

Wednesday, May 12.

FIRST DIVISION.

KIRK-SESSION OF WEST PARISH OF ST NICHOLAS, ABERDEEN v. KIRK-SESSION OF THE QUOAD SACRA PARISH OF ST GEORGE'S-IN-THE WEST, ABERDEEN.

Church—Parish—Trust—Parish Quoad Sacra—Trust for Behoof of Poor of the Parish Instituted before Disjunction of Parish Quoad Sacra—Settlement of Scheme—Right of Poor of Part of Parish Disjoined Quoad Sacra to Participate in Benefits of Trust.

A fund was raised by the kirk-session of a parish church in 1846 for the erection of a school for the education of children of the poor of the congregation and parish. With the fund thus raised buildings were acquired and maintained till 1910, when because of changes in educational administration they were sold. The kirk-session having presented a petition to the Court for approval of a scheme for the future administration of the fund, now represented by the price obtained for the buildings, a claim was made on behalf of the kirk-session of a parish *quoad sacra* disjoined from the old parish in 1880, for a share of the fund for the benefit of the poor of the parish *quoad sacra*.

Held that the fund fell to be divided between the kirk-session of the parish church and the kirk-session of the church of the parish disjoined *quoad sacra* in 1880.

On 23rd April 1914 the Reverend George Henry Donald and others, the Kirk-Session of the West Parish of St Nicholas, Aberdeen, *petitioners*, presented to the Court a petition for approval of a scheme for the administration of a fund of which they were trustees.

The petitioners averred—"That on 28th January 1846 the Kirk-Session of the West Parish of St Nicholas, Aberdeen, resolved that steps be taken with a view to obtaining funds for the erection of a sessional school for the said parish, and in a convenient situation therein, in order the more effectually to avail themselves of the advantages then in their power for the education of the children of the poor of the congregation and parish, and to realise more fully in this respect to the parish the benefit of the parochial system of the Church of Scotland. Following on this resolution a building fund was raised amounting to about £1300. The said fund included (1) grants from Government amounting to £382; (2) grants from the trustees of John Gordon's Charitable Fund (a local body) amounting to £150, and made on the express condition that the said school should not be appropriated or used for any other purpose than that of a sessional or parish school; (3) legacies; and (4)

subscriptions and collections from members of the congregation and similar sources.

"Thereafter the said Kirk-Session purchased a site in George Street, Aberdeen, for the said school. The conveyance of the site bore to be granted under the authority of 4 and 5 Vict. cap. 38, entitled 'An Act to afford further facilities for the conveyance and endowment of sites for schools,' and provided, *inter alia*, that the property should be held for the purposes of that Act, and be applied as a site for a school for poor persons of and in the West Parish, and for no other purpose whatever, such school to be under the management and control of the Kirk-Session. The school was accordingly erected and carried on by the Kirk-Session as an elementary school for the said parish and was enlarged in or about the year 1865.

"On 26th November 1851 the Kirk-Session adopted a constitution for the said school. That constitution, which the Presbytery of Aberdeen sanctioned on 24th December 1851, provided, *inter alia*—(1) The property of the school is, and hereafter shall 'be, vested in the Moderator and other members of West Parish Kirk-Session as a board of trustees for educational purposes within said parish. (2) The school shall be called the West Parish School and shall be in perpetual connection with the Established Church of Scotland, and under the superintendence and management of the Kirk-Session of West Parish, and subject to the jurisdiction of the Presbytery of Aberdeen in the same manner as are the parochial schools established by law. (3) The object of the school shall be to provide for the children of parishioners and others the elements of a useful secular and religious education. . . . (5) The school fees and other sources of revenue available for the school shall be applicable only towards payment of teachers' salaries, the purchase of books, and other furnishings for the school, the upholding of the fabric of the school and keeping of it in repair; the expense of insurance, the payment of feu-duty, and other proper and necessary expenses connected with the school and property thereof. (6) The teachers . . . in addition to the hours given to the work of instruction on weekdays . . . shall employ not less than one hour on Sabbath in the religious instruction of the children attending school during the week, and such others being children of parishioners as may attend.'

"The school remained vested in the said Kirk-Session for the objects set forth in the said constitution until December 1873. In July 1873 the Education Committee of the General Assembly of the Church of Scotland requested the Kirk-Session to transfer to them the said school, to be used as a practising and model school, and as a training college, subject to its being also conducted as theretofore as an elementary school for the benefit of the parish. In compliance with the said request, the school was so transferred by assignation, dated 17th and 18th December 1873. . . .

[The assignation bound the Education

Committee to provide in the said buildings for an elementary school as theretofore, or in the event of their failure so to provide an elementary school to pay to the Kirk-Session the sum of £1190, 18s. 1d. After certain changes in educational administration the Education Committee sold the buildings and paid to the Kirk-Session on 10th February 1910 the sum of £1190, 18s. 1d.]

