had to do with Gray was this, that in consideration of the money paid up by Dickison, and which money he or his firm got, he onerously and *unico contextu* granted a new bond over his property; but this was not in contravention of the Bankrupt Act, and was no fraud at all against anybody, and here the fallacy of the pursuers pleading that Gray got no value for this bond is obvious. Gray did get value for the bond, or his firm got it, which is exactly the same thing. In law Gray got every sixpence that Renton & Gray got, and was liable just as if he had been sole partner. Now, Renton & Gray got Dickison's money—the money wherewith he paid off his bond—and it was that very money to the extent of £300 which formed the value in Gray's bond. It is nonsense to say that Gray got no value for it, or gave the bond for nothing. His firm had the money in their bank account. But I may say that even if Gray had not got the money this would make no difference, provided the creditor in the bond gave full value. This would validate the bond in a question with Gray. It was his own fault if he suffered Renton, or Renton & Gray, to misapply the money.

I have only one other remark to make, and it is this, that I think the strongest equity protests against the view which the Lord Ordinary has taken. It seems plain that both the deeds must go or neither. It will never do to hold the discharge good, and at the same time reduce the new bond, in consideration of which alone the discharge was granted. There is no principle for that. But although the case was perplexing and embarrassing in its first presentment, I have come at last very clearly to see, and I trust I have made myself intelligible in explaining, the grounds on which I think both deeds are good and valid, and on which I think the whole reasons of reduction should be repelled.

Lord Justice-Clerk—We delayed pronouncing judgment in this case until the decision in the analogous case of *Rose* against *Spaven*. There is certainly a strong similarity in the circumstances connected with the fraud committed by Renton in both cases. In both he acted as agent for all the parties concerned. In both, being in want of money, and unable to provide it because hopelessly insolvent, he procured it by pretending to one client that a loan for which another client held a security was to be called up. In both, long after the money had been paid, he obtained a discharge of the loan from the creditor; and in both he induced another person to grant a security without receiving any value whatever, excepting what the discharge so granted might be supposed to give him. I was of opinion in the case of *Rose*, and had the present case presented no additional features should have been of opinion here, as the Lord Ordinary has found, that no value whatever had been given for the second security. I was, however, in the minority in the case of *Rose*, and although but for the authority of that decision I should have thought it abundantly clear that as Renton & Gray had been hopelessly insolvent for six months before, no previous debt due by them could constitute value to a third party in a new transaction, I might yet have felt myself bound to give that effect to it. The discharge granted by Smith's trustees only made Renton debtor to Smith's trustees instead of to Dickison for the sum paid for it, and if the debtor had been able to pay might have been value as an assignation to a good debt, but of course a debt due by Renton was of no value. But the present case embraces one element to which I think the Lord Ordinary has not attached sufficient weight, but which seems to alter, and indeed to reverse, the legal aspect of the facts. Gray was not a third party in any sense. He received the payment made by Dickison, which was carried to the credit of the firm in his own books, and he became bound to obtain the discharge from Smith's trustees; and the discharge which he was thus bound to obtain was executed on an express undertaking by him to grant this security. In this way Smith's trustees gave full value to Gray, not through Renton, but directly to himself; and as the security was thus granted in fulfilment of a prior onerous obligation, the Act 1696 can have no application to the transaction.

As regards Dickison, therefore, the case is quite clear. He paid his money to the agent for his creditor, and the creditor adopted the transaction and discharged him. As regards Smith's trustees, the same man, or one of the men, who received the money, undertook to give a new security on this discharge being executed, and he does so. Doubtless Gray was cheated by his partner, but this could never entitle either Gray or his creditors to challenge a transaction for which full value was given, and which took place in fulfilment of a prior onerous obligation.

Lord Ormidale concurred.

Counsel for Pursuer — Asher — Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Dickison—J. P. B. Robertson—Wallace. Agents—Welsh & Forbes, S.S.C.

Counsel for Bain and Others (Smith's Trustees)—R. Johnstone. Agents—J. & J. Galletly, S.S.C

Tuesday, June 15.

FIRST DIVISION.

[Bill Chamber—Lord Shand, Ordinary.

LINDSAY (CHRISTIE'S TRUSTEE) *v.* HENDRIE.

(*Ante*, 11th July 1879, vol. xvi., p. 730, 6 R. 1246.)

Bankruptcy — The Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 125, 152, 169—*Trustee—Power of Commissioners to Fix and Vary Trustee's Remuneration—Appeal—Competency.*

The commissioners on a bankrupt estate at five successive statutory meetings fixed the trustee's commission at 5 per cent., but at the sixth raised it to 6½ per cent. on his whole recoveries since the beginning of the sequestration. No appeal was taken (under section 169 of the statute) within fourteen days, but on the trustee presenting his petition for discharge a creditor objected thereto, *inter alia*, on the ground of the above charge

of 6½ per cent. for commission. *Held* (*diss.* Lord Deas) that the action of the commissioners had been irregular and incompetent, that their deliverance was still subject to review of the Court, and discharge refused *in hoc statu*.

Opinions that an additional allowance by the commissioners to the trustee for clerks' writings was irregular, but was not in the circumstances to be disturbed.

Opinion (*per* Lord Deas) that the creditor's remedy was an appeal under section 169, and that none having been taken, the deliverance by which the rate of commission was raised had become final and could not be disturbed.

