petency it was founded on this—that the defenders were concluded against conjunctly and severally only, whereas the record did not disclose any case of joint and several liability against them. The Sheriff-Substitute has repelled this plea, and I think he is right.

The only wrong complained of by the pursuers is that Innes left their employment as and when he did, and the only damages they have suffered are the consequences of that wrong. But that wrong is averred to be the result of the joint acts of the defenders—that of the defenders the Aberdeen Steam Laundry Company in inducing Innes to break his contract with them either directly or by "harbouring" him in the knowledge of his contract with the pursuers —and that of Innes in breaking his contract. No doubt the ground of action against each defender is different—that against Innes being breach of contract, and that against the Aberdeen Steam Laundry Company the doing of a wrongous and illegal act—but they both contributed to produce the one wrong of which the pursuers complain, and therefore I think they are conjunctly and severally liable in the consequences. I am therefore of opinion that the plea of incompetency should be repelled.

As regards the plea of irrelevancy I am not prepared to sustain it *hoc statu*. I think it is very desirable that the actual facts should be ascertained before deciding any law in the case. I would propose, therefore, that "before answer" we should allow the parties a proof of their averments.

The Lord President and Lord Kinnear concurred.

Lord M'Laren was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, found that the action as laid was competent, repelled the defenders' second plea-in-law, and allowed the parties a proof before answer.

Counsel for the Pursuers — Salvesen — Glegg. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders — W. Campbell, Q.C.—Cook. Agents—Henry & Scott, W.S.

Friday, November 4.

FIRST DIVISION.

M'LEAN AND OTHERS, PETITIONERS.

Charitable Trust — Ex officio Trustees — Transference of Trust to New Trustees.

The minister and session of the First United Presbyterian Congregation, Alloa, as *ex officis* trustees for the administration of an educational trust, presented a petition to the Court, in which, on the narrative that the original purpose of the trust had failed, they craved the Court for the approval of a scheme for the application of the trust funds to a kindred object. They further prayed that the administration along with the funds of the trust should be transferred from them and their successors in office to the School Board of Alloa, or alternatively that a judicial factor should be appointed. In support of this application the only reason stated was that "the petitioners desire to be relieved of their office." The Court *refused* the petition so far as regards the application for a transference of the trust to another body of trustees or to a judicial factor.

Mr Alexander Paton, of Cowden Park, Alloa, died on 18th September 1860 leaving a trust-disposition and settlement, of which the sixth purpose was as follows:—"I hereby direct and appoint my said trustees, within one year after my death, if practicable, or as soon thereafter as may be, to make payment of the sum of £5500 sterling to the Minister and Session of the First United Presbyterian Congregation, Alloa, at the time, and their successors in office, in trust for the education of such children as may be connected with the foresaid works of Kilncraigs, whom failing, or in addition to whom, if in the opinion of the said minister and session and their foresaids the funds shall admit of such addition, of poor children connected with the said congregation, whom failing, or in addition, to whom, if in the opinion of the said minister and session and their foresaids the funds shall admit of such addition, of poor children in the town of Alloa: Declaring that the said minister and session shall immediately, on receiving payment of the said sum, lend out the same on good heritable security in name of themselves and their foresaids in trust as aforesaid, and the said minister and session and their foresaids shall have full power to change or renew the loans from time to time as may be necessary, and they shall keep the said sum entire, and shall in nowise infringe or encroach upon the same, but shall apply only the free annual interest or profits of the same in payment, first of the cost of a school-house and teacher's dwelling-house to be erected on a suitable site in the vicinity of the foresaid works of Kilncraigs, and which cost shall amount to a sum between £700 and £800 sterling; secondly, of salaries to teachers, assistants, and others; and thirdly, of such relative incidental expenses as the said minister and session and their foresaids may find it necessary to incur; and further, declaring that the said minister and session and their foresaids shall have the sole right and power of making regulations as to the education to be imparted to the foresaid children, of admitting children to the benefits of such education, of electing teachers, assistants, and others, fixing the duration of their holding office, and assigning their several duties, and generally of exercising whatever management, superintendence, and control may be necessary in reference to the arrangements connected with the purposes of this bequest." This legacy, to-

gether with another of £450 which accrued owing to the failure of another trust purpose, was duly paid over to the minister and session, who in 1865 purchased a site, erected a school and teacher's house within the burgh of Alloa, and appointed a teacher. The school was carried on by them in accordance with the trust directions up to 1875. From that date up to 1890 the income of the trust was handed over to Messrs John Paton & Company, the proprietors of Kilncraigs factory, who virtually managed the school, the children attending it being connected with that factory. In 1890 Messrs Paton decided to terminate their management of the school and the contribution which they had been giving, and the trustees thereupon decided to reduce the teaching staff and teach only the higher standards. In 1892 they tried the experiment of opening the school to any children who chose to attend.

