

served rather than otherwise, is put in possession of a disposition without his having paid the price. Then a loan is obtained over the subjects, and the sum borrowed is received by Mr Welch, but no part of it is applied in payment of the price. The money seems to have been applied otherwise. Mr Welch gives no explanation except that his brother took charge of his cash matters. That is not satisfactory. In the meantime, Mr Jackson is proceeded against for payment of a trust debt little more in amount than the price of the subjects, and he is incarcerated for it. What is the explanation of all this? It is said there was a real burden over the subjects which had to be cleared off. There does seem to have been such a burden at one time, but there is also some evidence that it had been paid off, although there was no discharge of it. That, however, was no reason for putting Galloway in possession. It might have been a reason for suspending the settlement. I don't see that it is any excuse at all. This is not satisfactory; but it is said that Mr Jackson afterwards acquiesced in what had been done. That is not a good answer either. I don't think it is proved that he did acquiesce in the sense in which the statement is made. Therefore I think there has been a great departure from the course of conduct which this trustee ought to have followed, and irregularity of such a character that I think it not right that he should be continued as trustee. I give no opinion as to his motives. If he had sold the property at an undervalue, that would have been a case of the grossest kind imaginable. But although he did not do so, he had ulterior views, whatever they were, which were favourable to Galloway, the purchaser, and unfavourable to the trust estate. And besides, he mixed himself up with one of two parties, betwixt whom he had been empowered to act as arbiter. The judgment of the Court is that Mr Welch must be removed from office.

On the motion of the LORD ADVOCATE, Mr Welch was found liable to the petitioners in expenses, subject to some modification; and it was stated that he would not be allowed to charge his own expenses against the trust estate.

Wednesday, Nov. 8.

## SECOND DIVISION.

### WILSON v. NIGHTINGALE.

Counsel for the Pursuer—Mr Mackenzie and Mr Orphoot. Agents—Messrs Traill & Murray, W.S.

Counsel for the Defender—Mr Fraser and Mr Scott. Agent—Mr James Nisbet, S.S.C.

This is an action at the instance of Mr Richard Wilson, chartered accountant in Edinburgh, against Mr Edward William Nightingale, clothier there, in which he concludes for the sum of £97, 15s. 11d., conform to account rendered for professional business done by him on account of and under the employment of the defender. The defender does not dispute the employment of Mr Wilson, but maintains that his charges are quite exorbitant, and that the understanding between them was that Mr Wilson was not to charge the full fees of an accountant. After the Lord Ordinary had repelled a preliminary plea stated by the defender, to the effect that the pursuer had not relevantly set forth the grounds of his claim by specific accounts, the parties agreed to refer the matter to Mr John Hunter, Auditor of the Court of Session, *qua* accountant, whereupon the Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

“The Lord Ordinary, having heard counsel and made avizandum, repels the first plea in law stated for the defender, and of *consent* remits to the Auditor of Court, *qua* accountant, to examine into the nature and extent of the services rendered by the pursuer which are set forth on the record as the ground of the claim made by him under the conclusions of the present action, with power to the

said Auditor to call for documents and explanations from the parties, and take such probation by examination of havers and witnesses as may be necessary to enable him to carry out this remit; and grants commission to him, and diligence against said witnesses and havers accordingly; and thereafter to report what sum in his opinion would amount to adequate remuneration to the pursuer for work done by him on behalf of the defender.”

Upon this a long proof followed before the Auditor, in the course of which several objections were taken by the defender, and brought by him, by appeal, under review of the Lord Ordinary. Mr Hunter reported that the work which Mr Wilson had been employed to do for the defender was of such a nature as to be suitable only for a professional accountant, and that his charges were extremely moderate, and ought to be sustained in full. Against this report the defender lodged a number of objections, and a full discussion took place before the Lord Ordinary both upon these objections and on the objections that were raised in the course of the proof. The Lord Ordinary repelled all the objections, sustained Mr Hunter's report, and found the defender liable. To-day the Court concurred in the result of this judgment, but held that they could not enter on the objections which were taken in the proceedings before the reporter. The parties had preferred that manner of ascertaining their rights to going, in the usual way, through the courts of law, and they must be held bound by their own acts. The remit to Mr Hunter was not a judicial reference, but a private arrangement among the parties, and Mr Hunter had thereby conferred upon him a discretionary power with which the Court could not interfere, and which they were not by any means prepared to say he had exceeded.

