

have or have not exceeded that level, all the presumptions are against the pursuer, the wrong-doer originally, who was at least bound to have preserved clear evidence of the state of things, first, when he commenced his operations, and secondly, when he completed them.

Neither of those things he did. I may say that I attach no importance to the evidence of the contractors on this question of levels. In such a matter it is, in my view, entirely worthless, and no man in the practical affairs of life would for a moment place it against the levels of the engineer. While the restoration of the burn was as yet not commenced, Mr Hope wrote to Methven that the burn had not been deepened to the required depth, and requesting Methven to say whether he questioned the accuracy of the statement. But there was no reason why this matter should have been left to rest on these levels. The old landmarks had been totally obliterated by the unwarranted acts of the pursuer himself. There was no difficulty in preserving certain conclusive evidence of what they were; but the pursuer having failed to do so, must abide the result. If this were a matter of ancient date, or if there were a necessary *penuria testium*, I might have accepted these calculations as conclusive. But, as it is, I am compelled to come to the result at which your Lordships have arrived. The matter is left in doubt, and the doubt is fatal to the proof of the affirmative.

It is impossible, however, not to see that the defenders are also not without fault here. If Mr Chesser had asked for and seen the letter which Mr Hope wrote to the tenant after the work had been completed, which he admits he was aware of, and which I think he should have seen, and had checked Mr Esdon's calculations as regarded the depth to which the burn had been excavated, all these doubts would have been removed. I am left with an impression that here the fact is with Mr Hope; but he has put himself so far in the wrong that even this element will not overcome the presumptions against him.

I observe, with regret, persons in the position of both of these parties surrounding their disputes with unnecessary difficulties by asserting and acting on their supposed rights at their own hand. But I see no other result to this lawsuit than that at which your Lordships have arrived.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Dean of Faculty (Fraser)—Balfour—Pearson. Agent—Party.

Counsel for Defenders — Solicitor - General (Macdonald) — Gloag. Agents — M'Ritchie, Bayley, & Henderson, W.S.

Friday, March 1.

FIRST DIVISION.

BROATCH, PETITIONER.

Administration of Justice—Procurator—Suspension of Procurator by a Sheriff.

Circumstances in which the Court, on a petition by a procurator in a Sheriff Court for recall of an order by the Sheriff suspending

him from his office, refused to interfere, but superseded consideration of the petition till the petitioner should, if so advised, apply to the Sheriff for recall of the order.

This was a petition presented by Robert Broatch, law agent in Dalbeattie, a procurator in the Sheriff Court of the stewartry of Kirkcudbright, for recall of an order by the Sheriff (NAPIER) suspending him from his office. The petitioner was agent for the defenders in an action that depended before the Sheriff-Substitute (NICOLSON) at Kirkcudbright, in which the Sheriff had pronounced an interlocutor repelling certain preliminary defences and ordering a proof. Against this the defenders had reclaimed, the reclaiming petition being prepared and signed by the petitioner. When the petition came before the Sheriff on 30th November 1877, his Lordship pronounced this interlocutor, from which it will appear what his grounds for pronouncing it were:—

“Edinburgh, 30th November 1877.—On looking at the prayer of the reclaiming petition in this case, before proceeding to study its contents the attention of the Sheriff was at once attracted by the following statement, which immediately precedes the prayer for reversal. It bears to be written, not as for the party litigant, but expressly in the name and for behalf of ‘the writer,’ viz., Robert Broatch, procurator and agent for defenders. ‘The writer cannot resist, too, stating the following facts. His Lordship, the Sheriff-Substitute, decides nearly every case against his clients, the cause of which is only conjectural; but it cannot be because of their cases being bad, for your Lordship, although apparently disinclined to alter unless on very strong grounds, has reversed three decisions in favour of the writer’s clients; and out of six appeals to the Court of Session in only two of them were the Sheriff-Substitute’s adverse judgments adhered to, and these two might also have been reversed had they been well handled, but were not so well managed as clients with plenty of money would have secured. The writer has every respect for the learned Sheriff-Substitute, but these facts tend to sap his confidence in the soundness of his judgments; but the writer could not resist adverting to these facts, because it so happens that at the present moment two or three other cases have been decided against his clients.’

“This agent’s ‘facts,’ as he calls them, are by no means intelligibly stated as regards the details; but the Sheriff will not condescend to endeavour to understand them. This much, however, he has no difficulty in perceiving through a very transparent gloss of respect, that the purport of the passages above quoted is to accuse the Sheriff-Substitute of the Stewartry of systematically and unrighteously giving judgments against parties, not according to the merits of their cases, but because they happen to be clients of Mr Robert Broatch. That the Sheriff-Substitute does so is asserted as a fact. The cause of his doing so, as Mr Broatch is pleased to inform the Sheriff, ‘is only conjectural.’

“As regards the Sheriff-Substitute, the Sheriff has no hesitation in coming to the conclusion that this accusation amounts to the criminal offence of maligning a Judge, *omni suspicione major*.

