

might be due by him. In compliance with the last of said conditions defender handed over to pursuer a stock certificate for £80 of Caledonian Railway Company's stock, and a deed of transfer relating to the same, partly filled up, but blank in some respects, and in particular in respect of the transferee's name. (Stat. 2) Accounts were regularly rendered and settlements carried through until the 27th June, when pursuer rendered an account showing a debit balance against defender of £67, 18s. 2d. The accuracy of this account was impugned by defender, and payment thereof refused, as upon the assumption that the accounts between pursuer and defender were made up (as it was proper they should have been) upon quoted prices, no loss had been incurred. Upon 11th July, however, the defender received a memorandum from the pursuer in the following terms:—'To J. Rayner, Esq., Wardrobe Chambers, &c. July 11th, 1887—I beg to advise having bought of you £80 Caley, at 94½, £75, 8s. (Signed) JOHN SHAW.' And along with said memorandum there was sent a blank deed of transfer, with the request that defender would fill it up and sign it, to the effect of transferring the Caledonian Railway Company's stock, given as cover, to a Mr G. L. Payne. This the defender refused to do. (Stat. 3) Upon defender's refusal to fill up and sign said blank deed of transfer, the pursuer proceeded at his own hand to fill up such blanks as had been left in the original deed of transfer in his possession, which bore the defender's signature, and in particular inserted therein his own name as transferee, and thereafter forwarded this document, with the stock certificate already in his possession, to the Caledonian Railway Company, and asked them to register the transfer. This was done by the pursuer fraudulently, and was an unauthorised conversion of an inchoate deed of transfer into an actual transfer, on account of an alleged loss, the occurrence of which was denied, and which in any event did not exhaust the security pursuer sought to appropriate. The defender, learning what had been done, communicated with the Caledonian Railway Company, who accordingly refused to register the transfer."

The defender pleaded—“(1) No debt being due by defender, the pursuer was not entitled to sell said stock. (2) The pursuer, having dealt with said stock in breach of the conditions of deposit, is not entitled to have said transfer registered. (3) The deed of transfer founded on by the pursuer being the deed neither of the defender John Rayner, nor of anyone on his behalf, or legally deriving from him, is invalid as an assignment of stock, and the said defenders, the Caledonian Railway Company, should therefore be assoltied.”

Argued for the pursuer—The transfer was a probative deed, and looking to the defender's admission no sufficient reason had been assigned for setting it aside. If it was to be set aside this must be formally done, and not by way of exception. The provisions of the Companies Clauses Act, 1845, and especially the provisions of section 15 relating to the transfer of shares, were incorporated in the Caledonian Railway Company's Act.

Argued for the defender Rayner—The pursuer's case was not sufficiently fully disclosed

in the light of the defender's averments, and he should be ordained to state his case more fully.

The Court after hearing parties closed the record, and of consent remitted the case to the Sheriff for proof.

Counsel for the Pursuer—C. S. Dickson.
Agent—David Turnbull, W.S.

Counsel for the Defender (Rayner)—M'Clure.
Agent—R. Bruce Cowan, W.S.

Counsel for the Caledonian Railway Company—R. Johnstone—Clyde. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, June 12.

FIRST DIVISION.

BURNETT v. CRABB AND OTHERS.

Church—Lapsed Trust—Parties Entitled to Funds.

By trust-disposition dated 3rd May 1739 certain lands in Brechin were disposed in trust under a declaration that the price had been “truly paid out of the money belonging to the Episcopal Congregation of Brechin, and that the lands were purchased for making a convenient meeting-house or house of worship for the said congregation.” The church was erected, and a disposition to the subjects was taken in name of certain parties mentioned in the deed as security to them for sums advanced for the erection of the building. The trust created in 1739 was, by the assumption of new trustees, kept up till 1830, at which date the then trustees borrowed from the managers of the Relief Congregation of Brechin a sum of £145, and granted a wadset therefor, in which it was, *inter alia*, provided that the chapel should be used solely as a chapel for the said Relief Congregation, and for no other purpose, and that if it came to be used for any other purpose then the wadset right should cease and determine. The money thus obtained was employed in paying off the debts of the “Licensed” Episcopal Congregation.

