

in view of the Legislature when such cases were appointed to be tried in the first instance before the Sheriff, but with of course a right of appeal to a higher Court where all questions of law as well as of fact would be determined. No doubt it was also contemplated that they might be removed into the Court of Session for trial, and of course there are cases where it is apparent that no question of law is stated but only questions of pure fact suited for jury trial. The present case, as it appears to me, is one much more likely to turn on law than on fact; and while a right of appeal is given under the 73rd section of the Court of Session Act to any person who may conceive that his case is suited for jury trial, the Court is not bound to adopt that conception. In my judgment this is not a case specially suited for jury trial, but one which would be better disposed of by remitting to the Sheriff, in order that the case may be tried in the way in which it was contemplated by the Legislature that the ordinary run of cases would be tried, although I am afraid but a small proportion of them are in fact tried in that way.

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court remitted the cause to the Sheriff-Substitute for proof as allowed by him.

Counsel for the Pursuer and Appellant—
C. N. Johnston, K.C.—Constable. Agents—
—Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—
Salvesen, K.C.—Hunter. Agents—
—Millar, Robson, & M'Lean, W.S.

COURT OF TEINDS.

Friday, March 18.

(Before the Lord President, Lord Adam,
Lord M'Laren, Lord Kinnear, and
Lord Low.)

SIR JOHN CHEYNE, PETITIONER.

Teinds—Process—Disjunction and Erection of Parish Quoad Sacra—Petition to Substitute Amended for Original Deed of Constitution—Procedure.

The church and parish of Oban were by decree of the Court of Teinds in 1867 disjoined from the united parish of Kilmore and Kilbryde and erected into the church and parish of Oban *quoad sacra*. A deed of constitution had, in accordance with usual practice, been previously adjusted and approved of by the Church Courts. It provided for the management of the affairs of the church by a body of trustees holding office for life, some of whom were trustees *ex officio*, others elected. The

titles to the church, burying-ground, and manse were taken in their favour and they were personally bound, failing ordinary church revenue, to keep the fabrics in repair. In 1903, it being thought desirable that the affairs of the church should be managed by an elected church committee, a petition was presented to the Court of Teinds by the Procurator-Fiscal of the Church of Scotland craving that an amended deed of constitution might be received by the Clerk of Teinds and lodged in the process of disjunction and erection in substitution for the one existing.

The Court, after reports by the Clerk of Teinds adverse to the petitioner's proposals, ultimately remitted to the Lord Ordinary on the Teinds to consider the petition and whole proceedings, and to adjust the amendments proposed. The Lord Ordinary thereafter adjusted amendments on the original deed of constitution giving effect to the petitioner's proposals in so far as compatible with the preservation of the rights and obligations of the trustees with regard to the titles of the church, manse, and burying-ground and the maintenance of the fabrics, and the Court *authorised* the Clerk to receive a supplementary deed of constitution in terms of and subject to the conditions expressed in the deed adjusted by the Lord Ordinary.

This was a petition to the Court of Teinds presented on 8th January 1903 by Sir John Cheyne, K.C., Procurator for the Church of Scotland, craving for authority to lodge an amended deed of constitution in the process of disjunction and erection of the parish of Oban, in order that the same might be acted upon in time coming in substitution for the existing constitution. The petitioner, as Procurator of the Church of Scotland, was an *ex officio* trustee both under the original deed of constitution and the proposed amended deed.

The petition set forth, *inter alia*.—"That by an Act passed in the Parliament of Scotland in the year 1707, intituled 'An Act anent Plantation of Kirks and Valuation of Teinds,' your Lordships are empowered, authorised, and appointed to judge, cognosce, and determine in all affairs and cases whatsoever which by the laws and Acts of Parliament of the Kingdom of Scotland were formerly referred to and did pertain and belong to the jurisdiction and cognisance of the commissioners appointed for the plantation of kirks and valuation of teinds, as fully and freely in all respects as your Lordships do or may do in other civil causes.

"By the New Parishes Scotland Act 1844 (7 and 8 Vict. c. 44) powers are given to your Lordships, upon the application of any person or persons who shall have acquired or undertaken to acquire a church and to endow the same, to inquire into the circumstances, and after due intimation to all parties having interest, to erect such church into a parish church in connection with the Church of Scotland and to mark

out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same or any part thereof may have belonged or been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of Scotland.

