

be in all respects one trust, creating an undivided liability in the trustees, and which, as regards that liability, must be dealt with as an English trust, although the greater portion of the trust-estate has been vested in heritage in Scotland. The fact that the trustees hold lands in Scotland may create special liabilities, and make them amenable to the jurisdiction of the Scotch courts; but it is not so clear that it can have the effect of constituting a separate Scotch trust. The Lord Ordinary further entertains considerable doubt whether the petitioners are right in assuming that the appointment by the Court of Chancery applies only to the funds in England. It rather seems to him that the appointment is in general terms applicable to the entire trust created by the trustor's settlement, and that the English funds are only mentioned as the subjects of special powers conferred by the Court upon the trustees.

"While, on these grounds, the Lord Ordinary entertains some doubt of the competency of the application, he is of opinion that, if competent, it is in all respects proper and expedient that it should be granted as the easiest and most economical mode in which the parties who are now vested with the office of trustees can acquire a title effectually to administer and dispose of the Scotch estate. The recent Trusts (Scotland) Act is conceived in very general terms, and does not in any way expressly limit the power of the Court in appointing new trustees. For these reasons, the Lord Ordinary is upon the whole disposed to think that the prayer of the petition, which is limited to the Scotch estate, and the rents and produce thereof, may be granted. But he is of opinion that it is a proper question for the decision of the Court."

BLAIR for the petitioners.

The Court unanimously refused the petition, holding that it was unauthorised by the statute, which applied only to Scotch trusts, and that there were ample means otherwise by which the trustees could make up a title to the Scotch estate.

Agents for Petitioners — Hunter, Blair, and Cowan, W.S.

Saturday, March 13.

SECOND DIVISION.

MACDOUGALL *v* CAMPBELL.

School—District—Parish. Circumstances in which held that a party claiming to be schoolmaster of a separate parish and entitled to the emoluments pertaining thereto, had failed to instruct any other character than that of schoolmaster in a district of a united parish.

This was an advocacy from the Sheriff-court of Argyllshire in an action brought by Duncan Macdougall, designing himself parochial schoolmaster of the parish of Dalavich, in the county of Argyll, against Captain Colin Yorke Campbell of Barbreck, in the same county. The sum sued for was the proportion of the pursuer's salary as schoolmaster foresaid, said to be due by the defender as an heritor in the parish of Dalavich; and the question was, whether the pursuer possessed the character which he claimed, or was, on the other hand, one of four schoolmasters of the single or united parishes of Kilchrennan and Dalavich. The pursuer's allegation was, that Dalavich was a separate parish, although served by the same minist-

ter as Kilchrennan, and that he was schoolmaster of the said separate parish. The defender, on the other hand, alleged that Dalavich and Kilchrennan were, and had always been, only one parish; and that the alleged parish of Dalavich was just one of the districts of which the united parish was composed.

After considering the evidence, the Sheriff-substitute (HOME) found for the defender, holding that the pursuer was not parish schoolmaster of Dalavich, but only teacher of the school at Dalavich. He added the following note to his interlocutor:—"A great deal of evidence has been adduced in this case of an extremely intricate nature, but the Sheriff-substitute, after carefully considering it, has come to the conclusion that the pursuer has not succeeded in making out his case. His allegation is that the districts of Kilchrennan and Dalavich are two distinct parishes, though served by one minister, and that, this being the case, he is entitled to the position and emoluments of schoolmaster of the parish of Dalavich. On the other hand, the defender asserts that Kilchrennan and Dalavich are not, and never were, two parishes, but merely two districts or ends of the same parish; and this being the case, the pursuer is only one of four schoolmasters of the parish of Kilchrennan and Dalavich, therefore only entitled to the emoluments which may accrue to him as such.

"The early history of Dalavich seems lost in obscurity. It appears from the certified excerpt report of the Sub-Commissioners of the Presbytery of Argyll, under warrant by the High Commissioners, dated 5th June 1624, No. 152 of process, that at that time Dalavich was part of the parish of Kilchrennan or Kildochrennan. An objection was taken to the admissibility of this document as evidence, but it seems to the Sheriff-substitute that it is an extract from the records of the Teind-court, and as such, and being duly certified by the Teind clerk, it is admissible. If they ever were separate parishes, it appears clear to the Sheriff-substitute that they were united before that time, and that they have remained united ever since.