At the date of the wadset part of the Episcopalian Congregation joined the Relief Congregation, while the remainder joined another congregation of Episcopalianism formed in Brechin about 1792. In 1847 the right of the wadsetters terminated in consequence of the formation of the United Presbyterian Church through the union of the Relief and Associate Synods. In 1875 a judicial factor was appointed on the trust, who in 1879 advanced the redemption money, and obtained a conveyance of the chapel, which he sold for £500. After payment of the expenses of the factory and the redemption price, there remained a balance of £176, 14s. 2d.

A petition having been presented by the judicial factor for the direction of the Court as to the disposal of this balance, answers were lodged for (1) the Episcopal Church in Brechin,

which had been joined by part of the congregation of the Licensed Episcopal Church in 1830; and (2) for the United Presbyterian Congregation in Brechin. Both parties claimed the fund, not as matter of legal right, but as entitled thereto in equity.

Held that as the chapel was built in 1743 by and for the Episcopalians of Brechin, the moneys arising from the sale of the chapel in consequence of its disuse, and the failure of the trust on which it was held, should be given to the parties representing the Episcopalians of Brechin.

This petition was presented by John Burnett, judicial factor on the trust created for behoof of the Licensed Episcopal Congregation in Brechin, praying for the direction of the Court as to how the trust funds in his hands should be divided or administered.

The history of the trust, so far as bearing on the present question, was as follows:—For some time after the Revolution of 1688 the then Episcopalian incumbent continued to officiate in the Parish Church of Brechin, but early in the eighteenth century an Episcopalian Congregation was formed, who purchased a piece of ground in the city, built a chapel upon it in 1743, and continued to worship in the chapel until the Penal Acts of 1746 and 1748 were passed. The disposition, which was dated 3rd October 1749 (and recorded 21st April 1755), was taken in the name of Patrick Dickson, as trustee for the said congregation, and by it he acknowledged and declared that the price had been “truly paid out of the money belonging to the Episcopal Congregation of Brechin, and that the lands were purchased for making a convenient meeting-house or house of worship for the said congregation.”

Dickson thereafter, in respect of advances made by Colin Alison and Alexander Jack and others, disposed to them and others, under certain specified conditions, as trustees for and to the use of the said congregation, and also in security to them for their advances, the subjects “presently used as the Licensed Episcopal Chapel or house of worship.”

The term “Licensed Episcopal Chapel” meant a chapel the minister or officiating pastor of which had satisfied the conditions required by the Penal Acts of 1746 and 1748. By 10 Anne, c. 7, persons of the Episcopal persuasion in Scotland had been permitted to assemble for divine worship provided, *inter alia*, that none should officiate or exercise the functions of a pastor unless he possessed and had registered a letter of orders from some Protestant bishop. But the Act 19 Geo. II. c. 38 (1746) (explained by 26 Geo. II. c. 34) required such pastors to qualify by taking the oaths to His Majesty, on pain of their meeting-house being shut up, inflicted certain penalties of fine, imprisonment, and loss of civil practice on all persons resorting to an unregistered meeting-house, and enacted that the letter of orders above required must be by some bishop of the Church of England or of Ireland. In consequence of these enactments the public ministrations and rule of the Scottish Episcopal clergy almost entirely ceased, their services were conducted privately, and former congregations dispersed. In some towns, including Brechin, the local congregation, or the majority of members, procured the services of an English or Irish Episcopal clergyman

qualified under the Act, and continued to meet for divine worship publicly in their chapels as before the said Acts. The same religious articles and doctrines were taught, and the same forms of worship and ritual were observed as in the Scottish Episcopal Churches prior to 1746, but the service included prayer for the reigning sovereign. These were usually called Licensed Episcopal, but sometimes Qualified English Chapels.

By disposition dated 9th August 1790, and recorded 15th June 1804, the said Alexander Jack having narrated the above-mentioned disposition by Patrick Dickson, that he was then the only surviving and acting trustee of the Licensed Episcopal Congregation in Brechin thereunder, that all the said advances had been repaid, and that the said congregation on 18th March 1790 had chosen John Smith of the navy, George Stewart, and twelve other persons as managers or trustees for the said congregation, five to be a quorum, and required him to denude in their favour, conveyed the said subjects to the said managers and their successors in office, named by the said congregation for ever, to be held in trust under the control and direction for and upon account of the said congregation, whose orders and directions the trustees and their successors should be bound to obey.

