundreds of congregations in Scotland whose pecuniary affairs are regulated by deeds of trust, and by the appointment of a committee of management in terms similar to those we have been considering, this case acquires an importance which it would not otherwise possess, because there is really nothing, no substantial interest, at stake here. It is only a question of administration, which of the two highly respectable bodies of gentlemen connected with this congregation are to be responsible for the due application of the feu-duties and casualties which come in under the constitution of the church. Now, the question, I understand, is whether the trustees are to be treated merely as trustees for the purpose of holding heritable property to prevent the inconvenience of heritable subjects being vested in a body which is continually changing (according to the argument for the pursuers), or whether these trustees are responsible for the application of the revenue of the trust so far as it comes into their hands. The determination of that question must, of course, depend upon the terms of the trust-deed itself, and therefore there is not much force in the analogies suggested, such as the case of trustees for joint-stock companies, or clubs and other private associations. It may very well be that in such cases the trustees merely hold funds for convenience, and under their trust have no duty to discharge as to revenue, not even to uplift it. But in this case the trustees owe a duty to the Court of Teinds, for it is a condition of the granting of disjunction and erection that the trust shall be undertaken by a body of trustees named, with powers of assumption, who undertake trust duty in all time coming. They cannot discharge their trust or get quit of their responsibility by delegating their duties to another body, however respectable, or to a committee of management, and therefore as matter of principle, I think Mr Darling, who was deputed, or at least allowed, by his co-trustees to receive this money was quite entitled to take up the position—“I am responsible for the revenue derived from this superiority, and I prefer to apply the money myself in terms of the trust-deed.” No doubt it is not the business of the trustees to repair the church, to make contracts with tradesmen, and to render themselves responsible directly to contractors, and therefore I agree with the observation of your Lordship in the chair, that when the committee of management exercise their duties in keeping the church in repair, and expend a sum for which they were not originally responsible, they may go to the trustees and call on them to make the duplicand available to meet the deficiency. But that is not the theory of the present action, for what is asked is that, irrespective of any statement of immediate necessity, the money is to be paid over, and there, as I venture to think, the committee of management have overstated their powers. I am therefore of opinion that the defenders should be assoilzied.

LORD KINNEAR concurred.

The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defender.

Counsel for the Pursuers—Campbell, Q.C.—Steele—Purves Smith. Agent—T. C. Smith, S.S.C.

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

Tuesday, November 29.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

GILLAN v. PARISH COUNCIL OF BARONY PARISH, GLASGOW.

Sheriff—Jurisdiction—Custody of Children—Custody of Children Act 1891 (54 and 55 Vict. c. 3), secs. 1, 2, and 3.

A sheriff has no jurisdiction to consider petitions for permanent custody of children, or petitions for the custody of children, where questions are raised under the provisions of the Custody of Children Act 1891, and the Court will not of consent, on appeal from the Sheriff Court, adopt such petitions and treat them as if they had originally been presented in the Court of Session.

This was an action brought in the Sheriff Court at Glasgow by Mary Ann M'Cann or Gillan, widow of William Patrick Gillan, formerly an ironwork labourer, and subsequently a carter in Glasgow, against the Parish Council of the Barony Parish of Glasgow.

The pursuer prayed the Court "To ordain the defenders to deliver to the pursuer each and all of her children, *videlicet*—George Gillan, Agnes Gillan, William Patrick Gillan, and James Gillan, presently in their custody or under their control, and failing their doing so within such period as the Court shall appoint, to grant warrant to officers of Court to search for each and all of the said children, and take possession of each and all of them, and deliver each and all of them to the pursuer; as also, on delivery of each and all of the said children having been made to the pursuer, to interdict the defenders from interfering in any way with the pursuer in her possession and custody of each and all of them; and to find the defenders liable in expenses."

The pursuer averred that she was married to William Patrick Gillan on 31st December 1886 according to the forms of the Roman Catholic Church, and that the four children referred to in the petition were born of this marriage—on 11th October 1887, 11th April 1889, 28th April 1891, and 25th January 1895 respectively; that her husband was admitted to Barnhill Poorhouse on 8th June 1895, and died there a few days later; that from that date till January 1896 the pursuer was paid sums varying from four to six shillings weekly on behalf of her children; that in

May 1896 the pursuer consented to her three eldest children being sent to the Children's Refuge on condition that they were returned to her as soon as she got a suitable house; that these three children, notwithstanding this arrangement, were transferred without her knowledge or consent to the custody and keeping of the defenders; that shortly thereafter she and her youngest child were admitted to the defender's poorhouse, but that she only remained there a few days, and on leaving requested the defenders to allow her to get the custody of her children and to take them with her, but that the defenders refused to do this, and that since then she had frequently applied for delivery of her children, but that the defenders not only refused to accede to this request, but even refused to allow her to interview, or to afford her any information concerning any of them, except the youngest, whom she was allowed to see for three hours in one day in each month. She also averred as follows:—"The pursuer is both willing and well able to support each and all of her said children, and desires their custody and keeping, which the defenders refuse to give her, in consequence of which the present action has been rendered necessary."

The defenders averred that the pursuer's children were admitted in the ordinary way as proper objects of parochial relief in consequence of their mother's destitution; that she had left the poorhouse voluntarily, leaving all her children in the custody of the defenders, and that the three eldest children had been boarded out with respectable people in the country, and that their health and character were being carefully attended to. They also averred as follows:—(Ans. 7) "Admitted that the defenders have refused to deliver the said children to the pursuer. Explained that the pursuer is unable to house, feed, clothe, or educate her children, and is not a suitable person to have the care and upbringing of the young children whom she voluntarily left to the care and in the custody of the defenders."

The Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27) enacts as follows:—Sec. 5—"The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just." Sec. 9—"In the construction of this Act the expression 'the Court' shall mean . . . In Scotland the Court of Session or the Sheriff Court within whose jurisdiction the respondent or respondents, or any of them, may reside."