On May 18th 1898 a petition was presented to the Court by the trustees, in which, after narrating the circumstances set forth above, they stated that, owing to the free education supplied by the Alloa Burgh School Board, the school was no longer required, the number of scholars attending it at that time being only nine. The petitioners averred accordingly that the direct object of the truster's bequest had practically failed, and that it was necessary that some kindred object should be devised carrying out the spirit of the truster's intention, and requested the Court to settle a scheme with this view. The petitioners suggested "that the balance of free income, after providing for a retiring allowance to Mr Stevenson (the present teacher) should be devoted to providing £5 bursaries to enable the bursars to attend the secondary or technical school of the Alloa Academy, which provides instruction in various classes of a literary and scientific character, the bursaries to be awarded after competitive examination, and to be tenable for three years. Upon the retiring allowance to Mr Stevenson ceasing, the petitioners suggested that the income then set free should be applied in providing scholarships of £30 each, to be tenable for three years, for enabling the holders to attend one of the Scotch universities or science or art colleges, or technical schools, with discretionary powers to those administering the funds to alter the amount of the bursaries or scholarships as they might think fit, and as the funds would permit. With a view to benefiting the special classes favoured by the truster, the petitioners suggested that five-tenths of the bursaries and scholarships should be made available to children connected with Kilncraigs factory; three-tenths to poor children connected with the First United Presbyterian Congregation, Alloa; and two-tenths to poor children in the town of Alloa." The petition then proceeded—"The petitioners, after full consideration, desire to be relieved of the trust, and they suggest that the Alloa Burgh School Board should be appointed in their room." They stated that the School Board had intimated their willingness to act, and prayed the Court "to appoint the School Board of the burgh of Alloa to take over the management and application of the said bequests from the petitioners in the future, or alternatively to appoint a judicial factor upon the said bequests, and to authorise the petitioners to transfer to the appointees the whole funds and heritage thereof, and to declare the trust in the petitioners and their successors in office at an end."

Answers were lodged by the School Board in which they approved of the petitioner's suggestions as to a future scheme, with certain modifications, and stated that "on such modifications and alterations being satisfactorily adjusted, they would be willing to take over the trust-estate and management thereof." Answers were also lodged by certain workers at Kilncraigs Works who offered no objection to the proposed transference, but called the attention of the Court to their rights under the settlement, and claimed to be heard thereafter with reference to the settlement of a scheme.

The Court remitted to Mr J. Edward Graham, advocate, to report on the questions raised in the petition and answers.

Mr Graham's report contained the following observations with regard to the proposed transference:—"The question whether your Lordships will authorise the transference of a trust such as this from a body of trustees expressly nominated by the truster to another and entirely different set of trustees is an important one. There can, I think, be no doubt that in many cases the interests of education would be served by the transference of endowments such as the present from trustees having no necessary connection with such interests, to school boards to whom the charge of education in the district is entrusted by the State; and the trustees of many similar endowments would probably be glad to be in like manner relieved of their duties and responsibilities in connection therewith. But I find no authority or precedent for such a transference. In the case of *Philp's Trust*, June 28, 1893, 20 R. 900, a petition by a body of governors appointed under the Educational Endowments (Scotland) Act 1882, for authority to alter their scheme so as to transfer part of the trust property to the school board, who were to undertake to supply the special education given by the governors, was refused on the ground that what was proposed was alienation of part of the capital of the trust-estate in favour of a statutory board external to and independent of the trust, and that the trustees could have no control of the alienated property. The only distinction between that case and the present seems to be that in *Philp's Trust* only a part of the estate was proposed to be alienated, and the existing trustees would have had no control over the part so alienated, whereas in the present case it is proposed to transfer the whole trust-estate so that the new trustees would come in the place of and undertake the responsibilities of the old ones, and would be bound to administer the funds in

accordance with any scheme approved by your Lordships. In the case of the *Governors of Jonathan Anderson's Trust*, March 12, 1896, 23 R. 592, the transference of the use of certain buildings and of the income of certain funds to a school board was sanctioned, but there was no question of alienation of capital.