In 1792 the Penal Laws against Episcopalianism in Scotland were relaxed by the Act of Relief (32 Geo. III. c. 63), which permitted their ministers to qualify by taking the oaths of allegiance and subscribing a certain declaration, but as regarded Brechin the Licensed or Qualified English Congregation continued to maintain its independent position down to 1830.

Between 1792 and 1800 a Scottish Episcopal Congregation was formed in Brechin, consisting originally of such members of the Episcopal persuasion as had held aloof from pastors and chapels licensed under the said Acts. This congregation built a chapel in St Andrew Street, known as the Church of St Andrew, Brechin, in the diocese of Brechin, according to the division of dioceses for the purposes of the Scottish Episcopal Church. The Licensed or English Congregation thereafter suffered a gradual diminution of the number of its members, who were attracted to St Andrew's Church. But they continued, considerable in number, to raise sufficient funds for minister's stipend and other congregational purposes, and maintained stated religious worship until the death of their pastor Mr Straton in 1820. After that period they were unable to raise a sufficient stipend to secure a permanent English pastor, though religious services were maintained until June 1830 or thereby, at which date they had incurred debts to the extent of £145 or thereby.

By disposition dated 12th November 1829 the said John Smith, George Stewart, and three others, the surviving trustees and disponees in the disposition by Alexander Jack already referred to, disposed the said subjects to John Burnett, David Burnett, and ten other persons, the then managers of the Licensed Episcopal Congregation, and their successors in office, in trust for behoof of the said congregation. The said trustees were duly infeft on 17th November 1829.

By contract of wadset and disposition in security, dated 17th and registered in the Burgh Court Books of Brechin 19th days of June 1830,

the said trustees David Burnett and others, specially authorised by said Episcopal Congregation, in consideration of the sum of £145 sterling instantly advanced to them as managers foresaid out of the money belonging to the Relief Congregation in Brechin in connection with the Relief Synod of Scotland, by James Ramsay, treasurer of the latter congregation, wadsetted and disposed to William Ferrier, the said James Ramsay and others, the then managers of the said Relief Congregation, and to their successors in office, the said chapel, in trust for the use and behoof of the said Relief Congregation, but redeemable by the said disponees' or their successors in office, assignees or other successors, in right of the premises from the said wadsetters, by payment of £145; but providing that the said chapel should be used solely as a chapel or place of worship for the said Relief Congregation, and for no other purpose whatever, and that if the said Relief Congregation should at any time cease to be connected with the said Relief Synod of Scotland, or should cease to maintain religious worship regularly in said chapel, by a preacher in connection with the said Relief Synod, then the wadset right should *ipso facto* cease and determine, and the said subjects revert to the disponents and their foresaids, they being bound to pay the said principal sum of £145.

The said wadset price was applied by the said managers, John Burnett, David Burnett, and others, in payment of the debts of the said Licensed Episcopal Congregation. The Relief Congregation entered into possession of the chapel. Thereafter the Licensed Episcopal Congregation ceased to meet for religious services or other purposes as a separate body. A large number of its members, as at June 1830, including the said managers, continued to attend the said chapel, and joined in the worship and services of the Relief Congregation, and became ordinary members or adherents of the said congregation.

The Relief Congregation, composed as aforesaid, possessed the said subjects as a chapel until the Relief body in or about 13th May 1847 became incorporated in the United Presbyterian Church. After the incorporation that congregation was and still is known as the High Street United Presbyterian Congregation, and continued to possess the said subjects as before until a few years before this petition was presented, when they erected a new church, and ceased to maintain religious worship in the said chapel.

The survivor of the managers of the Licensed Episcopal Congregation, who were the disponents under the disposition of 12th November 1829, and reversers under the contract of wadset already referred to, was David Burnett, upon whose application the present petitioner had been on 9th January 1878 appointed judicial factor on the trust-estate of the Licensed Episcopal Congregation. Upon his appointment the petitioner applied to the managers of the United Presbyterian Congregation for a reconveyance of the said subjects in consequence of the wadset's right (under the condition in the contract of wadset) having ceased. The petitioner advanced the redemption price of £145, and £6 as the balance of the value of certain articles

of chapel furniture taken over by him and the said managers in May 1879, and reconveyed the said subjects to the petitioner as judicial factor, who completed his title by registration, and subsequently sold them under the authority of the Court for £500. After payment of the expenses of the factory and the redemption money there remained in the petitioner's hands a free balance of £176, 14s. 2d.