The estates of C. & A. Christie, coal and iron-masters, and of the individual partners of the firm, as such partners and as individuals, were sequestrated in April 1871, and Mr T. S. Lindsay, C.A., was confirmed trustee thereon. Three commissioners were appointed, of whom one became bankrupt in 1876 and was disqualified, and the other two died in 1878. At the date of this petition the sole commissioner was Mr R. F. Todd, who was appointed on 28th May 1878. At their statutory meetings on 18th August (three present), and 15th December 1871 (three present), and 6th June 1872 (two present), the commissioners fixed the trustee's commission at 5 per cent. on the sums received by him. On 20th December 1872 they (two present) fixed his commission at 5 per cent. on the sums received by him or entered in the charge side of his account, in addition to clerk's writings, and the like commission on the sums recovered under an arrangement with Lord Wemyss as to Wallyford Colliery. On 20th March 1873 (two present) they fixed his commission at 5 per cent. On 19th December 1873 (two present), taking into consideration the time, labour, and responsibility incurred by the trustee, and the saving of legal expense to the estate arising therefrom, they fixed the trustee's commission and remuneration at 6½ per cent. on the amount of the charge in the trustee's accounts, and authorised the trustee to take credit for that amount in his accounts with the estate after deducting payments on account.

On Mr Lindsay presenting his petition for discharge in 1879 objections were lodged by Mr Hendrie, tobacco manufacturer, who was a creditor on the estate for £49, 17s. 8d. He objected, *inter alia*, (1) to the trustee's charge of £1886, 2s. 6d. as commission, being at the rate of 6½ per cent. on £29,344, 0s. 11d., the amount of charge on the trustee's accounts; and (2) to a charge of £82, 3s. 10d. for clerks' writings.

On 31st July 1879 the Lord Ordinary on the Bills (Ormidale) before answer remitted to the Accountant in Bankruptcy to hear parties, examine, and report.

The Accountant lodged a report, from which it appeared that at the date of the sequestration the company estate consisted of (1) the Gladsmuir Iron Works, (2) the Gladsmuir Brick and Tile Works, (3) the Spilmersford Lime Quarry, (4) the Wallyford Colliery and Brick and Tile Works, (5) the Penstone Mines and Garlton Hæmatite Mines. That in managing these businesses and winding them up and disposing of their assets the trustee had very great difficulties owing to the lands and minerals being held by the bankrupts under different proprietors and under several leases. Owing to the rents and royalties being in arrear, the landlords had in a number of instances taken out sequestration for rent. They also made large claims for compensation, damages, &c., which the trustee had great trouble in investigating, and which he succeeded in reducing materially. It further appeared that in the course of the two first years after sequestration the estate was realised, with the exception of one complicated claim at the instance of a landlord, which led to cross actions, and which was finally settled in 1878 by the landlord paying £237, 15s. 8d. to the estate.

On 23d April 1880 the Lord Ordinary on the Bills (Shand) having heard counsel and considered the record and productions, and the report by the Accountant in Bankruptcy, refused *in hoc statu* to grant decree of exoneration and discharge as craved. His Lordship added this note:—

"*Note.*—This application raises a question of considerable importance with reference to the practice which ought to be followed under the Bankruptcy Statute in fixing the commission payable to the trustee in the sequestration. The amount in dispute is upwards of £450; and as the question will probably be submitted for the consideration of the First Division of the Court, where I should have an opportunity of reconsidering my present opinion after further argument, and with the benefit of consultation with my brethern, I should have preferred to report the whole matter to the Court for decision. As, however, it appears to be doubtful whether that course is competent under the statute, I have thought it better to refuse the application *in hoc statu*, and the cause may now be taken to review, should the petitioner desire it, before any further procedure takes place in the petition or in the sequestration.

"The Accountant in Bankruptcy, in compliance with the interlocutor of 31st July last, has presented an able and exhaustive report on the proceedings in the sequestration, and as to the general considerations which in practice determine the rate of the trustee's commission in the winding-up of bankrupt estates; and with this report in process I do not think it necessary to recapitulate matters of detail. There can be no doubt that owing to the various important and involved undertakings in which the bankrupts were engaged, the trustee had delicate and difficult duties to perform, and that there was some measure of personal responsibility in carrying on for a time the operations in certain of the businesses in which the bankrupts were engaged. But keeping all this in view, I am of opinion that if the question of the amount of commission payable to the trustee is not to be held to be foreclosed by the proceedings of the commissioners sanctioning a charge of 6½ per cent. on the whole items of charge in the trustee's accounts, and by the resolution of the creditors at the meeting of 20th February 1879, by which the majority present sanctioned what the commissioners had done, the Accountant in Bankruptcy is right in thinking that commission to the amount of £1463, 13s. 7d., being at the rate of 5 per cent. on the gross receipts by the trustee, would be proper and adequate remuneration.

"There is no absolute rule that 5 per cent. is the maximum commission to be allowed for the

winding-up of bankrupt estates, even where the amount involved is, as in the present case, about £30,000. Where the estate is large it is clear that, according to the practice of the Court enforced in the cases of *Boaz* v. *Craig's Trustees*, 3d December 1829, 8 S. p. 175, and *Thomson* v. *Wight*, 31st May 1834, 12 S. p. 660, and which has been apparently invariably followed in later years, as appears from the concluding part of the Accountant's report, 5 per cent. is considered a suitable commission even where the trustee has had to deal with questions involving very considerable difficulty and trouble and some responsibility. It must be observed that the Accountant in this case, in reporting 5 per cent. as a reasonable rate of commission, includes in the sums liable to the charge the gross receipts of the trustee, including large sums payable to preferable creditors, and items of considerable amount which he thinks are properly of the nature of cross entries. It is obvious that a commission of 5 per cent. on such sums, where the trustee is merely realising a preferable security and paying over the amount to the secured creditor, is much higher than ought to be allowed, or than is in practice allowed; and having this circumstance in view, it is clear that the sum already mentioned, which the Accountant has reported to be in his opinion adequate, would really give the trustee a much higher rate than 5 per cent. on the receipts divisible among the unsecured creditors. The circumstance and the long-continued practice in cases of bankruptcy seem to show that if the question were open, or if one or more of the creditors had timeously brought under review the deliverance of the commissioners allowing the higher rate now complained of, the Court would have restricted the amount of the commission for which the trustee has taken credit to the rate of 5 per cent.