### MACBRIDE v. CLARK, GRIERSON, AND CO.

Counsel for the Pursuer—Mr Pattison and Mr Watson. Agent—Mr James Renton, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Clark. Agents—Messrs A. G. R. & W. Ellis, W.S.

This is a question as to the construction of a cautionary obligation. It arises in the following circumstances:—In 1861 the company of William Anderson, Son, & Clark, of St Vincent Street, Glasgow, obtained from the Union Bank a cash credit upon a current account to the amount of £3000, upon their granting a bond along with several co-obligants. The said company, and the individual partners of it, Mr James Gemmell, Glasgow; Mr James Munn, Glasgow; and Clark, Grierson, & Co., Argyle Street, Glasgow, as a company; and Robert Bland Clark, and William Grierson, the individual partners of the company, all bound and obliged themselves as full debtors and co-obligants to pay to the bank whatever might be found owing by the firm of William Anderson, Son, & Clark. This firm became bankrupt in 1861, and at that time there was due by them to the bank, in respect of their operations on the cash credit, a sum of £2790, 6s. 3d. of principal, besides interest on the current account. After the insolvency various payments were made by several of the co-obligants in implement of their obligation. Among other payments some were made from time to time by the pursuer, who is judicial factor on the estate of Mr Munn, now dead, one of the co-obligants, and an action is now brought by him to determine what are the several obligations of the parties. The question which truly arises is whether Robert Bland Clark and William Grierson signed merely as partners of Clark, Grierson, & Co., and in corroboration of the company signature, or added their individual obligations to that of the company. The pursuer, on the one hand, contends that according to the sound legal construction of the bond there are five separate cautionary obligants; while the defendants, on the other hand, contend

that there are only three, Clark, Grierson, & Co., as a company being one party. The Lord Ordinary (Jarviswoode) held that the obligation of Robert Bland Clark and William Grierson, as individuals, was super-added therein to the obligation of Clark, Grierson, & Co., as a company.

To-day, after argument, the Court made *avizandum* with a reclaiming note for the defenders.

Thursday, Nov. 9.

## FIRST DIVISION.

### KELLER v. ROBERTSON AND OTHERS.

Counsel for the Advocate—The Lord Advocate and Mr F. W. Clark. Agents—Messrs Lindsay & Paterson, W.S.

Counsel for the Respondents—Mr Patton and Mr Gifford. Agents—Messrs Dalmahoy, Wood, & Cowan, W.S.

This was an advocacy from the Sheriff-Court of Perthshire. An action of removing had been raised in 1859 at the instance of the Rev. Alexander Stewart Robertson, James Mailler, and Alexander Frazer, three of the members of the kirk-session of the Free Church congregation at Burreltown, for the purpose of having the advocator removed from the schoolhouse at Burreltown known as the "Woodside Institution." The removing was opposed by Mr Kiellar, and had been depending in the Perthshire Court from 1859 to 1864.

