

which vested in her as she has done. I am for answering the second question in the affirmative.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Counsel for the First and Second Parties—Dundas. Agent—James Marshall, S.S.C.

Counsel for the Third Party—Constable. Agent—James Marshall, S.S.C.

Counsel for the Fourth Party—Young—Crabb Watt. Agent—G. Meston Leys, Solicitor.

Friday, June 16.

FIRST DIVISION.

HARRISON AND OTHERS, PETITIONERS.

Trust—Removal of Trustee ex officio—Nobile Officium—Amendment of Petition.

One of the trustees of an Episcopal chapel, charged with the nomination of the clergyman, &c., was "the bishop of the diocese." By trust-disposition the building and its site was heritably vested in trustees, one of whom was the Bishop of G., in whose diocese the chapel was then situated, under declaration that the bishop of the diocese and his successors in office were always to be members of the trust. Upon the transference of the chapel to the diocese of E., the trustees under the trust-disposition prayed the Court to remove the Bishop of G. and his successors, and to substitute the Bishop of E. and his successors, or alternatively to sanction the resignation of the Bishop of G., and the assumption of the Bishop of E. and his successors. The prayer of the petition was, at the suggestion of the Court, amended into a prayer for authority to the trustees to transfer the property from themselves including the Bishop of G. to themselves without that Bishop, and to the Bishop of E. and his successors in the diocese in which the chapel might be situated. Thus amended, the prayer of the petition was granted.

By resolution of 1845 fixing the constitution of Trinity Episcopal Chapel, Melrose, it was determined that the nomination of a clergyman should be in the hands of five trustees, viz., "the bishop of the diocese" and four laymen. Difficulties have arisen in raising money for the chapel's erection, &c., the then Duke of Buccleuch acquired a site and built the church at his own expense. He then, by trust-disposition dated 16th April 1849, conveyed the subjects to "the Right Rev. Walter John Trower, M.A., presently Bishop of the diocese of Glasgow, whom failing his successors in that See," himself, and three other laymen, these being the trustees under the constitution, although the constitution was not specifically referred to.

The trust-disposition contained a declaration "that on the death of the present Bishop of the diocese, the surviving trustees or their quorum shall be obliged to grant such deed of nomination and assumption as shall be necessary for formally investing his successor in the office of trustee, and in the feudal right to the said subjects, and on the death of any one of the before-mentioned lay-trustees, the remaining trustees or their quorum shall have the power of naming and assuming another lay-trustee in place of the party so dying.

In 1888 the county of Roxburgh, in which the chapel is situated, was, by the Episcopal Synod, by virtue of their code of canons, validly transferred from the diocese of Glasgow to the diocese of Edinburgh of the Scottish Episcopal Church.

In 1893 the Right Rev. William Thomas Harrison, Bishop of Glasgow, the Duke of Buccleuch, Mr Murray of Wooplaw, Lieutenant-General Sprot, Mr Charles Erskine, then acting under the said trust-disposition, presented a petition to the First Division of the Court of Session, in which they set forth that the Bishop of the diocese contemplated in the constitution of the chapel was plainly the Bishop of the diocese in which the chapel might for the time being be situated, that that Bishop was now not the Bishop of Glasgow, but the Bishop of Edinburgh, and that it was intended and desirable that the same Bishop should be one of the trustees in whom the heritable subjects were vested. They accordingly prayed the Court "to remove from the office of *ex officio* trustee, under the trust-disposition narrated in the petition, the Right Reverend William Thomas Harrison, the present Bishop of the diocese of Glasgow and Galloway, in the Scottish Episcopal Church, and his successors, and to appoint in his room and place as trustee the Right Reverend John Dowden, Bishop of the diocese of Edinburgh, in the Scottish Episcopal Church, and his successors, being the Bishop of the diocese in which Trinity Church, Melrose, is now situated, or otherwise to sanction the resignation by the said Right Reverend William Thomas Harrison, Bishop of Glasgow, of his said office of *ex officio* trustee, and the assumption into his place of the said Right Reverend John Dowden, Bishop of Edinburgh, and his successors, so long as the said Trinity Church, Melrose is situated in the diocese of Edinburgh, and thereafter the Bishop of the diocese in the Scottish Episcopal Church in which Trinity Church, Melrose, may for the time being be situated, or to do otherwise in the premises as to your Lordships may seem proper."