The Licensed Episcopal Congregation having ceased to exist there was no trust beneficiary entitled to this sum, or the income arising therefrom, and it was with a view of getting the direction of the Court as to the application of this sum of £176, 14s. 2d. that the present petition was presented.

The petitioner averred that the object of the trust was in his opinion the promotion and maintenance of religious services according to the Episcopalian form of worship in Brechin and its vicinity; that it was practically impossible to trace the individual sources of the funds invested in the purchase of the said subjects referred to in the disposition of 1749 by Patrick Dickson and others; and that, as far as was known, there was not in existence any complete record of the membership of the Licensed Episcopal Congregation. The petitioner stated that he was ready to pay over the free balance of the funds to whichever party should be found in the judgment of the Court entitled thereto.

Answers were lodged for the Rev. James Crabb and others, the vestry of St Andrew's Episcopal Church, Brechin, in which they claimed that the fund in question should be paid over to them as representing the congregation for whose benefit the trust was originally created. They denied that the majority of the Licensed Episcopal Congregation joined the Relief Church, and submitted that the original congregation who bought the land in 1739, and built the chapel in 1743, still existed in the congregation of St Andrew's Church. That this congregation were engaged in the erection of a new church, and that if the funds in the hands of the judicial factor were given over to them they would be applied in building a church, "for the Episcopal Congregation in Brechin," the purpose for which the original fund was raised.

Answers were also lodged for the Rev. R. W. Orr and others, on behalf of the High Street United Presbyterian Congregation, who maintained that they had an equitable claim to the fund in question. They averred that when the chapel was conveyed in wadset to the Relief Congregation a large majority of the members became members of the Relief Congregation, which became incorporated in the United Presbyterian Church in 1847, and was now represented by the respondents; that when the Licensed Episcopal Congregation amalgamated with the Relief Church they did this deliberately rather than amalgamate with the St Andrew's Congregation which at that date had been for a considerable time in existence. The respondents claimed this fund also on the ground that it was the balance of the price of the church which was wadsetted to their predecessors in 1830. They averred that while in their possession a considerable sum was expended in improving the building whereby the price ultimately realised by the petitioner was increased.

Argued for the Rev. J. Crabb and others—The original fabric was built out of money belonging to the Episcopal Congregation of Brechin, and its clergyman belonged to the Scottish Episcopal Church. Its character was not changed during the subsistence of the Penal Statutes, and on their repeal the church still remained in the possession of the Episcopalian body in Brechin. Nor did the existence of the wadset in any way affect the question of title, for on paying up the redemption money the Episcopalian Congregation would still have been in right of the fabric. When this was done in 1879 by the petitioner the reversionary right of the congregation still remained, and so they were entitled to any balance which might remain in the factor's hands after all expenses had been met. The price realised represented really the value of the site, for which reason the sum expended on the fabric by the United Presbyterians could not be taken into account. The mere fact that the majority of the original congregation at the time of the wadset joined another body, even if true (which was not admitted), was of no avail in the present question, as the minority who represented the principles were entitled to the property.

Argued for the Rev. R. W. Orr and others—They were entitled to this fund as being the representatives of the congregation which worshipped in the church before the contract of wadset was entered into. The wadset was an alienation in favour of another church, and it was terminated in 1879, when the title of the reverser revived, at which time the wadsetters and the reversers became one body—*Attorney-General v. Bunce*, April 22, 1868, 6 L.R., Eq. 563. Further, they were entitled to this sum upon equitable grounds, because the reversion of £176 was the result of money spent by them in keeping up and improving the building while it was in their hands. In 1830 the church was worth £300. £200 was laid out on it in 1832, and as the result of this outlay it realised £500 in 1880—*Kennedy v. Morrison*, March 20, 1879, 6 R. 879.

At advising—

LORD PRESIDENT—This case was heard before Lord Mure, Lord Adam, and myself. It has been thought advisable to give judgment notwithstanding Lord Mure's continued indisposition. His Lordship has read over and considered the judgment I am about to pronounce, and has expressed his entire concurrence.

The funds in the hands of the judicial factor consist of the net proceeds of the sale of a building in Brechin, erected about the year 1743 as a chapel for the use of an Episcopal Congregation, which apparently had been formed some years previously.

