

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 Dummay 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-

tute's interlocutor, approved of the report; found that of the two modes of repairing the said dyke, that of building it to the height of 4 feet 6 inches or thereby, with two wires and standards along the top, was that best suited to the line of march, and also cheapest; and that no sufficient cause was alleged for repairing the said dyke by rebuilding it to its old height; therefore repelled the defender's pleas, and authorised the pursuer to repair the dyke in the manner specified, at Mr Ritchie's sight, &c. This note was added:—

“*Note.*—If it be competent to consider the best mode of repairing the dyke under such a petition as the present, there can scarcely be any doubt that that which is recommended by the reporter (whose report is most distinct and satisfactory) is in all respects the more suitable and advantageous.

“But the defender objects to the competency of any change upon the height, structure, or character of the fence; and the Sheriff-Substitute has given effect to this plea.

“It rather appears to the Sheriff that there has been some misapprehension as to the scope of the petition and the effect of Mr Ritchie's report. The petition craves an inspection and report as to ‘what works and repairs are necessary to put the same (viz., the “march fence or dyke”) into a proper and sufficient condition as a march fence,’ and Mr Ritchie reports to the effect stated in the foregoing interlocutor. He quite distinctly states that whichever mode of repair is adopted, the dyke ‘requires to be rebuilt,’ with the exception of 100 yards at the upper end. The rest of it is all bad, though there is a yard or two here and there ‘fairly plumb.’ With the exception of that 100 yards, he says the ‘dyke throughout is in a dilapidated condition,’ and he states the cause of this to be ‘the absence of proper packing or hearing in the body of the building.’

“Now, when the defender insists that an old dyke of this kind is not to be altered in ‘height, structure, or nature,’ he takes up a position which seems to the Sheriff to be indefensible; for when a march fence is so dilapidated throughout as to require substantially to be rebuilt in order to be made a sufficient fence, it is quite understood that the reconstruction may involve consideration of the character of the structure. If experience has shown that a dyke of 4 feet 6 inches, with two wires along the top, is better as a sheep fence, and more suitable for such ground as that in question, and if reconstruction in that form would cost less than reconstructing on the old plan, there is no authority for contending that both parties must agree before any such change can be made. On the contrary, the opinions of the judges in *Strang v. Stewart* (Mar. 3, 1864, 2 Macph. 1015; affr. 4 Macph., H.L., p. 5) are to the effect that it is within the jurisdiction of the Sheriff to consider what is the most suitable and advantageous mode of repair, and that neither party can insist that the same style of fence is always to be continued.

“In the present case the report of Mr Ritchie shows that reconstruction upon the more modern and approved style of sheep fence recommended by him will cost 1s. 5d. a-yard, whereas the kind of repair demanded by the defender will cost 1s. 10d. a-yard. It is said that the old kind of fence affords more shelter. But it does not appear to the Sheriff that the defender's allegations on this subject can be allowed to outweigh the report of Mr Ritchie, that the form of fence which he

recommends is ‘that best suited for this line of march.’

“The Sheriff cannot help observing that in the correspondence produced the defender himself appears sometimes to have recognised the advantages of a repair in the form recommended by Mr Ritchie, although ultimately he has thought fit to stand upon what he conceived to be his right to have the old fence repaired exactly in the same style in which it was originally constructed, or not at all.

“The Sheriff has endeavoured to put the interlocutor in such a shape that an appeal may be taken at once to the Supreme Court, if this is desired—(See *Malcolm v. M'Intyre*, Oct. 19, 1877, 5 R. 22).

“It is obviously expedient that if there is to be an appeal upon this matter it should be disposed of before the expense of repairing the fence has been incurred.”

The defender appealed to the Court of Session, and argued—(1) It was doubtful whether the terms of the prayer of the petition were wide enough to cover the case of total reconstruction, and not merely of repair. (2) The defender was legally bound only to help in repairing the existing dyke; he preferred the old height and form of dyke as a shelter for his sheep, owing to the lie of the ground, and his interest was very much greater than the pursuer's in the matter. His position in law was thus the stronger, *melior est conditio prohibentis*. The dyke here was common property, being built on common ground; in *Strang's* case the fence was not in law a march fence at all.

The pursuer replied—(1) The terms of the petition were sufficiently wide. (2) The reporter and the Sheriff having approved of the second alternative plan as most suitable in every way, their discretion should not lightly be disturbed.