"Several references were made by both parties to the earlier records of the parish, from the time Mr William Darroch was appointed minister in 1701, or in 1707, for both dates are given, though the former seems the more probable; but whichever it was, there are among those minutes more than one of great importance in their bearing on this case.

"If the Sheriff-substitute is right in the meaning he attaches to them, it would seem that there was no regular school in the parish before 1708, when it appears that on 4th April the minister stated that he had requested a young man to open a school at Kilchrennan, and he was willing to do so, and asked the session and other tenants present if they would contribute to his salary, which they promised to do. A week after, on 11th April, he asked the session and others present at Dalavich to do so too, but they declined. It would appear from this that there was then no school either at Kilchrennan or Dalavich. It might, perhaps, be argued that this also shows there were two sessions and two parishes; but the Sheriff-substitute is satisfied this is not the case, as it appears from the sederunt of several meetings that the same elders sat in both sessions; and it appears from the extract, No. 78 of process, that there is still one session for both.

"In the autumn following, as appears by minutes

of 3d October and 7th November, the schoolmaster, who was a student at Glasgow, had to return to college, and there is some difficulty about keeping up the school for the winter, which seems to be settled by Campbell of Auchinbreck granting a bond of 500 merks Scots for the school, and a brother of the previous schoolmaster agrees to carry on the school for the winter months.

"Then there is the very important minute of meeting at Inverinanmore, on 25th February 1712, which seems to the Sheriff-substitute to give the true origin of the present system of schools in the parish. By it the session, 'considering the sad condition of this parish for want of a school, and that one school would not serve the whole parish,' resolved to erect four English schools, one at Kilchrennan, one at Dalavich, one at Ardchonnell, and one at another place, the name of which the Sheriff-substitute has not been able to decipher. From this it seems clear (1) that the parish was then considered as one; (2) that there was, at that particular time, no school at all, either in Kilchrennan or Dalavich. Four schools are erected, three of which certainly are identical with three of the present ones; and the Sheriff-substitute has no doubt that they have continued to exist from that date till the present time. They are also erected as in one parish, and not two in Kilchrennan and two in Dalavich.

"There is thus distinct evidence of the Dalavich school having been erected, as one of four schools, in the parish of Kilchrennan and Dalavich, and there does not seem to the Sheriff-substitute to be any evidence that this arrangement was ever altered. No doubt the pursuer was appointed 'schoolmaster of the parish of Dalavich,' but the parish is frequently spoken of as the 'united parishes of Kilchrennan and Dalavich, and it was therefore natural enough that the schoolmaster at Dalavich might have been spoken of as schoolmaster of the parish of Dalavich. Doubtless, also, the heritors of Kilchrennan pay the schoolmaster in their end, and those of Dalavich those in their end, but this may well be regarded as a private arrangement among themselves; and, indeed, it does appear to the Sheriff-substitute that any accidental practice of regarding the parish of Dalavich as separate from the parish of Kilchrennan, *quoad* the schoolmaster, would be at all sufficient to constitute it legally a separate parish in this respect, without any distinct act of separation of the two parishes, when they are proved to have been constituted as one *quoad hoc* when the separate schools were first established. The records of the parish have been carefully enough kept since then, and they do not seem to contain any evidence of such a separation.

"With regard to the question of contract, it appears to the Sheriff-substitute that it cannot influence the decision of the case—(1) because it is not mentioned on record; and (2) because, in his opinion, it cannot be relevantly pleaded, so as to give the pursuer the benefit of a new Act of Parliament increasing the burdens on the side of the heritors. If any effect can be given to it, it can only be that of a private arrangement between the pursuer and the heritors appointing him, which must be held only to apply to the state of matters which existed when it was made."