By disposition dated 3rd May 1739 Nicholas Cowie and another conveyed the ground afterwards occupied in part by the chapel to Patrick Dickson. On 3rd October 1749 Patrick Dickson executed a deed, in which he declared that the price which he had paid to Cowie and another for the subjects in 1739 was truly paid out of money "belonging to the Episcopal Congregation of Brechin for making a convenient meeting-house or house of worship for the said congregation," that he was trustee for the congregation, and that at the request of the managers he had sold part of the subjects in 1740 and 1742, and had applied the prices of said subjects along with

other moneys advanced by himself and others in building the meeting-house. The chapel was so erected in pursuance of the Toleration Act of the 10th of Queen Anne, and subject to its conditions—that the minister to officiate in the chapel should be ordained by some Protestant bishop, should not be the established minister of any church or parish, and should take and subscribe the oaths of allegiance and abjuration, and should during divine service pray for the Queen and the Royal Family.

Such was the position of the Brechin Episcopal Congregation and its minister at the time of the erection of the chapel. But a very serious change soon occurred; for in the Rebellion of 1745 the Scottish Episcopal clergy had so generally manifested their sympathy with the cause of the exiled Royal Family, both by words and deeds, that in the years 1746 and 1748 two Acts were passed—well known as the Penal Acts—against the Episcopalian in Scotland. These Acts not only required every chapel to be registered by a certain date, and that the ministers should qualify themselves by taking the oaths of allegiance and abjuration, and pray for the King and Queen by name, but also prohibited any minister from officiating who had not been ordained by some bishop of the Church of England or of Ireland. In short, as Professor Grub states in his careful and accurate historical work—"The obvious intention of the Legislature was to suppress the Scottish Episcopalian Church and the native clergy altogether, and to grant toleration to those clergymen only who derived their orders from the English and Irish Churches." The same author adds, that "so far as appears, no more than five Scottish clergymen attempted to avail themselves of the provisions of the statute by qualifying in terms of law." It may therefore very safely be inferred that from the date of these Penal Statutes till their repeal in 1792 the minister of the Episcopal Chapel in Brechin must have held his letters of orders not from any bishop of the Scottish Episcopal communion, but from an English or Irish bishop. It was their position under the Penal Statutes that gave the Brechin congregation and all other lawful Episcopal congregations in Scotland during the period now referred to the distinctive description of "Licensed."

The trust created by the disposition of 3rd May 1739 and 3rd October 1749 was kept up by the assumption of new trustees in 1790 and 1829, and was in 1830 vested in David Burnett and ten other persons, managers of the congregation. These trustees borrowed a sum of £145 from the managers of the Relief Congregation of Brechin, and granted a wadset therefor on 17th June 1830, in which, however, it is provided—"That the said chapel shall be used solely as a chapel or a place of worship for the said Relief Congregation, and for no other purpose whatever, and if the said Relief Congregation should at any time cease to be connected with the said Relief Synod of Scotland, or should cease to maintain religious worship regularly in said chapel by a preacher in communion with the said Relief Synod, then the said wadset right should *ipso facto* cease and determine, and the said subject revert to the said disponees and their foresaids, they being bound to pay the said principal sum of £145." The money thus ob-

tained was employed in paying off the debts of the "Licensed Episcopal Congregation." The immediate effect of this wadset was that the Licensed Episcopal Congregation as a united body ceased to exist. Some of them joined the Relief Congregation who in virtue of the wadset were in possession of the chapel, and others joined another congregation of Episcopalians in Brechin which had been formed soon after the passing of the Act of 1792, which is, as I understand, at the present day in connection with the Scottish Episcopal Church, and is the only existing Episcopal congregation in Brechin.

The chapel remained in the possession and use of the Relief Congregation from 1830 till 1847, when the Relief Synod formed a union with the Associate Synod, and the united body became what is now known as the United Presbyterian Church.

This event put an end to all right on the part of the wadsetters of 1830 to continue their occupation of the chapel in terms of the provision above cited from the contract of wadset. Nevertheless the congregation, formerly Relief, but now United Presbyterian, continued to occupy the chapel as a place of worship till the year 1876, when they built a new chapel for themselves and ceased to occupy this chapel.