"The question of difficulty in the case is, whether the deliverance of the commissioners of 19th December 1873, by which they 'fix the trustee's commission and remuneration at the rate of 6½ per cent. on the amount of the charge' on his accounts is conclusive and binding on the objector, particularly after the resolution of the creditors at their meeting on 20th February 1879? On this question my opinion is adverse to the trustee. If the commissioners in the ordinary course of the sequestration had from time to time fixed the trustee's remuneration at 6½ per cent. even on the gross receipts, and the deliverances had not been appealed from under the 169th section of the statute, probably the Court could not have interfered with what had been done. And, again, if the intromissions of the trustee during any one statutory period had been, in the opinion of the commissioners, attended with extraordinary trouble or responsibility, and a commission at the rate of 6½ per cent. on these particular intromissions had been fixed in the succeeding audit and adjustment of the trustee's accounts, this would not, I think, have been disturbed by the Court even on appeal, particularly if approved of by the majority of the creditors. But the proceedings in this case were very different. The estate had been practically realised prior to the 20th of December 1872, and, indeed, had been almost entirely appropriated to the payment of a dividend of 2s. in the pound authorised by the minute of that date. And the trustee's commission was the subject of five different resolutions of the commissioners, viz., on 18th August and 15th December 1871 respectively, 6th June and 20th December 1872 respectively, and 20th March 1873, on all of which occasions the commissioners 'fixed' the commission on the trustee's intromissions by allowing him at the rate of 5 per cent. on all sums entered on the charge side of his account. Notwithstanding this, on 19th December 1873 the commissioners, at one of the statutory dates, when they formally resolved to postpone the declaration of any further dividend, by resolution again fixed the commission, not as applicable to the period subsequent to 20th March 1873, but as applicable to the whole period from the beginning of the sequestration, and already dealt with by the prior resolutions, at the increased rate of 6½ per cent., with the result that on 14th March 1875 the trustee took credit in his accounts for a sum of about £450 of additional commission for the same intromissions and actings which had been in the view of the commissioners when the previous resolutions were passed.

"It appears to me that this proceeding is unauthorised by the statute, and that the commissioners were not entitled to enlarge the commission already fixed as they did. The statute, sections 125, 130, and 132, directs the commissioners, in the view of the payment of dividends at certain statutory periods, to audit the trustees' accounts 'and settle the amount of his commission, and authorise him to take credit for such commission in his accounts with the estate;' and provides that 'they shall certify, by a writing under their hands, engrossed or copied in the sederunt book, the balance due to or by the trustee in his account with the estate.' The obvious intention of the statute is, that at each statutory period the commissioners shall determine the amount to which the trustee is entitled as commission for the trouble and responsibility he has had up to that time, and the balance for division amongst the creditors; and the commissioners therefore performed their statutory duty properly in this instance in fixing the trustee's commission from time to time at 5 per cent. with reference to his intromissions during the statutory period immediately preceding the date of the deliverances. Each deliverance was subject to appeal to the Sheriff or the Lord Ordinary on the bills, either at the instance of the trustee or of any creditor, but if not appealed against within fourteen days the deliverance became final.

"This being so, I am of opinion that the deliverance of 19th December 1873, raising the trustee's commission to 6½ per cent., was beyond the powers of the two commissioners by whom it was made. It may possibly be competent under the statute to 'settle' a rate of commission *ad interim* by a deliverance expressly to that effect, and which reserves power to add to the amount on a later audit. But if that course be competent, and be intended to be followed by the commissioners, I think it must appear distinctly on the face of the deliverance. In the present case the commission was fixed absolutely. In several instances it was fixed by three commissioners, while the deliverance of 19th December 1873, although dealing to a considerable extent with the commission which had been already disposed of by the whole body, was made by two of

their number only. If this proceeding was competent, the same thing might have been done by a new body of commissioners, if those originally elected had resigned or become disqualified. In this way a rate of commission fixed by commissioners who knew all the facts personally regarding the trustee's intromissions and the trouble attending them might be subsequently altered by commissioners not possessed of the same advantages.

"If it could be shown that the deliverance of 19th December related to intromissions or trouble in the management of the estate during the immediately preceding statutory period of four months, and that the rate of 6½ per cent. on the whole charge of the accounts was intended to cover trouble or responsibility during that period only, the deliverance would be unobjectionable in substance although wrong in point of form. But no case of this kind can be presented by the trustee. The sederunt book shows that the intromissions between 20th March and 19th December 1873 were of comparatively small amount, and 5 per cent. commission would be ample remuneration for these. The estate was substantially in the same position on the 19th of December as it had been on the 20th of March. It has not been said or suggested that the commissioners had any elements or considerations before them in December which did not equally present themselves when the previous deliverances were pronounced, and particularly when the payment of the dividend was authorised.

