

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