"In all applications under the said Act it has been usual and is necessary (the heritors having no responsibility in the matter) for the Church Courts to provide by means of a deed of constitution for the management of the church property and for conducting the ordinary affairs of the new parish. The deed contains a nomination of the trustees in whom the property and endowments of the church are vested. But the statutory requirements are secured by separate deeds of conveyance and declarations of trust which are recorded in the public registers and are specially reported on under remit in the process of disjunction and erection. The deed of constitution is not recorded in the books of any civil court; but an extract thereof from the books of the General Assembly of the Church of Scotland is lodged in the process of disjunction and erection and remains in the hands of the teind clerk. It is referred to in the decree of erection; but the authority of the Teind Court is not interponed thereto.

"After the New Parishes Act came into operation in 1844 certain deeds of constitution were provided and have hitherto been acted on, although from change of circumstances they are no longer suitable for the management of the affairs of some of the older parishes erected under the Act.

"Upon a petition presented to your Lordships under the Act above-mentioned, the church and parish of Oban were, by decree dated 5th June 1867, disjoined from the united parish of Kilmore and Kilbryde, and erected into the church and parish of Oban *quoad sacra*. In accordance with the usual practice, a deed of constitution had been previously adjusted and approved of by the Church Courts; and an extract thereof was produced in the process of disjunction and erection and was referred to in the application and decree.

"The said deed provides for the management of congregational business by a body of trustees of whom three held office *ex officio* and the remainder are elected on the occurrence of vacancies from time to time by the male communicants of the congregation. The said trustees hold office for life, although they may have ceased to belong to the congregation or to the Church of Scotland or may have left the district.

"The arrangement for the management of the affairs of the church by such a body is not satisfactory, and is injurious to harmony and efficiency in the conduct of congregational business. It deprives the kirk-session and the congregation for the time being of a voice in the management of the financial and other business affairs of the church, and tends to impair that active interest and liberality on the part of

members of the congregation upon which the prosperity of a *quoad sacra* church is largely dependent. In all the more recent erections of *quoad sacra* churches and parishes the system has now accordingly been superseded by a new form of deed of constitution, in which the duties of the trustees are confined to the holding of the property in order to secure the statutory conditions of endowment, while the management of the financial and other business affairs of the church is entrusted to a body composed of representatives of the kirk-session and of the congregation periodically elected.

"It is accordingly desirable that certain changes should be made in the deed of constitution by which the business affairs of the church and parish of Oban should be administered by a church committee consisting of three members of the kirk-session (of whom the minister, if he so desires it, shall be one), to be chosen annually, and six representatives of the congregation to be elected by the whole body of communicants, of whom two shall retire annually. . . . The proposed modifications do not affect or alter any statutory obligation imposed upon the trustees, with this exception, that, as the administration of seat rents and collections is conferred upon the church committee, an obligation is imposed on that body to keep the church and dwelling-house of the minister in repair from the proceeds thereof, and they are further required to hand their accounts annually to the trustees.

"In order to obtain the sanction of the General Assembly to the proposed modification a petition was, with the unanimous approval of the Presbytery of Lorn (within the bounds of which Presbytery the parish of Oban is situated), presented to the General Assembly by the minister and kirk-session and trustees of the church, craving the Assembly to approve of the alteration of the constitution upon the lines above indicated, to remit to the delegation to adjust with the petitioners the terms of the proposed alterations, and to instruct the Procurator of the Church upon such alterations being adjusted to make application to the Court of Teinds for approval of the amended constitution. The General Assembly appointed intimation of the petition to be made from the pulpit of Oban Parish Church, and all parties interested to be cited to appear at the bar, and on 20th May 1902 the General Assembly granted the prayer of the petition."

The Court on 20th February remitted to the Clerk of Teinds to examine the proposed amended deed of constitution along with the original deed of constitution, and to report whether the same could be received consistently with the trusts, if any, constituted by the original deed when the parish was erected in June 1867.