"Having regard to the terms of the statute and the commissioners' deliverances, I think the creditors were warranted in holding that from time to time prior to 19th December 1873 the trustee's commission had been finally fixed with reference to all previous intromissions. It would be difficult to maintain as against the trustee that the commissioners could thereafter have reduced his commission for these services below the sum they had already allowed. On the other hand, it appears to me that the creditors, having found from the earlier deliverances and the accounts that the commission had been fixed, could not suppose that at such statutory period thereafter, when the commissioners resolved from time to time to postpone the payment of any further dividends, the whole question of commission from the outset was liable to be opened up for reconsideration. If, as I think, the creditors were entitled to regard the rates of commission as having been finally settled, they were thereafter relieved from the necessity of constantly observing the proceedings in the sequestration, so as to make themselves acquainted with the deliverances of the commissioners, of which they receive no notice in case they desired to appeal within the time allowed by the statute, and to which their attention would not naturally be directed unless an additional dividend were declared, in which case each creditor receives a special notice.

"It appears to me further, on the grounds stated by the Accountant in Bankruptcy, that the charge for clerks' writings in addition to commission is not sanctioned by the statute, and cannot be allowed by the trustee. In a case where an unusual amount of writing occurs this ought to be taken into account in fixing the commission, and I think that a door might be opened which would lead to abuses under the statute if any different rule were followed. There seems to be no good reason, if the charges in respect of a copying clerk are allowed, why similar charges should not be admitted for work done by other clerks.

"In regard to the proceedings at the meeting of creditors on the 20th of February 1879, I have only to observe that if the view already stated be sound, the creditors had no power to sanction the proceedings of the commissioners at their meeting on 19th December 1873. And, moreover, it appears to me that although no doubt it would have been proper that the objector should have appealed against the resolution of that meeting, yet he is entitled to have the resolution of the creditors considered by the Court in the present proceedings. See the case of *Thomson* v. *Wight*, already noticed.

"Should the view I have stated be acquiesced in or affirmed by the Court, the parties will be heard as to the further procedure necessary before the trustee can obtain his discharge. In that case it would probably be arranged that the trustee should receive commission at 5 per cent. on his intromissions to the close of the sequestration. But if he is to claim a larger amount, it will be for consideration whether it will be necessary to have additional commissioners appointed, and the subject again considered by them and the creditors, before fixing the sum which will remain for the payment of a final dividend."

The petitioner reclaimed, and argued — The action of the commissioners had been both competent and judicious. The rate of the trustee's commission was left by the statute to their discretion; they were the best judges as to it; and they might competently have fixed it at an even higher rate than they had here done. There was nothing in the statute to prevent them from authorising an additional rate of commission on sums already dealt with if circumstances should in their opinion warrant such a course. In any view, it was incompetent for a creditor now to object to the commission so fixed; his remedy was to have appealed (under section 169) within fourteen days—the deliverance of 19th December 1873 had now become final. Though no notice of the additional allowance had been given directly to the creditors, yet the fact was entered in the sederunt book, which was open to their inspection, nor did the statute provide for any such notice being given. The charge for clerk's writings had been specially allowed by the commissioners on 20th December 1872, and such allowance was both customary and reasonable.

Replied for the objector—The commissioners had acted beyond their statutory powers in going back on past periods and allowing additional commission on sums already dealt with. In any view, 6½ per cent. was too high a rate in the circumstances; and the whole estate having been practically realised in two years, any additional allowance was clearly uncalled for. It was competent to object at this stage, the whole proceedings relative to the trustee's discharge being before the Court under section 152. An appeal had not been taken within the fourteen days because no notice of the commissioners' doings had been sent to the creditors. The charge for clerks' writings was practically an

additional charge for commission, and was excessive and illegal.

Authorities—*Bruce* v. *Davenport & Company*, July 7, 1825, 4 S. 151; *Boaz* v. *Craig's Creditors*, Dec. 3, 1829, 8 S. 175; *Thomson* v. *Wight*, May 31, 1834, 12 S. 660; *Russell* v. *Taylor & Nicholson*, Nov. 26, 1869, 8 Macph. 219; *Milne* v. *M'Callum*, Jan. 22, 1878, 5 R. 546.

At advising—

Lord President—In this sequestration of C. & A. Christie I am disposed to concur in the judgment pronounced by Lord Shand in the Bill Chamber, and to affirm his interlocutor.

The question is, Whether the increase of the commission allowed to the trustee on the last date on which the commissioners dealt with the subject is a regular and competent allowance of commission? or, Whether it is not under the statute an irregular and incompetent going back upon the previous resolutions of the commissioners, which were within the statute? The scheme of the statute in regard to this matter is very plain and consistent throughout. Four months after the commencement of the sequestration the commissioners are to meet and ascertain what recoveries have been made of the assets of the estate, and also what expense has been incurred in making these recoveries, and to ascertain the balance, and consider then whether they should make a dividend. Now, in order to the accomplishment of that purpose, upon the expiry of the first four months from the date of the sequestration, the 125th section provides that "The trustee shall proceed to make up a state of the whole estate of the bankrupt, of the funds recovered by him, and of the property outstanding (specifying the cause why it has not been recovered), and also an account of his intromissions, and generally of his management; and within fourteen days after the expiration of the said four months the commissioners shall meet and examine such state and account . . . . and they shall audit his accounts and settle the amount of his commission and authorise him to take credit for such commission in his accounts with the estate; and they shall certify by a writing under their hands, engrossed or copied in the sederunt-book, the balance due to or by the trustee in his account with the estate as at the expiration of the said four months, and they shall declare whether any and what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors." Now, this last is the crowning act of their proceedings upon this occasion of the expiry of the first four months. The object is to ascertain whether there is any divisible fund, and in order to ascertain that there is to be a balance struck between the amount of the assets, so far as recovered, and the expenses incurred. Now, one very important item of expense in every sequestration is the remuneration to be awarded to the trustee, and that remuneration is to be given in the form of a commission or percentage upon the trustee's recoveries. Therefore nothing can be done in the way of ascertaining a balance or determining whether there is to be a dividend until the precise amount of the trustee's commission shall have been ascertained and fixed and allowed for. It therefore appears to me that it is indispensable that the remuneration to the trustee up to the date of the first meeting of the commissioners at the expiration of four months should be fixed, and also that it should be finally fixed. In like manner, after the expiration of every succeeding four months, until the estate has been fully realised and divided, there is to be a similar proceeding, and in section 130 provision is made for the expiration of the second four months, and then in section 132 this enactment occurs—"The like procedure shall be followed out as to subsequent dividends at similar intervals of time thereafter in order that a dividend may be made on the first lawful day after the expiration of every three months from the day of payment of the immediately preceding dividend until the whole funds of the bankrupt shall be divided."