"The said sum of £1190, 18s. 1d. was invested by the Kirk-Session partly in £1000 $\frac{1}{2}$ per cent. debenture stock of the Great Central Railway Company and partly in the West Parish Savings Bank and on deposit-receipt. The interest at the outset was applied in payment of the rent above mentioned (*i.e.*, a rent of £19 paid by the West Parish for use of the buildings for a Sunday School), and other expenses, and in a grant *ex gratia* of £5 to St George's-in-the-West *quoad sacra* Parish, Aberdeen, which was erected in 1880 mainly out of the West Parish, and the balance of interest has been accumulating pending the disposal of this petition.

"The petitioners desire and deem it expedient and consistent with their duties and with the intention of the original trust that the said fund should be devoted to the maintenance of Sunday Schools and religious training of the young, and mission services for the poor of the parish, and to the taking on lease and purchase or erection of buildings for these purposes. They accordingly crave the Court to settle a scheme with a view to the carrying out of these purposes and sanctioning the investment of the said fund."

Answers were lodged for the Reverend James Smith and others, the Kirk-Session of the *quoad sacra* Parish of St George's-in-the-West, Aberdeen.

The answers stated—"The respondents concur in the statements of fact narrated in the petition except in so far as therein stated that the said *quoad sacra* parish of St George's-in-the-West was erected 'mainly out of the West Parish,' the said *quoad sacra* parish being in fact erected entirely out of the said West Parish.

"The area covered by the said *quoad sacra* parish was at the time of the building of the original school inhabited by those for whom the school was especially intended, and in point of fact the greater number and the poorer of the children attending the said school were drawn from this area. The original buildings and the buildings which now stand in their place are entirely within the said *quoad sacra* parish.

"When the fund of £1190, 18s. 1d. became available the respondents through their moderator made a claim for a share of the said fund. This claim has never been disputed by the petitioners, and the sum of £5 mentioned in the petition as an *ex gratia* grant was in fact voted by the petitioners to the respondents as a contribution from the fund. When the said *quoad sacra* parish was erected with the concurrence of the petitioners no reservation was made of any claim to the said fund.

"The respondents have erected within the said *quoad sacra* parish a hall for Sunday school and congregational purposes,

and they are therefore in a position to carry on the religious work mentioned in the petition in the manner contemplated when the original school was set up.

"In the whole circumstances the respondents respectfully submit that they are entitled to a share of the said fund for the exclusive use of the said *quoad sacra* parish, and that in any new scheme for the management of the said fund the petitioners should provide either for payment to the respondents of the capital sum of £500, or alternatively for payment to the respondents annually of the sum of £20, in order that the respondents may provide for religious instruction in the said *quoad sacra* parish in the manner intended when the resolution of 28th January 1846 was passed and which covered then the whole undivided West Parish of which St George's-in-the-West *quoad sacra* parish is the northern half."

On 19th June 1914 the Court remitted to Mr R. A. Lee, advocate, to inquire into the facts and circumstances set forth in the petition and answers and to report.

On 4th February 1915 Mr Lee reported, and submitted the question whether it was proper that as in the proposed scheme the poor of the respondents' parish should be excluded from all the benefits of the trust.

The petitioners argued—The fund was destined for the benefit of the parishioners of the West Parish. The *quoad sacra* parish was a new parish set up, and the poor of this new parish had no claim on the fund. There was no precedent for division of the funds of a parish church when part of the parish was disjoined *quoad sacra*. No division of teinds or endowments was made. *Old Monkland School Board v. Bargeddie Kirk-Session*, November 15, 1893, 21 R. 122, was distinguishable from the present case. In *Old Monkland School Board* a scheme had to be adjusted for two distinct purposes—educational and religious. The appropriate claims were made by the school board and the Kirk-Session. In the present case both parties claimed for the religious purposes to which the fund was dedicated.

The respondents argued—The fund was a trust for behoof of the poor persons in the area known when the fund was instituted as the West Parish of St Nicholas. The decree of disjunction was for ecclesiastical purposes only, and could not exclude beneficiaries from participation in the trust funds. A large proportion of the beneficiaries were in the area known after the disjunction *quoad sacra* as the parish of St George's-in-the-West. *Old Monkland School Board* was in point, and the Court should follow it and divide the fund.

On 13th March 1914 the opinion of the Court (the LORD PRESIDENT, LORD MACKENZIE, and LORD SKERRINGTON) was delivered by

LORD PRESIDENT—We are of opinion that the respondents have not ceased to be beneficiaries under this trust, and accordingly that the proposed scheme ought to be adjusted by counsel so as to embrace the inhabitants of the entire area of the original parish.