On appeal, the Sheriff (CLEGHORN) adhered. After going over the evidence in detail, the Sheriff observes in his note:—"Looking to the grounds on which the Court of Session decided the very ana-

logous case of *Kilberry v. Kiltcalmonell*, in 1852, the Sheriff cannot doubt that a far stronger case is made here for the unity of the parish. So complete, indeed, is the evidence that for more than two centuries there has been but one parish, that the pursuer is obliged, in his reclaiming petition, to resort to the ingenious argument that it may be inferred, from a long course of practice as to schools, that in the presumed decree of union (now lost) there must have been provisions for maintaining the separate existence of the original parishes as regards schools. But there are several conclusive answers to this ingenious line of argument. First, while in the *Kilberry* case there were strong circumstances in the history of the parish tending to show that originally they had been separate, in this case the older history seems to establish that there was originally but one parish, and that the recent designation is a misnomer, arising, not unnaturally, from the minister officiating at two points of this widely-extended parish, and so Dalavich became imported into the name along with the original name of Kildachrenan. The case is much the same as those of the existing parishes Gigha and Cara, and Colonsay and Oronsay, which are each composed, not of two parishes, but of two islands.

"Again, assuming that there were at one time two parishes, it appears clear that they must have been united before the year 1629, and long before the origin of the parochial school system in 1696, and before there existed any schools in this particular parish. The session records show that, up to 1712, there were no schools in the parish, and then, for the first time, the Act 1696 was put in force in that remote region. It is not, therefore, easy to conceive how a union before that period could have provided for a separate existence of the parishes as regarded schools.

"The opinions of the Court in the case of the *Marquis of Bute v. Magistrates of Rothesay*, 2 Macph. p. 1278, seems to show that a parish *quoad sacra* is entirely a modern contrivance, and that of old a parish was an entity for all parochial purposes, and a union or disjunction at such an early date implied union or disjunction *quoad omnia*."

The pursuer advocated.

CLARK and BALFOUR for him.

FRASER and H. J. MONCREIFF for defender.

At advising—

LORD JUSTICE-CLERK—The claim of the pursuer is, that he is parochial schoolmaster of the parish of Dalavich, and so entitled to a salary larger than the allowance which he has hitherto received. The case is laid upon the ground of an appointment to an actual parish, and it is also maintained on the ground that, if not a parish, the defender was, by himself or his predecessor, a party to his appointment as a proper parish schoolmaster, and is so bound to make payment of the emoluments which would have accrued to him had he been truly elected a parochial schoolmaster.

The necessary condition of the pursuer's success under either view is a proof of his appointment as parochial schoolmaster of the parish of Dalavich. The defenders say that Dalavich is a part of the parish of Kilchrenan, or that Kilchrenan and Dalavich are one parish, and that, under an arrangement dating in the early part of the last century, a schoolmaster was appointed to teach a school in that part of the parish known by the name of Dalavich. He does not dispute his status as a teacher paid by the heritors, and entitled as a

teacher in a school in that district to receive a salary. He denies his pretensions otherwise. The salary which the defender acknowledges to be payable is confessedly inadequate upon the footing of his being the proper parish schoolmaster of the alleged parish of Dalavich, but is sufficient viewing the pursuer as the teacher of an additional school to the parish school in the parish of Kilchrenan. The pursuer says that the heritors so represented the appointment as to induce him to accept of it as that of the parochial schoolmaster of Dalavich. It is plain, therefore, that an appointment to teach a parish school at Dalavich is not what is required in the case of the pursuer, but an appointment to be parochial schoolmaster of the parish of Dalavich. That alone can warrant a demand for the salary of a parochial schoolmaster. It is above all indispensable in order to support or give any degree of plausibility to the alternative view presented, viz., that of alleged liability incurred by appointing the pursuer to the office of parish schoolmaster to the parish of Dalavich. If there be no such parish he cannot be the parochial schoolmaster; if there be such appointment, there cannot be a contract or a quasi contract inferred from it.