On 27th February 1903 the Clerk reported adversely to the petitioner. In the course of his report he stated—"The proposal to lodge an amended deed of constitution, now made for the first time, raises the

question whether this can be done without prejudice to the arrangements made when the church and parish were erected *quoad sacra*, and specially the titles to the church, the obligations for maintenance of fabrics, the securities for the stipend and other provisions applicable to the case. The reporter has not observed, and it is not stated, that any injury has arisen to the benefice from the original deed of constitution of April 1866, which has been in use for over thirty-six years, and it does not appear that any general rule could be laid down to set aside a constitution where some of the trustees are non-resident or have ceased to belong to the congregation or to the Church of Scotland. It can be shown that constitutions have been adopted where the trustees have been liable to all these objections.

“On comparing the original deed of constitution with the proposed amended deed the reporter finds that the Procurator for the Church, the Principal Clerk of the General Assembly, and the Convener of the General Assembly’s Committee on the endowment of chapels of ease, and their successors in office, are the official trustees in both cases. The names of the local trustees in the original deed—eight in number—are different from those in the amended deed, who are only six in number. These appear to have been appointed in succession to certain of the original local trustees, because under article 9th it was provided that on a local trustee resigning or dying a new trustee shall be elected to supply the vacancy, but the present local trustees do not fully represent the original constitution trustees.

“Without going minutely into detail of all the changes proposed, the reporter may briefly notice what appear to be the chief features of the proposed amendments. Under the original deed of constitution, which was a separate deed (*i.e.*, not embodied in the petition) the minister was not a trustee, the trust being held by gentlemen connected with or favourable to the Church of Scotland. The stipend of £100 was provided by a deed of appointment and declaration of trust by the trustees for the General Assembly’s committee for endowment of chapels of ease, containing an obligation to pay to the minister and his successors in the cure the annual sum of £100 out of certain feu-duties held by the granters, and the deed, which was dated 15th, 20th, and 25th June 1867, was recorded in the Particular Register of Sasines for the Sheriffdom of Edinburgh, &c., the 29th June same year. The conveyance of the church and burying ground was taken in favour of the trustees, official and local, named in a ‘deed of constitution for the said church, granted by the General Assembly of the Church of Scotland on the 16th and 18th days of April in the year 1866,’ and the conveyance states that ‘the persons after named were appointed trustees for the purposes therein set forth,’ and it was declared that ‘the church and burying-ground were to be held in connection with the Church of Scotland and for

the purposes or trusts specified in the said deed of constitution and in conformity with the relative Act of Parliament 7 and 8 Vict. cap. 44, and that the said trustees (other than those *ex officio*s and their fore-saids shall be bound and obliged at all times to maintain the said church and the other erections on the said ground in proper and substantial repair.’ The feu-charter of the manse, dated 6th March 1867, and recorded in the General Register of Sasines 14th March same year, is also in favour of the constitution trustees, and contains an obligation upon them to maintain the property ‘in proper and substantial repair.’ It will thus be observed that upon the local trustees there is a special obligation to maintain the fabrics under the conveyances in their favour.

“But in addition to this, there not being a sufficient sum otherwise provided, the local trustees signed a minute undertaking to maintain the fabrics of the church and manse. This is referred to in the Clerk’s report in these terms—‘*Third*. There is the usual minute by the trustees for the proposed parish, showing that the average annual ordinary collections for the last five years have been £45, 15s. 8d., and the seat rents £41, 2s. 4d., and they bind themselves to apply the ordinary revenues of the church to the support of the fabrics, and further constantly to keep the whole buildings in thorough and complete order and repair in all time coming;’ and, further, it is stated that ‘the expense of supporting the fabrics (estimated at £5) is provided for by the seat rents, amounting to £41, 2s. 4d. per annum, and the obligation of the trustees always to keep the buildings in repair.’

“What is proposed under the present application is practically to set aside the management of the trustees and to devolve the business on the minister and certain members of the church, although there is no reserved power in the deed of constitution to make any alterations whatever. It does not appear to the reporter that the proposal can be entertained, having regard to the obligations imposed on the trustees and undertaken by them to maintain the fabrics. . . . There is nothing in the original deed of constitution of Oban to prevent the minister being elected as a trustee provided he is elected in the method pointed out in the constitution, but the reporter is unable to see how the minister and certain members of the congregation elected as managers can assume the powers which were devolved on the trustees by the deed of constitution and deeds which were executed in their favour involving the maintenance of fabrics. . . . In the whole circumstances, as the proposed amended deed of constitution would sanction a form of management inconsistent with the original constitution the reporter regrets that he is unable to report in favour of the application being granted. . . . The question whether the church has a reserved power to alter arrangements upon which a church and parish have been erected *quoad sacra* does not appear to have been raised before. There might be circumstances

favourable to a change where a minute could be lodged setting forth the amendments, and if approved of by the Court could be allowed to be lodged in process without interfering further with the original deed of constitution. This would seem to be preferable to lodging a completely new deed of constitution."