On 12th May 1915 the Court pronounced this interlocutor—

“ . . . Of consent decern and ordain the petitioners out of the fund referred to in the petition to pay to the respondents the sum of three hundred pounds, together with the expenses of process incurred by the respondents as the same may be taxed by the Auditor of Court, the said sum of £300 to be held by the respondents the Kirk-Session of the *quoad sacra* parish of St George's-in-the-West, Aberdeen, for the purpose of providing for religious instruction in the said *quoad sacra* parish: Allow the scheme proposed by the petitioners to be withdrawn, and authorise them to retain in their own hands the balance of the said fund after deduction of the said sum of £300 and the respondents' expenses of process, the said balance to be used and expended by the petitioners in their absolute discretion. . . .”

Counsel for Petitioners—Lippe. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for Respondents—A. R. Brown. Agent—James P. Sym, W.S.

HIGH COURT OF JUSTICIARY.

Monday, May 17.

(Before the Lord Justice-General,
Lord Salvesen, and Lord Anderson.)

BRANDER v. MACKENZIE.

Justiciary Cases—War—Evidence—Order Made by Military Officer Commanding—Defence of the Realm (Consolidation) Regulations 1914, sec. 10—Defence of the Realm (Consolidation) Act 1914 (5 Geo. V, cap. 8)—Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), sec. 38 (2).

The Summary Jurisdiction (Scotland) Act 1908 enacts—Section 38 (2)—“ Any Order by any of the departments of State or Government, or any local authority or public body made under powers conferred by any statute, or a print or copy of such Order, shall, when produced in any proceedings under this Act, be received in evidence of the due making, confirmation, and existence of such Order without being sworn to by any witness, and without any further or other proof, but without prejudice to any right competent to the accused to challenge any such Order as being *ultra vires* of the authority making it, or on any other competent ground. . . .”

Held that an Order, in terms of the Defence of the Realm (Consolidation) Regulations 1914, made by the military officer commanding, for the closing of licensed premises in his district, was, in the absence of any challenge as to its authenticity on the part of a person accused of contravention, sufficiently proved by the production at the trial of a copy of the Order founded on.

Opinion per the Lord Justice-General that it was sufficient for the prosecutor to found on the Order in question without producing a copy thereof in Court.

The Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), sec. 38 (2) is quoted *supra* in rubric.

The Defence of the Realm (Consolidation) Regulations of 28th November 1914, made in terms of the Defence of the Realm (Consolidation) Act 1914 (5 Geo. V, cap. 8), section 10, enacts—“ The competent naval or military authority may by Order require all or any premises licensed for the sale of intoxicating liquor within any area specified in the Order to be closed except during such hours and for such purposes as may be specified in the Order, either generally or as respects the members of any of His Majesty's forces mentioned in the Order; and if the holder of the licence in respect of any such premises fails to comply with the Order, he shall be guilty of an offence under these regulations, and the competent naval or military authority may cause such steps to be taken as may be necessary to enforce compliance with the Order.”

James Mackenzie, publican, Tayport, *respondent*, was charged in the Sheriff Court at Cupar, at the instance of George Brander, Procurator-Fiscal of Fife, *appellant*, on a summary complaint stated thus—“ That you did on 3rd and 5th February 1915, in your public-house in Dalgleish Street, Tayport aforesaid, known as the ‘Bell Rock Bar,’ fail to close the same from and after 6 p.m. each evening for the sale of intoxicating liquor in respect of all soldiers of His Majesty's forces for the time being within said burgh, contrary to the Orders made by the commanding officer of the military in said district, dated 8th December 1914, under the Defence of the Realm (Consolidation) Regulations 1914, whereby you are liable to be imprisoned with or without hard labour for a term not exceeding six months, or to a fine not exceeding one hundred pounds, or to both such imprisonment and fine.”

The charge was found not proven, whereupon the Procurator-Fiscal took a Case for appeal.

The Sheriff-Substitute (ARMOUR HANNAY) stated the Case thus—“ The case was called before me on 16th February 1915, when the accused pled not guilty, and the diet was adjourned till 2nd March 1915. On 2nd March 1915 the case was again called before me, when accused adhered to his plea, and evidence was led. The Procurator-Fiscal produced and put in evidence, without objection or challenge on the part of the accused, a copy of the Order dated 8th December 1914, and bearing to have been signed and issued by Brigadier-General Augustus de Segur M'Kerrell, C.B., Fortress Commander, Dundee, as a competent military authority, within the meaning of the said Defence of the Realm (Consolidation) Regulations 1914, ordering and requiring all premises licensed for the sale of intoxicating liquor within the burghs of Newport and Tayport to be closed from and after 6 o'clock p.m. as respects all soldiers of His Majesty's