"As regards the Sheriff himself, to make him the recipient of such an accusation, and that by means of an unparalleled abuse of the forms of process, and with an obvious intention to bias his judgment on the appeal, he can view in no other light than as a gross contempt of Court.

"Under these circumstances, and after some hesitation as to whether it might not be his duty to place this matter in the hands of the Procurator-Fiscal, the Sheriff feels himself constrained to issue the following order:—

"1. The reclaiming petition in question, which the Sheriff declines to consider or receive, must be withdrawn from process and retained in the hands of the Clerk of Court.

"2. The Sheriff suspends Mr Robert Broatch from his office of procurator in the Court of the Stewartry, debars him from acting as such therein, and appoints this order to be entered in the books of Court.

"That there may be as little delay in this case as circumstances will admit of, the Sheriff allows the defenders to give in a reclaiming petition in place of that withdrawn, if so advised, under a new agency, and that within such time as may seem just to the Sheriff-Substitute under the circumstances; and also allows the pursuers to see the same, and revise and adjust their answers already lodged in accordance therewith; and with these orders remits the process back to the Sheriff-Substitute to proceed accordingly."

The petitioner Broatch on hearing of this interlocutor wrote as follows to the Sheriff:—

"Dalbeattie, 3d December 1877.

"My Lord,—I have just returned from Kirkcudbright, where I read your interlocutor suspending me. The passage referred to was written most thoughtlessly, and in a great hurry, without considering the effects of my words. I was at the time greatly annoyed at having lost some cases, and I allowed my feelings to get the better of my judgment. I now see that I was extremely wrong in writing as I did. I called, two days after lodging the paper at the Clerk's office, when I had time to reflect, to see if I could get the passage deleted, but it had gone to your Lordship.

"I am prepared to tender to Sheriff Nicholson and yourself the humblest apology, in any form and manner that may be asked of me; and I humbly beg that you will allow me to do so, and reinstate me in that position in which I have long acted, and by which I can alone support my wife and four young children, who would be reduced to great straits unless I am restored to that position.

"I trust that your Lordship will take my case into your merciful consideration.—I am, my Lord, your Lordship's humble servant,

"ROB. BROATCH."

He also wrote in similar terms to the Sheriff-Substitute.

He presented this petition on January 12, 1878, to the Court of Session for recall of the Sheriff's order, when it was argued *inter alia* for him, that this suspension being for an indefinite period, amounted to a sentence of deprivation, which was not competent to the Sheriff.

Before the petition was advised, the petitioner, by request of the Court, printed and boxed this letter from the Sheriff to himself, of date 25th January 1878:—

"6 Ainslie Place, Edinburgh.

"Sir,—Immediately after I had been placed under the disagreeable necessity of suspending you from your occupation of procurator in the Court of the Stewartry, I received a letter from yourself admitting the justice of that sentence, but earnestly praying that I would revoke it. This prayer was founded upon two pleas—First, that the offence in question had been committed in a hasty and thoughtless moment, of which you instantly repented, and hastened to prevent the transmission of the case under appeal to the Sheriff containing the passage in question, but found you were too late to intercept it. Your second was a more powerful plea, being for your wife and young family. All this was accompanied with an offer to make amends in any form of words the Sheriff and his Substitute might be pleased to dictate.

"To this letter it was impossible, from the nature of the offence, that you could have expected an immediate reply in any form. A favourable reply on the instant from the Sheriff would have stultified the reasons for suspension he had so fully stated; and the information which he immediately obtained from the county officials was such as to render any favourable reply entirely out of the question.

"In the first place, I have ascertained that the offence in question, instead of being thoughtlessly committed and instantly repented, was deliberately persisted in notwithstanding you were strongly and kindly advised not to send it. But what is of more consequence is the fact, that before I could have had time to answer your letter you fell upon a fraudulent scheme, and cunningly carried it out, of concocting a letter as if written by a third party, who had never seen it, but which was all written in your own hand, for the purpose of being sent to all the daily journals, as the voluntary and independent composition of the party whose name you had affixed to it, also in your own hand. This would have been forgery had you not, through the aid of a go-between, upon whom it reflects the greatest discredit, obtained to one of the copies of the letter you had concocted the actual signature of the ignorant individual (one Latimer) whom you had selected for your fraudulent purpose, which only succeeded with one of the public journals. This letter was a laudation of yourself, and virtually a repetition of the offence for which you had been suspended.

"I have now to ask you to explain your conduct in this matter, of which a full precognition has been taken, and is in the hands of the Procurator-Fiscal Mr Milroy, who has my instructions to let you see the same if you require it.—I remain, Sir, your most obedient, &c.

"MARK NAPIER."

He also printed and boxed the following reply:—

"Dalbeattie, 6th February 1878.

"My Lord,—I have had the honour to receive your Lordship's letter of the 25th ult.