On 14th July 1903 the Court pronounced the following interlocutor:—"The Lords having resumed consideration of the petition, with the report of the Clerk, and heard counsel with reference to the amendments to the deed of constitution, Allow the petitioner to lodge in the present proceedings for the consideration of the Court at next calling a minute containing such amendments as in the opinion of the petitioner are calculated to improve the management of the affairs of the church and parish *quoad sacra* under the original deed of constitution, but excluding from said minute all such alterations as would in any way affect the rights and duties of the local trustees in respect of the obligation imposed upon them in the disposition of the church and manse respectively, and minute by the trustees, to maintain the fabrics, and remit to the Clerk to adjust with the agent for the Church the proposed amendments, subject to the approval of the Court."

The petitioner lodged a minute, and thereafter the Clerk of Teinds presented a second report, in which he stated that he could not recommend the proposed regulations.

On December 11th 1903, the Court having resumed consideration of the petition with the minute and second report of the Clerk of Teinds, pronounced an interlocutor remitting "to the Lord Ordinary to consider the petition and whole proceedings, to hear counsel thereon, and to adjust the amendments proposed to be made on the deed of constitution, and report to the Court. Proposed amendments of the deed of constitution were thereafter adjusted by the Lord Ordinary and reported to the Court, and the petitioner lodged a minute moving the Court to approve of the amendments of the deed of constitution as adjusted by the Lord Ordinary, and to grant warrant for a supplementary deed of constitution in terms thereof granted by the General Assembly or the delegation thereof, to be received by the Clerk and lodged in the process of disjunction and erection in the parish of Oban in order that the same might be acted on in time coming as supplementary to the existing deed of constitution. The proposed amendments provided for the election of a committee of three members of the Kirk-Session and six members of the Church, who generally were to manage the affairs of the congregation. Their relation to the trustees was determined by article 9, which was as follows:—"It shall, subject to the conditions underwritten, be lawful and in the power of the trustees to authorise the Church Committee, by minute signed by the chairman and the clerk to the trustees, to keep the church, manse, and appurten-

ances thereof in good order and repair, to superintend the seat-letting and to administer the proceeds of the same, and of the church collections for statutory purposes, provided always (1) that the upkeep of the church, manse, and appurtenances thereof shall be a primary charge upon the revenues of the church arising from seat rents and from special collections for statutory purposes; (2) that the trustees shall be entitled to require the Church Committee to make a special church collection for the upkeep of the said buildings at such time or times as they may think proper if in their judgment it is necessary so to do; (3) that the Church Committee shall upkeep said buildings to the satisfaction of the trustees, and in the event of their failing to do so the trustees may recall the foresaid authority to the Church Committee and resume the management of the financial and other business affairs of the church as if such authority had never been granted; and (4) that nothing herein contained shall in any way affect the rights and obligations of the trustees under the Act 7 and 8 Vict. c. 44, the charter of novodamus of 1st March 1867, under which they hold the church and burying-ground, the feu-charter of 6th March 1867, under which they hold the manse, and the said minute subscribed by them on 11th March 1867."

On 18th March 1904 the Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition and whole proceedings, with the report by the Lord Ordinary, dated 15th March current, and relative amendments of the deed of constitution therein referred to, and minute for the petitioner, authorise and empower the Clerk to receive the supplementary deed of constitution when granted, the same being subject to the conditions therein expressed, and specially in article 9th thereof, and decern."

Counsel for the Petitioner—C. N. Johnston, K.C.—Constable. Agents—Menzies, Black, & Menzies, W.S.

COURT OF SESSION.

Thursday, March 10.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

INVERARITY v. COUNTY COUNCIL OF FORFARSHIRE.

Public Health—Special Drainage District—Assessment—Expense of Forming Special Drainage District—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), sec. 133.

Where a special drainage district has been formed in a county the County Council is entitled, under the