Now, this is a very carefully considered and well-digested scheme of procedure for the realisation and division of the estate, and I think that the trustees and commissioners and creditors are bound to follow the letter of the statute in carrying out those proceedings. What occurred in the present case is stated by the Accountant in Bankruptcy very distinctly in his report. The sequestration was awarded on 5th April 1871, and the present applicant was in due course appointed trustee, and three gentlemen were named as commissioners. It appears that in the course of two years after the sequestration had been awarded the estate was completely realised, with the exception of one claim. That was a claim of rather a complicated kind, which arose at the instance of Mr Baillie Cochrane, landlord of a certain farm belonging to the trust-estate, and a counterclaim on the part of the trustee. That was not settled until the year 1878, and then it was settled by the landlord Mr Baillie Cochrane making a payment to the trustee of £237, 15s. 8d. The whole recoveries, therefore, of the estate, with the exception of this small sum, were made before 1874, and this last recovery, which was not of very great amount, was made in 1878. Now, as regards the proceedings of the commissioners, the Accountant informs us that on the 18th of August 1871 the commissioners, being all present, fixed the trustee's commission at 5 per cent. on the sums received by him. This was the first proceeding of the commissioners upon the expiration of the first period of four months. In December 1871 they were again all present, and they did exactly the same thing—they fixed the trustee's commission at 5 per cent. In June 1872 they again did the same, and on 20th December 1872 they fixed the trustee's commission at 5 per cent. on the sums received by him or entered in the charge side of the account, in addition to clerks' writings, and the like commission on the sums recovered under a certain arrangement with Lord Wemyss, which was a special transaction. On 20th March 1873 again they fixed the trustee's commission at 5 per cent. Now, up to this time the proceedings of the commissioners are quite unchallengeable, with the exception of one particular, viz., that on the 20th of December 1872 they gave the trustee, in addition to his commission, a charge for clerks' writings—the writings of his (the trustee's) clerks. That is an irregularity in my opinion, I think it is quite clear, from the construction of the Bankruptcy Act, that the trustee must be remunerated by commission alone, and he cannot

receive his remuneration in any other form or in addition to remuneration which he receives in the form of commission. That is one of the objections before us, which I shall deal with immediately. But the more important objection arises from what follows on the 19th of December 1873. Upon that occasion the commissioners, taking into consideration the time, labour, and responsibility incurred by the trustee, and the saving of legal expenses to the estate arising therefrom, fixed the trustee's commission and remuneration at the rate of 6½ per cent. on the amount of the charge in the trustee's accounts, and authorised the trustee to take credit for that amount in his accounts with the estate after deducting payments on account. Now, the meaning of this, it seems to be conceded on both sides —although it is a little awkwardly and ambiguously expressed—is said to be that the trustee is to receive 6½ per cent. upon the whole of his recoveries from the beginning throughout the whole sequestration. In other words, the commissioners have not only allowed him 6½ per cent. on the recoveries he may have made since the last award of commission, but they gave him 6½ per cent. upon the whole recoveries made, and so alter what they have done themselves upon five previous occasions. Upon the five previous occasions they proceeded, in terms of the statute, to fix the trustee's remuneration at 5 per cent., and now they say that that shall be altered, and it shall be made 6½ per cent. I think that is incompetent under the statute. I think the deliverance of the commissioners fixing the trustee's remuneration at the statutory periods is subject to review by appeal either by the trustee or by anyone interested; but if it is not appealed from within the period fixed by the statute, then it becomes final, and it is just as little liable to be altered by the commissioners as by anyone else. It would be very unfortunate, I think, if we came to any other conclusion, because we should run great risk in that case of defeating the object of the statute in fixing those periods for ascertaining the precise state of affairs in the sequestration and ascertaining what available fund there is for a dividend—for that is the great object of all those balances at the end of each period of four months.

It is said, however, that this deliverance of the 19th of December 1873, which in my opinion is incompetent, is now itself final, and cannot be disturbed. I think there are various cases in which the Court have held that in the final winding-up of a sequestration, and in the matter of the trustee's discharge, they will not sanction incompetent proceedings, even though the deliverances fixing those proceedings have not been on their merits brought under review within the time fixed by the statute, and in such a case as the present I am very clearly of opinion that the Court has it in its power, at the instance of any creditor or any party interested in dealing with the discharge of the trustee, to say whether the deliverances of the commissioners fixing his remuneration are within their powers under the statute, and if they be not, then I think the Court are quite entitled to refuse effect, as I propose that your Lordships should do in the present case.

As to the objection to the charge for clerks' fee, awarded under date 20th December 1872, I am not disposed to disturb that in the present case, although I must take leave to say, at the same time, that I think that was quite irregular, because the statute has fixed that no form of remuneration shall be allowed to the trustee except commission, and that that commission must cover all his expenses. But the deliverance of the 20th of December 1872 has long since received effect, and we have held it and will hold it, in our present judgment to be final as regards everything else. Therefore, in the circumstances, and looking to the small amount involved in the objection, I think your Lordships would do well not to disturb that arrangement. But I am quite prepared, for the reasons I have now stated, to adhere to the interlocutor of the Lord Ordinary.