In 1875 the now deceased David Burnett, who was then the sole survivor of the trustees of the chapel, and also sole survivor of the reversers under the wadset of 1830, applied to the Court for the appointment of a judicial factor on the trust-estate when the present petitioner was appointed. The factor now informs the Court that in 1879 he advanced the redemption money, £145, out of his own funds, redeemed the subjects, and as reverser under the wadset obtained a conveyance of the chapel in his favour. Thereafter, under authority of the Court, he sold the chapel for £500, and the surplus after deducting the redemption money and the expenses of the factory, amounting to £176, 14s. 2d., falls to be disposed of under the present application.

Two parties claim the fund, not as matter of legal right, but because they each consider that they have the best claim in equity to the remaining balance of the property of this lapsed trust.

The first parties are the present minister and congregation of St Andrew's Episcopal Church, being, as I understand, the only Episcopal congregation in that burgh. The second parties are the High Street United Presbyterian Congregation of Brechin, from whom as in right of this wadset of 1830 the chapel was redeemed by the factor. After full consideration I am of opinion that the former are entitled to prevail. It has been contended that the chapel having been licensed under the statutes of 1746 and 1748 had no connection with the Scottish Episcopal Communion to which the St Andrew's Congregation belongs, because the minister of the licensed chapel must have been ordained by an English or Irish bishop. But the chapel was erected and in occupation as a place of worship before the passing of these statutes, and there is no reason to suppose that while it existed under the authority of the Toleration Act of Queen Anne, its minister was not a Scottish Episcopalian under the superintendence of a bishop of that denomination. While the Penal Statutes

remained in force the congregation were of course reduced to the necessity of either employing a minister in English or Irish orders or of abandoning the right and privilege of public worship altogether. But it has not been alleged that after the Penal Acts were repealed in 1792, and down to the year 1830, the minister of the chapel was not a Scottish Episcopalian, or in connection with the Scottish Episcopalian Church. It is only between 1746 and 1792 that the building is, so far as we see, spoken of as a "licensed chapel or house of worship." When the congregation was broken up under the provisions of the contract of wadset in 1830 we are told that some of the members continued to worship in the chapel with the Relief Congregation who thereafter occupied it, while others joined the Episcopal Congregation of St Andrew's. We have no means of judging of the proportions of those who adopted the one course and the other. Nor is this of much consequence, as the total number must have been trifling, and there is great probability in the suggestion that the falling off of the congregation between 1792 and 1830 must have been owing to the building of another and more commodious Episcopal Chapel in Brechin in connection with the Scottish Episcopal Church.

The United Presbyterian Congregation base their claim on the allegation that a large number of the Episcopal Congregation in 1830 joined the Relief Church, and that their descendants are now members of the United Presbyterian Congregation. This averment is obviously incapable of proof, and would not be very material even if proved, for the wadset, which is the only title of possession which the United Presbyterian Congregation ever had to the chapel, made their possession for the twenty-nine years between 1847 and 1876 illegal, as constituting a breach of contract, the provision of that contract already quoted plainly implying that while the wadset endured the chapel might be used for a congregation of the Relief Synod but for no other class of religionists, and that on the redemption of the wadset, or its forfeiture for failure to comply with this condition, the chapel should return to the trustees for the Episcopal Congregation, a body always thereafter kept up, and in the end represented in 1873 by the gentleman on whose application the present factor was appointed.

The United Presbyterian Congregation further allege that while in possession of the chapel the Relief Congregation spent £209 on the maintenance of the chapel in 1830 and 1832, and the United Presbyterian Congregation £74 for the same purpose in 1847. It is very doubtful, to say the least, whether such a claim could be maintained by a wadsetter in possession for a long period of years as a condition of giving effect to the reverser's power of redemption. But it is at all events too late to maintain such a claim after possession has been given up, and the redemption money paid and received, and the whole right of the wadsetter extinguished.

The short ground of judgment seems to be that the chapel was built in the year 1743 by and for the use of the Episcopalians in Brechin, and that the moneys arising from the sale of the chapel in consequence of its disuse, and the failure of the trust on which it was held, ought to be

given to the only parties who now represent the Episcopalians of Brechin.

LORD ADAM concurred.