"It seems clear that at common law a trustee has no power to devolve the trust upon other persons, and in the present case the trust is conferred not only on the minister and session of the said church at the time, but also on 'their successors in office.' Are the present holders of office entitled to deprive their successors of the duty or privilege of administering this trust, and is the said duty not one necessarily appertaining to the office of minister or member of session, and therefore one which such minister or member is not entitled to decline? . . .

"The petitioners make the alternative suggestion of an appointment of a judicial factor, but if your Lordships should be of opinion that the petitioners ought to be relieved of their trust, it would, I think, be very much better that the trust should be transferred to the School Board, who are the natural guardians of education in the district. There is no prospect of a trust such as this coming to an end, and therefore new appointments of successive judicial factors would be required."

Argued for petitioners — The holder of an office was not bound to accept a trust imposed upon him *ex officio* — *Shepherd* v. *Hutton's Trustees*, February 24, 1855, 17 D. 516 at 520. Moreover, gratuitous trustees were entitled to resign — *M'Connell's Trustees, Petitioners*, December 16, 1897, 25 R. 330. Their resignation, however, would involve anomalous consequences, and accordingly the Court should allow the proposed transference. Such transference had been made in *Steedman* v. *Malcolm*, June 23, 1842, 4 D. 1441; *Managers of Prime Gilt Box of Kirkcaldy*, May 27, 1859, 21 D. 871. In cases of charitable bequests, where the object had failed, the Court had transferred to *ex officio* trustees—*Governors of Jonathan Anderson Trust*, March 12, 1896, 23 R. 592; *Harrison*, June 16, 1893, 20 R. 827; *M'Culloch* v. *Kirk-Session of Dalry*, July 20, 1876, 3 R. 1182; *Low*, November 17, 1865, 4 Macph. 35. The case of *Philp's Trustees*, June 27, 1893, 20 R. 900, was different, because there the petitioners proposed the alienation of part of the trust property, and there was no security that the assignees would devote the funds to the purposes intended, there being no separate trust created.

At advising—

Lord President—We were invited by the petitioners first to consider that part of their prayer by which they desire us to transfer this trust from the petitioners to the School Board of the Burgh of Alloa, and I think it is convenient that this course should be followed. We are thus confronted with a proposal both novel and surprising.

By the will of a manufacturer resident at Alloa, who died in 1860, the Minister and Session of the First United Presbyterian Congregation of Alloa at the time, and their successors in office, were appointed trustees to administer a sum of £5500 for certain educational purposes. Those purposes were thus expressed—"The education of such children as may be connected with the" testator's "works of Kilncraigs, whom failing, or in addition to whom, if in the opinion of the said minister and session and their foresaids the funds shall admit of such addition, of poor children connected with the said congregation, whom failing, or in addition to whom, if in the opinion of the said minister and session and their foresaids the funds shall admit of such addition, of poor children in the town of Alloa." Various powers and directions were given to the trustees (*inter alia*, to build a schoolhouse), and a general declaration is made that the minister and session and their successors should have the sole right and power of making regulations as to the education to be imparted to the children, of admitting children to the benefits of such education, of electing teachers, fixing the duration of their holding office, and assigning their several duties, and generally of exercising whatever management, superintendence, and control may be necessary in reference to the arrangements connected with the purposes of the bequest.

This bequest has been administered by the successive ministers and kirk session from that day to this. A school was duly built and has been conducted by the trustees. In the course of events the attendance at the school has dwindled, and the present situation is thus summed up by the petitioners—"On account of the free education provided by the Alloa Burgh School Board in all the standards, the total number of children attending the school is only nine, of whom three are connected with Kilncraigs works, two with the petitioners church, and four with the town of Alloa." In these circumstances the petitioners are of opinion that the direct objects of the truster's bequest have practically failed, and that it is necessary that some kindred object should be devised, carrying out the spirit of the truster's intention. Accordingly they propose the discontinuance of the school and the application of the funds to a scheme of bursaries at the secondary or technical school of the Alloa School Board, and scholarships at one of the universities or colleges or technical schools. It is suggested that five-tenths of the bursaries and scholarships should be made available to children connected with the Kilncraigs Works, three-tenths to poor children connected with the United Presbyterian congregation, and two-tenths to poor children in the town of Alloa.