Lord Deas—This is a question as to the trustee's discharge. The sole objection to that discharge is that it is said the commissioners have allowed him too much commission upon his recoveries. Now, this is not an objection personal to the trustee. I do not see what fault the trustee has committed. It is not said he got that deliverance corruptly, or that he had anything to do with it at all. The view I take of this matter is a very short one. I believe with your Lordship that those deliverances in 1871 and 1872—two deliverances in each year—are final under the statute. A power of appeal is given to any creditor against any of those deliverances, but it must be exercised within a certain time.

The 169th section provides that it shall be competent to appeal against any deliverance of the trustee to the Lord Ordinary or the Sheriff, provided a note of appeal be lodged within fourteen days from the date of the deliverance. Now, undoubtedly under that section any of those deliverances fixing 5 per cent. might have been appealed from within that period, but they were not appealed from, and I agree with your Lordship therefore that they are final.

There can be no doubt, I suppose, that in like manner the deliverance of 19th December 1873, when they fixed the 6½ per cent., might have been appealed from in the period I have mentioned, the same as the others, and if that be so, the whole question is, What is there in what the commissioners did upon that occasion in December 1873 to make that deliverance a nullity? It may be right or it may be wrong, but I can see no nullity in it. It is not certainly beyond their powers as commissioners in some instances, in some circumstances, to make an addition to the allowance for commission that has been made to the trustee. It may not have been right upon its merits, but I see no incompetency in that to amount to nullity. Then the commissioners, having fixed that allowance, went on from time to time sanctioning the trustee's taking credit for the whole amount of commission, and in point of fact they adopted his accounts upon the 16th of March 1875, allowing him to take credit for this commission, and finding any balance due by him upon that footing. And from March 1875 he has had that commission in his pocket. He got payment six years ago—he made it his own money, and from that time onward it has been in the pocket of the trustee, and because it has been done by the deliverance of the commissioners, is it to be said, at the distance of six years—it might be any number of years, because a seques-

tration very often lasts long after all the business, that is, for the benefit of the creditors, is practically done—is it to be said that after the lapse of perhaps twenty or thirty years, after the trustee has got all the commission he was allowed by the commissioners in his pocket, and has spent it, that it is to be an objection to his discharge that the commissioners allowed too much? Let it be that they allowed him too much—any creditor might have appealed within the statutory time, however small or miserable his claim might have been. But is there to be no duty upon the creditors as well as upon the commissioners in the matter? I cannot imagine that the statute ever contemplated a thing of that kind—it is so unreasonable and unjust in itself, and I find nothing in the statute to sanction it. When I say there is a duty upon the creditors, I mean it is the duty of every creditor to attend to his rights. It is not enough that he does not know of a certain deliverance by the commissioners. He was bound to know—he had the means of knowing—he had access to the sederunt-book at any time—and if he does not choose to exercise his right I do not see that he can come forward and challenge the deliverance when it comes to the time for the trustee to be discharged.

Upon that single ground I am very clearly of opinion that this objection to the discharge of the trustee, from no personal fault of his own, is one that ought not to be sustained.

Lord Mure—The first, and I think the main question we are called upon to decide under these objections and the report of the Accountant in Bankruptcy was this, Was it competent for the commissioners in 1873 to go back upon what they had done at five previous meetings in the matter of fixing the trustee's commission, and to increase the amount of commission that had been fixed at those meetings for work done prior to the date at which those meetings were held? That is the first and leading question, and I am very clearly of opinion with your Lordships that it was beyond the power of the commissioners, as statutory commissioners, acting under the regulations of this statute, to take the step they then took. The authority in the matter of fixing the commission is the 125th section of the statute, which evidently proceeds upon this, that it is desirable after the first four months of the sequestration that the accounts and the whole money transactions connected with the sequestration should be audited up to that date, and a dividend fixed at that date, and not only that this should be done, but it expressly provides that they shall audit the trustee's accounts and shall settle the amount of his commission. Now, that audit was regularly gone about here in 1871. The commissioners settled at that time upon 5 per cent., and the plain object of that provision of the statute is that the trustee should ascertain the state of the accounts at the end of those four months—and there are other clauses providing for a similar ascertainment of the state of the accounts every four months afterwards—in order that the dividend may be fixed which is to be paid to the creditors at that date. Now, it appears to me that if that resolution of the commissioners made known to the creditors at that date, and made known to the trustee at that date, was not appealed against by him or by his creditors, they have no power of going back now upon what the commissioners then did. That was done in 1871 in the first instance, and there were four meetings after that when the accounts were again audited and the 5 per cent. was fixed as the proper remuneration for the trustee for the work which had been done at the intermediate time, and fixed at a period when the exact nature of that work was much fresher in the minds of the commissioners than it could have been in the year 1873, when they passed the resolution which is now challenged. And, in my opinion, having regard both to the policy of the statute and to the express provisions of the statute, the settlement of the commissioners at those meetings must be held to have been final, and it was incompetently gone back upon on the 19th of December 1873.