The Court pronounced the following interlocutor:—

“ . . . Find the petitioner entitled to the expenses of the present proceedings and incident thereto out of the trust funds, as the same shall be taxed by the auditor, to whom remit for that purpose, and authorise the petitioner to take credit therefor; further, after taxation and adjustment of the law agents' accounts, . . . and deduction of the last-mentioned expenses, authorise the petitioner to make payment of the free balance of the trust funds that shall then remain in his hands to the respondents the Reverend James Crabb and others, the vestry of St Andrew's Episcopal Church, Brechin: *Quoad ultra* continue the petition.”

Counsel for the Petitioner—Kennedy. Agents—Gordon, Pringle, Dallas, & Company, W.S.

Counsel for the Respondents the Rev. R. W. Orr and Others—Strachan. Agent—W. Officer, S.S.C.

Counsel for the Respondents the Rev. J. Crabb and Others—Fleming. Agents—Gordon, Pringle, Dallas, & Company, W.S.

Wednesday, June 13.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

LOCKHARTS v. BROWN.

Partnership—Joint Adventure—Sale.

A, an ironmonger, entered into a joint adventure with his brother B, a general merchant, for carrying on the business of owners of fishing boats. The understanding between them was that each should bear part of the expense of the boats, and that each should supply goods from his own stores to the joint adventure, at the usual retail prices. B purchased nets from L at wholesale prices, which he fitted and made ready for fishing, and then supplied to the joint adventure at retail prices. In an action brought against A, after B had become bankrupt, for the price of the nets, *held*, on the evidence, that B had no authority to enter into such a contract for behoof of the joint adventure; that B had purchased the nets from L on his own individual credit, and then put them into the joint adventure; and that the nets supplied were not *in rem versum* of the joint adventure. *Held* that A was not liable to L for the price of the nets.

This action was raised by N. & N. Lockhart, net manufacturers, Kirkcaldy, against John Brown, ironmonger, Lerwick, for payment of £162, 10s. 3d. alleged to be the balance due to them for nets and other goods supplied to a joint adventure of which the defender was a partner.

In 1879 John Brown, the defender, entered into a joint adventure with his brother William

Brown, grocer and general merchant in Lerwick, to carry on for their joint behoof the business of owners of fishing boats, which they were to hire out to fishcurers, fishermen, and others. On the 16th of February 1883 William Brown sent the pursuers an order in the following terms:—“Some time ago you sent me your price list of nets, and requesting an order, which I can now send you, and which I hope you will send on as soon as possible. This order is only for one of our six boats, but I wish to get this lot and let our men see them, and then I can order for the rest. As I have had nets which has not pleased our men from other places, and which came to be a serious loss to both our men and ourselves, but as I come to learn you have sent some to our town already which have given satisfaction, so I trust it may be a mutual benefit, so will you please send as undernoted as soon as possible, and oblige.—Yours, &c., WILLIAM BROWN.

“6 nets 60 yards 18 score 31½ rows to the yard 45/9 cotton.

“12 nets 60 yards 18 score 32 rows to the yard 45/9 cotton.

“P.S.—Also cotton lines to rig the same right and left hand, and rigging twine.—W. B.”

Other orders in similar terms were subsequently sent. In answer to these orders the pursuers supplied the goods requested at wholesale prices.

William Brown having become bankrupt, N. & N. Lockhart sued John Brown for the price of the goods so supplied.

The pursuers pleaded—“(1) The said goods having been ordered and sold and delivered on account of the said partnership or joint adventure, the defender is liable in payment of their price. (2) Assuming that the boats for which the goods supplied by the pursuers were furnished or used, were separate joint adventures, the defender, as a partner in each and all of said joint adventures, is liable in payment of the price of said goods.”

The defender denied liability.

Proof was led, the import of which was to the following effect:—The joint adventurers started with one boat in 1879. The largest number possessed by them at any time was six, and at the date at which the order for the goods in question was sent the number possessed was five, William Brown being separately interested in a sixth, in which his brother had no share. There was no written contract between the brothers, but William Brown thus explained their agreement—“The understanding my brother and I had as to supplies for the boats was that I should provide whatever I had in my shops. I was to charge the current prices I was charging to other people. In addition to that I was to have the supplying of the men with provisions, charging in that case also the current rates.” John's evidence on this point was as follows—“The understanding was that he (William) should provide whatever he had in his stores or shops as a general merchant that the boats required, and that I should provide whatever blacksmith work and other things I might have requisite for the boats out of my business; and we were each to charge the regular trade prices of the place—the retail prices. I thought my brother would be able to do some-