It appeared from the advocator's statement that a vacancy had occurred in the mastership of the school in the year 1845. The patronage was then in the hands of the kirk-session of Coupar-Angus. Candidates were advertised for, and several applications were made, but Mr Kiellar did not apply. He was, however, asked by the patrons if he would accept the appointment; but, as he alleged, he declined it on the ground that a permanent appointment was not offered. He said that it was thereafter arranged that he should accept the appointment on the understanding that his tenure of office should be for one year certain, upon trial, and that if he gave satisfaction during that period his appointment thereafter should be permanent. This statement was denied by the pursuers, who alleged that the appointment was one from year to year. Unfortunately the correspondence embodying this arrangement, except one letter from a Mr Clark to the advocator, as well as the minutes of the kirk-session of Coupar Angus, had gone amissing. Mr Kiellar was thereafter inducted into office. In 1846 he was made an elder of the church, and he continued in office until 1858, when he was dismissed, on the sole ground that his continuance in office was "not for edification." There was no charge made against him. As stated by Sheriff Gordon in his note—"It must be distinctly kept in view that the pursuers have prevailed solely in respect of their legal right to terminate the defender's engagement without reasons assigned, and not in respect of any misconduct on his part, proved, or even alleged, by the pursuers." Mr Kiellar appealed to the Presbytery against the judgment of the kirk-session dismissing him, but the appeal was dismissed. He then went to the Synod, where the Presbytery's decision was reversed by a majority of 17 to 2. The case then went to the Assembly, where it was held that the superior Church courts had no jurisdiction in the matter, and the judgment of the Presbytery, in so far as it dismissed the complaint, was affirmed. Mr Kiellar was thereupon of new dismissed, and an action was raised to have him removed from the schoolhouse. A long proof was led as to the terms of Mr Kiellar's appointment. Sheriff Barclay held that it was not proved that the appointment was one *ad vitam aut culpam*, or anything but an annual one. Sheriff Gordon adhered; and Mr Kiellar was ordained to remove.

It was argued for the advocator (1.) that his appointment was a permanent one in this sense, that unless something were alleged and proved against him he could not be summarily removed; and (2.) that the church courts were entitled and bound to deal with the matter; and that the judgment of the Synod having been in favour of the advocator, and the Assembly not having altered it, the advocator was still entitled to the office. He argued that he had proved by parole the terms of his appointment, which he had been prevented from proving otherwise by the kirk-session not having preserved his letter of acceptance and the minute of his appointment, which undoubtedly existed at one time.

On the other side it was contended that unless the advocator could prove a special contract to the contrary, he only held his appointment from year to year, and that he was removable at pleasure without cause assigned. The Burreltown kirk-session had only existed since 1853, and the documents, the loss of which was complained of by the advocator, were the documents not of the Burreltown kirk-session, but of that of Cupar-Angus, and the pursuers were not therefore responsible for the loss of them.

After full argument the Court to-day affirmed the judgment of the Sheriffs.

The LORD PRESIDENT, who delivered the opinion of the Court, stated that the point of this case lay within a comparatively small compass, although it had been spread over a very long proof. The question was whether Mr Kiellar had a permanent appointment or not. What he contended for was a somewhat peculiar kind of appointment, but it was quite intelligible. He said that he was not to be dismissed except for some disability. Now the only letter on the subject was the one from Mr Clark to Mr Kiellar. It was there stated that the appointment was to be "certain for one year, and to be put on a *more* permanent footing if after that trial both parties are pleased." As his Lordship read that letter, it was not a proposal for such an appointment as was contended for by Mr Kiellar. It was to be gathered from the evidence that Mr Kiellar had said something about a permanent appointment, but what he exactly said was not known. It also appeared that Mr M'Arthur, one of the kirk-session of Cupar-Angus, had made some proposal to the same effect. It does not appear when it was made, but it seemed clear it had not been given effect to. The question then was whether Mr Kiellar accepted office in terms of Mr Clark's letter, or whether he proposed other terms essentially different which were agreed to. That would require to be very distinctly proved, but it has not been satisfactorily established. It rather appeared that Mr Kiellar had written a letter in answer to Mr Clark's, but it has gone amissing. It was not clear that the kirk-session of Burreltown are responsible for the loss. Mr Clark's letter implied that something was to be done at the end of the year, but the matter stood over, and nothing was ever done. The judgments of the Sheriffs are therefore substantially right. They have allowed expenses subject to modification, which must be considerable in the circumstances.

### MILNE HOME AND OTHERS v. ALLAN AND OTHERS.

Counsel for the Pursuers—Mr Gordon and Mr Millar. Agents—Messrs Adam & Sang, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Gifford. Agent—Mr James Renton jun., S.S.C.

Mrs Milne Home of Wedderburn, proprietor of the lands and barony of Eyemouth, with consent of certain proprietors of houses and other heritable property in Eyemouth, raised this action against the defenders, who are trustees of the harbour of Eyemouth under the Act of Parliament 2 Vict., c. 36, to have it declared that the defenders had no right to carry away sand, shingle, gravel, rock, stones, or