That being the case, and it being incompetent, irregular, and illegal for the commissioners to take the step they took in December 1873, then it is a matter that can be challenged in the question now raised relative to the discharge of the trustee, when his accounts are brought under the notice of the creditors with a view to his discharge, and when the minority of the creditors who had not been a party to the resolution may fairly challenge those proceedings. I think there are many instances in the books where acts have been done which are clearly incompetent under the statute, in which those acts have been reviewed upon the application of the trustee for his discharge, and also upon the application of the bankrupt to have the remains of his estate restored to him if it turns out there is an estate to be restored. It has been urged that between 1873 and the present date there seems to have been acquiescence on the part of the creditors. I do not think their acquiescence in an incompetent proceeding can prevent those creditors who did not acquiesce from challenging it, and upon that ground I agree with your Lordships and the Lord Ordinary that the act of the commissioners in December 1873 was an incompetent and irregular proceeding, and cannot be allowed to stand.

Lord Shand—In dealing with this case when it came before me during vacation in the Bill Chamber I have given the reasons in the note to my judgment of that date which induced me to refuse *in hoc statu* the trustee's discharge, and I should not think it necessary to add anything to the note to my judgment on that occasion if it were not that there is a division of opinion amongst your Lordships now, my brother Lord Deas dissenting from the judgment of the Court. But as the judgment is not unanimous, I think it right to add a few observations to those which are contained in my former note, and, in the first place, I think this is quite a fitting occasion on which a question of this kind may be raised. Section 152 of the statute, which deals with the application of a trustee for his discharge, in its terms provides that when the application for discharge is made, the Lord Ordinary on the Bills or the Sheriff shall advise the petition, with the minutes of the meeting, and hear any creditor who may come forward; and I think if any creditor is in a position to say that there is a certain fund—whether it has gone into the pocket of the trustee or not—which ought to have been brought into

the general fund for division and divided amongst the creditors, but which has not been so dealt with, that is a matter which may be quite properly and legitimately taken up on the question of discharge, and we have an instance precisely of that kind in the case of *Thomson* v. *Wight*, 31st May 1834, 12 Shaw 660, which is referred to in my note.

That being so, I think the objector to this discharge is properly before the Court.

Then, as to the question on its merits, the renewed consideration which I have given to the terms of sec. 125 of the statute, with the benefit of the additional argument we have had, has strongly confirmed the views which I originally entertained. The language of that section is very precise. It provides that at the statutory period there mentioned the commissioners shall audit the trustee's accounts and settle the amount of his commission, and shall certify by a writing under their hands, engrossed in the sederunt-book, the balance due by the trustee in his accounts. There are two expressions in the statute which seem to me to have been intended to produce finality in what the commissioners are then doing. The first of these is that the trustee's commission is to be "settled," which I understand to mean fixed, and fixed finally, not tentatively only. The second is that they are to certify the balance due by the trustee in a question between him and the creditors. In the settlement of that balance, if he is thereby declared to be debtor to the creditors in the sum brought out, there is by implication a final fixing of the commission for past transactions; and I think the policy of the statute is very clear on that matter. The commissioners have then before them all the materials which enable them to judge what the commission should be. They are in a better position then than they ever can be afterwards for fixing the commission for what has already taken place. And, moreover, you have then, dealing with the matter of commission, a body of commissioners who know personally what the trustee has done, whereas as time wears on in the sequestration—as it wore on in this case—you have frequently a change in the commissioners, from the original commissioners resigning their offices or dying, or becoming incapacitated, and other commissioners coming in their places; and I think the statute has had in view that it was undesirable that new commissioners after a lapse of time should in this matter of commission go back on, and it may be entirely unsettle, what had been settled by their predecessors. Then, again, the creditors see a certificate by the commissioners of what the statute describes as the balance due by the trustee. If they are satisfied with what has then been done they acquiesce—if they are not satisfied they must within fourteen days appeal. And so it appears to me that as the commissioners had here time after time fixed the commission at five per cent. for the immediately preceding periods, it was incompetent either for the same commissioners or for others at a subsequent period to go back upon that and to give an increased commission, not upon or for anything the trustee had done in the meantime, but entirely in respect of those very intromissions for which his commission had already been settled, and in respect of which the balance due by him had already been struck and certified under the statute.

It was argued for the trustee that there had been delay on the part of this creditor in coming forward, but that I think is not surprising. The first dividend of 2s. in the pound, which was given on this estate I think in 1873, was the only dividend that the creditors were paid until the summer of 1878, when a notice was given of a second and final dividend of 1⅛d. in the pound. The creditor's attention was not called to the position of the funds between those dates, and immediately on his attention being called by the notice of the second dividend to the fact that 1⅛d. in the pound was to be paid, he came forward, or at least he did so shortly afterwards, and made a complaint to the Accountant in Bankruptcy that a further sum ought to be brought into the funds for division. It has been said from the bar that the claims are very small—they have been described as miserable—but I must say, for my part, I think it would be very unfortunate in this Court if we were to discourage creditors—even in small claims—from bringing under the notice of the Court irregularities which have taken place in a sequestration. I think that whether such irregularities are objected to by creditors with a small interest or a large one, it is of the highest consequence that the Court should rather invite than discourage their notice, and attention be called to irregularities of this kind with a view to their being corrected in bankruptcy proceedings; and it is worthy of observation that there was some evidence laid before us that in making the complaint which the objector did to the Accountant in Bankruptcy before he raised the question in Court, he had the concurrence of a number of other creditors.