The petitioners argued that this was a *casus improvisus* requiring the intervention of the *nobile officium* of the Court, that all parties interested were agreed that the change should be made, and that the only difficulty was as to how it should be carried out. One difficulty was that the successors *ex officio* of the Bishop of Glasgow were nominated to this trust, but in removing the present Bishop the Court

could also remove his successors. The Bishop left himself entirely in the hands of the Court although he did not see it to be his duty spontaneously to resign this trust. Removal was generally for fault and of course that was entirely out of the case, but that seemed the most feasible course.

At advising—

LORD ADAM—In the year 1845 certain members of the Scottish Episcopal Church were desirous that an Episcopal Chapel should be erected in Melrose, and took the necessary steps, by collection of subscriptions and otherwise, to give effect to their wishes.

It appears that on the 4th November 1845 a meeting of the subscribers was held when the constitution of the church was agreed upon. The first article of the constitution provided that the nomination of a clergyman to the chapel should be vested in five trustees therein named, viz., “the Bishop of the diocese,” the Duke of Buccleuch, and three other gentlemen. Provision is made in the constitution for the continuation of the trust, the management of the church, and other matters.

It further appears that the building committee appointed by the subscribers had been unable to raise funds sufficient to carry out their works, when His Grace the late Duke of Buccleuch came to their assistance and undertook the whole expense and responsibility of the building, he receiving the balance of subscriptions in the hands of the committee. A site was accordingly purchased by His Grace, the necessary buildings completed, and the church was duly consecrated by the Bishop of the diocese on 24th August 1849.

By trust-disposition dated 16th April 1849, His Grace, on the narrative that he had purchased the portion of land therein described, with a view to convey the same gratuitously to the trustees therein named, for the erection of a chapel, therein called Trinity Chapel, for the celebration of divine service according to the rites, &c., of the Scottish Episcopal Church, with a view to the appropriation of the said portion of land to these purposes in all time coming, disposed the said subjects to and in favour of the Right Rev. Walter John Trower, M.A., then Bishop of the diocese of Glasgow, whom failing his successors in that see, to himself the Duke of Buccleuch and certain other gentlemen, as trustees for the ends, uses, and purposes therein set forth. I understand that these trustees were duly infeft in the subjects, and they or their successors are now heritably vested in them.

The deed of constitution of Trinity Chapel is not specially mentioned in this trust-deed, but it is to be observed that the trustees named in the trust-deed were also the trustees then acting under the deed of constitution, and the trust purposes are in entire conformity with the articles of the constitution, and had matters remained in the position they then were, the present difficulty would not and could not have arisen.

As I have stated, one of the trustees named in the constitution of the chapel is “the Bishop of the diocese,” and at the date of the constitution in 1845 the county of Roxburgh in which the chapel is situated lay within the diocese of Glasgow. But it appears that by virtue of a resolution of the Synod of the Episcopal Church in Scotland, held on 3rd August 1888, the counties of Peebles, Roxburgh, and Selkirk were duly transferred to and now form part of the diocese of Edinburgh. The result of this is, that the chapel in question is now within the diocese of Edinburgh, and is no longer within the diocese of Glasgow. Now, I cannot doubt that the parties to the deed of constitution in naming “the Bishop of the diocese” as a trustee intended to name the Bishop of the diocese within which for the time being the chapel lay.

I accordingly think that the Bishop of Edinburgh is a trustee, and is entitled to act as such under the constitution, while the Bishop of Glasgow, being no longer Bishop of the diocese, is not. But as we have seen, the heritable subjects are feudally vested *inter alios* in the Bishop of the diocese of Glasgow and his successors in office, for the same trust purposes as are contained in the deed of constitution, hence the difficulty which has arisen in the administration of this trust, and the present application is made to us by all persons having interest, with a view to having the difficulty removed. We are asked with this object to remove from the office of *ex officio* trustees under the trust-disposition, the Bishop of the diocese of Glasgow and his successors, and to appoint in his place the Bishop of the diocese of Edinburgh and his successors, or otherwise to sanction the resignation by the Bishop of Glasgow of his said office, and the assumption of the Bishop of Edinburgh. No doubt either of these courses would attain the object sought, but I see difficulties in the way of sanctioning either. I would suggest, however, that the same end may be competently attained in another way, and that we may authorise and ordain the trustees under the trust-disposition to convey the subjects therein contained in favour of the Bishop of the diocese of Edinburgh, whom failing his successors in that see, His Grace the Duke of Buccleuch and the trustees acting under the trust-disposition, in the terms and for the ends, uses, and purposes specified in that deed. By authorising the trustees so to dispense I am satisfied that we shall be enabling them to carry out the intentions of the trustee the late Duke of Buccleuch, and all parties interested, and the deed of constitution of the chapel, and of the deed by which the subjects are held in trust, will be thereby brought into harmony. I would suggest, therefore, if the petitioners see no objections to the course proposed, that we should allow them to amend the prayer of the petition in the manner suggested, and thereafter grant authority. The proposed amendment is no doubt somewhat extensive, but seeing that all

persons having interest are parties to the petition, and that it is just another way of giving effect to the object of the petition, I think it may be allowed.