"I presume your Lordship is aware, although no reference is made to it in your Lordship's letter, that the order of suspension has been made the subject-matter of a petition at my instance to the Court of Session because you took no notice of my former letter, and is now under their consideration, after hearing counsel on my

behalf. Any communication therefore now from your Lordship on the subject I should have expected to have been far otherwise than that I have now the honour to acknowledge, which I now do, although perhaps tardily, and that only out of deference and respect for your Lordship.

"Your Lordship is under a misapprehension in stating that in my appeal to your Lordship I admitted the justice of my 'sentence.' On the contrary, I considered and still consider it, as stated in my petition to the Court, to be excessive, and beyond the just and equitable requirements of the case; while I have also submitted to the Court whether your Lordship had power to pronounce an order of indefinite suspension. In making my appeal to your Lordship I virtually admitted, as I still frankly admit, that whether I had ground or not for complaint against the Sheriff-Substitute, I had committed an act of indiscretion and impropriety, and perhaps also technically, although not intentionally, an act of disrespect to the Court by inserting in the reclaiming petition the objectionable passage, and, as you are aware, I offered to make an apology for doing so in any terms you might dictate, but you have rejected the offer. My Lord, it is unnecessary, and can serve no useful purpose, to say more on this head. The matter is now under the consideration of the Court, who will shortly decide the justice of the question between us.

"With regard to the other matters adverted to in your Lordship's letter, which have nothing whatever to do with the reasons of the suspension as then existing, yet evidently wished to be mixed up with them, I grieve to observe that your Lordship has thought proper upon *ex parte* information and inquiry to characterise my conduct as 'fraudulent.' Your Lordship might have withheld such a harsh and grave imputation, one which has caused me much sorrow and wounded me severely in my feelings, and suspended your judgment until at least you had given me an opportunity of being heard; but to assume, as you apparently do, the truth of the matters commented on by you, and then ask me for an explanation, is, to say the least, not a very fair or equitable proceeding; and therefore, while denying the accuracy of your Lordship's information and judgment, I must out of self-respect, and with all deference and respect for your Lordship, decline to vindicate myself from an accusation which your Lordship seems to think has been already established to your satisfaction.—I have the honour to be respectfully, my Lord, your Lordship's most obedient humble servant,

"ROB. BROATCH."

At advising—

LORD PRESIDENT (in delivering the judgment of the Court)—Nobody can doubt on reading this petition that the offence committed by the petitioner is a very serious one, and just as little can one doubt that the Sheriff was well entitled to visit him with a sentence of suspension. The petitioner is mistaken in supposing that this sentence is necessarily permanent. It is not a sentence of deprivation, but of suspension. That may be removed on cause shown by an application to the Sheriff. No such application has been made as yet, and one cannot help seeing that any such application must be couched in very different terms and in a very different spirit to that in

which the petitioner has hitherto addressed himself to the Sheriff. We are not prepared to interfere at present. We shall take this course, viz., supersede consideration of this petition till the petitioner shall, if so advised, apply to the Sheriff, by petition of course, to be reponed.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition and heard counsel for the petitioner, Supersede consideration of the petition, to give the petitioner an opportunity, if so advised, to apply by petition to the Sheriff to be reponed."

Counsel for Petitioner—Nevay. Agent—W. N. Masterton, S.S.C.

Saturday, March 2.

SECOND DIVISION.

[Lord Young, Ordinary.

EARL CAWDOR v. M'GILLIVRAY AND OTHERS AND THE LORD ADVOCATE.

Teinds—Titularity—Bona fide Perception—Where Surplus Teind paid bona fide to wrong Titular.

The Crown as titular claimed payment from the heritors of a certain parish of surplus teinds, and the claim was admitted and paid. Thereafter it appeared that another party, not the Crown, was the true titular. *Held*, in an action at his instance against the heritors of the parish and the Crown for payment of, *inter alia*, the teinds paid to them as above, that the Crown were in the position of intruders, and that in the circumstances they were not entitled to shield themselves either by a plea of *bona fide* perception or by the allegation that the titular was bound first to proceed against the heritors, leaving to them their remedy against the Crown.

Observed that it would have been a conclusive answer for the heritors as against the Crown in such an action to say that they had paid in good faith to the Crown, whose discharge was good to them against the pursuer.

Observations per Lord Justice-Clerk on the case of *Oliphant*, 1790, M. 1721.

Bona Fides.

Question whether the plea of *bona fide* perception and consumption is available to the Crown.

Opinion contra per Lord Young.

This was an action raised by Lord Cawdor against Neil John M'Gillivray of Dunmaglass and others, conjoined with a supplementary action raised by the same pursuer against the same defenders, and also against the Lord Advocate. The original summons concluded against the first defenders for two different sums, being the surplus teinds due and payable to the pursuer as titular of the teinds, parsonage and vicarage, of the parish of Dunlichity, out of two divisions