It has been further argued that it was the duty of the objector here—his duty to the trustee and to the commissioners—to have appealed against the deliverance of December 1873. The first answer to that is that the deliverance was, as I think, incompetent under the statute. But apart from that, let it be observed what the argument involves. In this sequestration there was absolutely nothing done in a question with the creditors between 1873 and 1878—that is, for a period of five years—and the argument involves this contention, that every creditor, however trifling his debt may be, is bound at each period of four months to call at the trustee's office and ask access to the sederunt-book, and ascertain whether in the meantime the commissioners, although nothing else has been doing in the sequestration, have been adding to the trustee's commission. During the period of five years there are fifteen points of time at which the complainers, according to the trustee's argument, may raise the commission previously settled under the statute, and each creditor, though there is nothing whatever doing in the sequestration, is bound to call at the trustee's office and examine the sederunt-book if he wants to keep himself safe in a question of this kind. I can only say I think it would be a very unfortunate construction of the statute that would lead to any such obligation being placed upon the creditors.

I do not know that I have anything further to add, except that while I agree with your Lordship in thinking it is clear upon the statute that the trustee's commission is the only charge by him that is authorised, and ought to include any charges for clerks, I am not disposed to differ

from the view your Lordship has now taken, that in the special circumstances of this case, and as the commissioners may be said to have fixed the commission at the rate of 5 per cent. on the footing that there should be an addition for clerks' charges, which they regarded as commission, that part of the deliverance of the commissioners should not be disturbed.

Lord Mure—Allow me to say, with reference to that last point, that I concur simply upon the special circumstances of this case, in thinking that the clerks' fee should be given in addition to the 5 per cent. commission. I quite agree with the view of the Accountant in Bankruptcy that the general rule is that commission should cover clerks' fee, but in this case they fixed the commission at the rate of 5 per cent. apparently upon the footing that the clerks' fee should also be allowed, and therefore it is not exposed to challenge.

The Court adhered.

Counsel for Petitioner (Reclaimer)—Kinnear—Macfarlane. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Objector (Respondent)—Shaw—Watt. Agents—Foster & Clark, S.S.C.

Wednesday, June 16.

FIRST DIVISION.

[Sheriff of Perthshire.

PATERSON *v.* MACDONALD.

Property—March—Act 1661, *cap.* 41—*Sheriff—Jurisdiction.*

A petition presented to the Sheriff prayed him, in virtue of the powers conferred by the Act 1661, cap. 41, to remit to a man of skill "to visit, inspect, and report on the present state and condition of the march fence or dyke between the pursuer's property of A and the defender's property of B, and to report what works and repairs are necessary to put the same into a proper and sufficient condition as a march fence," &c. *Held* that under this prayer, and under the terms of the Act, the Sheriff had jurisdiction, the man of skill having reported that the march dyke was in a practically irreparable condition, to authorise the pursuer to erect, at the joint expense of parties, and at sight of the reporter, a dyke of a different height, and with wires along the top, in place of the old stone dyke.

Colonel W. M. Macdonald of St Martins and Glenshee, in the county of Perth, raised an action in the Sheriff Court of that county against Mr D. A. Paterson of Dalnaglar. The petition, which proceeded under the Act 1661, cap. 41, craved the Sheriff to remit to a man of skill "to visit, inspect, and report on the present state and condition of the march fence or dyke between the pursuer's property of Dunmay Hill, on the said estate of Glenshee, and the defender's property of Dalnaglar, and to report what works and repairs are necessary to put the same into a proper and sufficient condition as a march fence, and also to report on the probable expense thereof, and thereafter to grant warrant and authority to the pursuer to execute the works and repairs so reported as necessary at the sight of such reporter, and at the joint expense of the pursuer and defender." The march dyke in question was about 50 years old, and had admittedly fallen into a ruinous condition, but the parties were at issue as to their rights and obligations as regarded its repair. The Sheriff-Substitute (Barclay) remitted to Mr James Ritchie, C.E., to inspect and report in terms of the prayer of the petition. Mr Ritchie accordingly lodged a report, in which he stated that the dyke as a whole was in an almost ruinous condition, although there were certain small parts of it to which much exception could not be taken. The reporter further stated that the whole dyke, with the exception of the parts in sound condition, would in his opinion require to be rebuilt in order to put it in proper condition as a march fence. This might be done either by re-erecting the dyke to its full former height (about 5 feet 6 inches), in which case more stones would be required for the "packing," or by rebuilding it to a lower height (say 4 feet 6 inches) and running two wires with iron standards along the top, in order to make it sufficient as a fence for sheep stock, in which case the old supply of stones would be sufficient. The reporter stated his opinion that the latter alternative would be best suited to that line of march; and he estimated the probable expense of that alternative at 1s. 5d. per lineal yard, while that of the former would be about 1s. 10d.

The Sheriff-Substitute subsequently issued this interlocutor and note:—"Finds that the petition to the Court is for the repair of a march dyke presently existing between the properties of the parties: Finds it shown by the inspector's report, and not disputed by the defender, that the said march dyke is in a state of disrepair, but parties are not agreed as to whether a new march dyke of a different height and construction should be erected: Finds under the petition it is only competent to have the existing dyke repaired, and it is not competent to order the dyke to be demolished and a new march fence erected in its stead: Therefore remits to Mr Ritchie to contract for the necessary repairs of the existing march dyke, and see the same repaired, and report the expenses thereof, and decerns.

"*Note.*—Had the action been for the erection of a march fence for the first time, the Sheriff-Substitute would have considered the suggestion of the reporter, and on proof, if required, determined the nature and kind of march dyke or fence. Perhaps if the dyke was completely dilapidated throughout, so that the repairs would have cost a greater sum than a complete new march fence, it might be held as if there had been no fence hitherto, but as this is not the fact, as appears by the report of the inspector, it seems not competent under the limited prayer of the petition to do more than to repair the existing fence. The parties must be left to their own judgment whether the opportunity should not be taken advantage of by getting a more suitable construction of fence better adapted to the locality."

The pursuer appealed to the Sheriff (Lee), who after hearing parties recalled the Sheriff-Substi-