Now, for the purposes of the present question, I am willing to assume, and for those purposes I now assume, that the petitioners are right in saying that the school has permanently failed, that the intention of the testator is not being effectively carried out by the mode which he

directed, that a case has therefore occurred in which the Court will sanction the application of the funds to some kindred object, and that the proposals of the petitioners are reasonably adapted to carry out this purpose.

But, then, to all this the petitioners add the proposal that the position and duties of trustees should be taken from the minister and kirk-session and should be conferred on the School Board of the Burgh of Alloa. The only ground upon which this proposal is rested is the following—"The petitioners, after full consideration, desire to be relieved of the trust, and they suggest that the Alloa Burgh School Board should be appointed in their room." It is added that the School Board are willing that this should be done. Accordingly the petitioners desire authority to transfer the whole estate to the School Board and a declaration that the trust in the petitioners and their successors in office is at an end.

Now, I never heard of such a proposal, and I am wholly opposed to it being sanctioned. These petitioners are trustees *ex officio*, and what they desire is not that they individually should be relieved of their responsibilities by resignation, but that the office and estate of trustees shall for all time be taken from them and their successors to whom the testator gave it and shall be given to another public body. I am aware of no case in which a testator having by extant writ chosen a given body of trustees, the Court has taken the estate from that body and has given it to another and different body of its own selection. And when I turn to the particulars of the present case, I find no circumstance which could justify a step so alien to our practice. By selecting the minister and session of a dissenting church as *ex officio* his trustees, the testator denotes his will that a denominational body shall administer his bounty. The ample powers of administration and regulation which he emphatically confers on them solely shows that, relying on sympathetic trustees, he devolves on them from time to time to devise the best means of doing for him what he was not there to do himself. Accordingly it seems to me that the fact that a crisis has now occurred in the history of the trust, and that some new mode of effecting the testator's intention must now be devised, instead of making the proposed change in the administering body the more appropriate, constitutes a clamant and imperious reason for the continuance of the body of trustees which the testator chose as best reflecting his own desires. No regulations which we can lay down in a scheme would be half so effective in carrying out the testator's intentions in the new situation as our leaving this United Presbyterian body at the helm. The importance of this is very well illustrated by the alternative course now proposed. On the Alloa Burgh School Board there need not be a single United Presbyterian member. The Board, or still more its majority, might quite well consist of the parish minister, the Episcopal clergyman, the Roman Catholic priest, and various people with no sympathy or interest in the United Presbyterian Church. And what possible excuse would there be for our terminating in favour of this miscellaneous body, the composition of which, so far as denominations are concerned, depends on the chapter of electoral accidents, the administration of the definite and exclusive body selected by the testator. The impossibility of such a course is the more apparent when the reason alleged is not any impossibility or even any practical difficulty in the way of continued administration of the petitioners. If it had been said that the congregation had ceased to exist, or that it no longer had a kirk-session, we might have had to look out for some fitting substitute. But all the reason given for this change is the petitioners' desire to be relieved of the trust.

I am for now refusing this part of the prayer of the petition. The petitioners must brace themselves up against their diffidence or self-abnegation, which are virtues not to be indulged in by *ex officiis* trustees. Accordingly, I do not think that we should at present dispose of or consider the rest of the prayer. The petitioners should have time to reconsider their position, on the footing that they and their successors in office are to administer the trust, and I am sure they will administer it satisfactorily and well. Their present proposals as to a new scheme of bursaries may turn out to be well considered, but at present they are made with the diminished responsibility of a body contemplating its own dissolution and leaving to others the execution of its plans. The same observation applies to the question with the teacher; and in order that these matters may be treated with the vigour and responsibility of trustees present and future, I think we should continue the cause.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced the following interlocutor:—

> "Refuse the crave in the prayer of the petition 'to appoint the School Board of the burgh of Alloa to take over the management and application of the "Paton Bequests" in future, or, alternatively, to appoint a judicial factor upon said bequests, and to authorise the petitioners to transfer to the appointees the whole funds and heritage thereof, and to declare the trust in the petitioners and their successors in office at an end'; and meanwhile continue the cause, and decern."

Counsel for Petitioners — Constable. Agents—Constable & Johnston, W.S.

Counsel for Respondents—D. Anderson. Agents—Taylor & Rorie, W.S.