LORD PRESIDENT and LORD M'LAREN concurred.

LORD KINNEAR was absent at the hearing.

The petitioners thereupon proposed to amend the prayer of the petition by substituting for the words "to remove" down to "is now situated" the following— "Authorise and ordain the trustees under the trust-disposition of 16th April 1849, or a quorum of their number, to dispose and convey the property held by them as trustees to and in favour of His Grace William Henry Walter Duke of Buccleuch and Queensberry, K.T., John Murray, Esq. of Wooplaw, in the county of Roxburgh; Lieutenant-General John Sprot of Riddell in the said county, Charles Erskine, Esq., residing at Friarshall, Melrose, and the Right Rev. John Dowden, D.D., residing at Lynn House, Gillsland Road, Edinburgh, the present Bishop of Edinburgh in the Scottish Episcopal Church and his successors, so long as Trinity Church, Melrose, is situated in the diocese of Edinburgh, and thereafter the Bishop of the diocese of the said Scottish Episcopal Church in which Trinity Church, Melrose, may for the time be situated, and that as trustees for the purposes and subject to the conditions and declarations contained in the said trust-disposition."

The Court allowed the prayer of the petition to be amended as proposed, and thereupon granted the first alternative as craved.

Counsel for the Petitioners—Mackay.
Agents—Strathern & Blair, W.S.

Saturday, June 17.

FIRST DIVISION.

STEWART & COMPANY v.
JOHNSTONE.

Process—Expenses—Objections to Auditor's Report—Time of Lodging—Act of Sederunt of 6th February 1806.

The Act of Sederunt of 6th February 1806 provides that "in case either party means to object to the report of the Auditor, he shall immediately lodge with the clerk a note of his objections."

Held that objections to an Auditor's report must be lodged within forty-eight hours, unless special cause is shown to justify further delay, and that objections lodged a month after an account had been taxed came too late.

In this case the Court found the defender entitled to expenses under deduction of

one-fourth. The defender's account was taxed on 11th May, and objections thereto by the defender were lodged on 10th June.

The pursuers argued—The objections came too late and could not be entertained. They should, according to the construction usually put upon the Act of Sederunt, have been lodged within forty-eight hours—*Adamson & Gulland v. Gardner*, July 4, 1878, 15 S.L.R. 664.

The defender argued—The delay in lodging the objections had been caused by there having been double agency in the case, but intimation of the objections had been made to the pursuers' agents soon after the taxing. Further, the question raised was really whether the Auditor had construed the Court's interlocutor correctly. In taxing the account he had first disallowed expenses wherever the defender had been unsuccessful, and had then deducted a fourth from the remainder. The objections proceeded on the footing that the fourth alone should have been deducted. In these circumstances the terms of the Act of Sederunt should not be construed too strictly against the defender.

At advising—

LORD PRESIDENT—The Act of Sederunt requires that objections to the Auditor's report shall be lodged immediately. According to custom forty-eight hours has been regarded as the measure of latitude thus allowed. It is not necessary to hold this an inflexible rule if special cause were shown why compliance with it could not be rendered. It is enough to say that in the present case no such cause has been shown, for here the departure from the duty of lodging objections immediately is wide and has not been excused.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court refused the note of objections.

Counsel for the Pursuers—A. S. D. Thomson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender—W. Thomson. Agent—Arthur S. Muir, S.S.C.

Tuesday, June 20.

FIRST DIVISION.

[Lord Low, Ordinary.]

MARTIN v. FERGUSON'S TRUSTEES.

Succession—Marriage-Contract—Mutual Settlement—Power to Revoke—Husband and Wife.

An antenuptial marriage-contract contained certain provisions in favour of the next-of-kin of the spouses in the event (which happened) of there being no children of the marriage, and a condition that the survivor of the spouses should forfeit certain benefits in the event of re-marriage.