The pursuer produces no minute of his appointment at all; we have no extract from the minutes of the heritors appointing him. He has not proved that this appointment or extract of his appointment, which he had at one time in his possession, has been accidentally lost or destroyed. He points to a minute of the Presbytery as the sole evidence of the terms of his nomination. This document is a minute not of the Heritors, but of the Presbytery, and the thing done at the meeting was not to appoint him to any office—the Presbytery could not do that—but to ascertain his qualification and accept of his signature of the formula. Reference is made to the minute of his appointment as a production made to the Presbytery, and we are asked to consider the description in the minute framed, it must be presumed, by the Presbytery clerk, as a full and sufficient proof of a claim for salary or damages for breach of contract. From aught proved in this case, the extract itself may be extant. I think that it would be a departure from the plainest rule in the case of evidence, to admit this as evidence of an appointment. Even if we were to adopt so strange and irregular a course as to hold the tenor of the document instructed, and to proceed upon it as if it were the original document referred to, but not produced in this case, we certainly have not an appointment to the office of parochial schoolmaster of a parish. The heritors of Dalavich are said to appoint, and they are said to have appointed, the petitioner to be schoolmaster in that parish—which, in the absence of specialties, might possibly be held to refer to the application to an appointment of a parish schoolmaster, but the appointment of a schoolmaster *in* the parish is not identical with an appointment to the office of schoolmaster *of* the parish. The form of the expression becomes more marked when we look to the similar entry as to the pursuer's predecessor, to which the pursuer himself appeals, and where the Presbytery minute describes the appointment—not as an appointment to be parochial schoolmaster of a parish—but an appointment as a teacher to a parochial school within the parish. It so happens that we have the actual minute of Gillies' appointment, which is No. 34 of process, and from it it seems to me clear that there

was no appointment to any office of a parochial schoolmaster. The vacancy is occasioned by the resignation "of the late teacher." It is a vacancy in the parochial school of Dalavich, and the election can only be read as that of a new teacher to a parochial school.

The pursuer cannot ask us to read his appointment as having been different from that of his predecessor.

We have the election of the parochial schoolmaster of Kilchrenan in 31st October 1852. It exhibits the most marked contrast to the appointment of Gillies, and sets out with great particularity the Act of Parliament, and the following out of its provision, and finally, the actual appointment to the office of parochial schoolmaster.

I think it would be enough to disprove this case that there is no evidence of such appointment as is indispensable where the evidence of any such appointment is disputed. I think it beyond all question that we have not the slenderest basis laid for the liability of the defender on the supposed ground of nominating the pursuer to an office, the emoluments of which are to be made good. There are, to the second view of the pursuer's case, numerous other objections which are palpable, but the objection that there is no written document instructed which can be represented as an appointment, and that the document to which we are referred cannot be read if even it were competent to look at it as containing any implied obligation to confer the emoluments of a proper parish manse, is sufficient.

The question as to whether Dalavich is truly a separate parish, or a district in Kilchrenan parish, or a part of the united parishes of Kilchrenan and Dalavich, has been dealt with fully in the interlocutors of the Sheriff-Substitute and Sheriff now brought under review. I have gone over the proof and the documents attentively, and I am bound to say that these interlocutors are to my mind perfectly satisfactory. Both of the learned Sheriffs have applied their minds to the determination of this question, and have stated their views so well and so clearly as to enable me to save your Lordships time by stating that I adopt them as correct. I hold it proved that, long before the school at Dalavich was instituted, there was only one parish; that there never was more than a single minister for the two districts; that the school of Dalavich was instituted as a parish school, but as embracing both Dalavich and Kilchrenan, and that that has continued all along on that footing, while the schoolmaster at Kilchrenan was appointed, and held the office of parish schoolmaster, and that the apparent anomalies seeming to point at separate parishes, are accounted for by the fact of there being in the parish two churches and two well-known districts in connection with them. The arrangements of the heritors *inter se* as to the maintenance of schools and the carrying out of their arrangements for convenience do not prove the fact of their having at any time two distinct parishes.

The other Judges concurred.

Agent for Pursuer—D. Milne, S.S.C.

Agents for Defender—Murray, Beith & Murray, W.S.