Authorities—*Strang v. Stewart*, March 3, 1864, 2 Macph. 1015; *Lockhart v. Sieveurwright*, 1758, M. 10,488.

At advising—

LORD PRESIDENT—This is a question under the Act 1661, c. 41. I think that Act has been in some cases, and perhaps in this case, read in a rather limited sense. It is expressed, no doubt, in very general terms, but just because it is so I think its operation and effect are the more extensive. The object of the Act is to regulate the formation and maintenance of march fences, and the power of such regulation is given to the local judge very wisely, I think, for he has opportunities of information and inspection which a different kind of Court cannot have. The leading enactment is—“That where enclosures fall to lie upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dyke which parteth their inheritance;” and then power is given to the local judge to see this Act put into execution, “and to grant process at the instance of the parties damnified and prejudged, and to see them repaired after the form and tenor of this Act above written in all points.” Now, I think, under the terms of the statute the jurisdiction of the Sheriff is extended to the original foundation and to the repair and maintenance of march fences.

But there is another occurrence which sooner

or later must happen in course of time, namely, that the march fence, originally a good one, is come to be irreparable, *i.e.*, in so bad a condition that it would be mistaken economy to spend money on the attempt to repair it. I cannot doubt that this occurrence is within the scope of the statute, and that the Sheriff has jurisdiction to entertain an application for rebuilding a dyke which has tumbled to pieces, or setting up any other fence as it was before, though that may be far from the meaning of a "repair" in the ordinary sense.

Another difficulty which was suggested was whether the prayer of the petition comprehends such an extensive operation as the Sheriff has ordered. I confess I am not moved by that suggestion. The prayer, not unlike the statute, is very general and very comprehensive in its terms. It asks the Sheriff "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." If it turns out on such inspection and report that the march fence is not reparable in the ordinary sense, but requires reconstruction, I think there is nothing in the terms of the prayer to prevent the reporter saying that the works which he thinks necessary to put the march fence into a proper condition as a march fence require total rebuilding. And if he did so, I think it is within the Sheriff's power, under the terms of the statute and of the prayer, to order such works to be made.

There being, then, no difficulty as to the Sheriff's jurisdiction, or in law, the question is, Has the Sheriff taken the right alternative of the two, suggested by Mr Ritchie? I think it is a good deal a matter of discretion; and it is not immaterial to observe that one of the alternatives suggested is the cheaper, and finds favour in the eyes of the reporter, who is properly the best judge. Taking that into consideration, I am little disposed to interfere with the discretion which the Sheriff exercises in stating his opinion on Mr Ritchie's report—that the best thing for parties is to adopt the alternative of rebuilding the dyke to a height of 4 feet 6 inches or thereby and putting two wires with iron standards on the top. That is a very good fence, and a common one in parts of the country where the copestones are sufficiently large and heavy to admit of the iron uprights being fixed in them; and I have no doubt Mr Ritchie might have seen his way to that being done in this case. I am therefore for adhering to the Sheriff's interlocutor.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court refused the appeal.

Counsel for Pursuer (Respondent)—Dean of Faculty (Fraser, Q.C.)—Thoms. Agent—George B. Smith, S.S.C.

Counsel for Defender (Appellant)—Kinnear—Harper. Agent—Wm. Duncan, S.S.C.

Friday, June 18.

FIRST DIVISION.

[Lord Young, Ordinary.

CITY OF GLASGOW BANK LIQUIDATION—
(DONALD FRASER'S CASE)—DONALD
FRASER v. THE LIQUIDATORS.

Public Company—Annuity to Official—Bankruptcy—Ultra vires.

The contract of copartnership of an unlimited joint-stock banking company gave the directors power to appoint a manager, cashier, and accountant, and such other officers and clerks as they may consider necessary for the proper management of the business of the establishment, with such salaries as to them shall seem proper, and to dismiss them when they should see occasion, and without assigning any cause; it being also declared that upon dismissal none of the officers of the company should have any claims against the company for salary or otherwise, except for the proportion of salary payable at the date of such suspension or dismissal. The agent of one of the branches of the bank retired owing to ill-health, and the directors granted to him an allowance of £150 per annum. On the failure of the bank some years after he raised an action to have this allowance continued, or for payment of a capitalised sum in lieu thereof. *Held* that the allowance was gratuitous, and could not be enforced as an obligation against the liquidators of the bank during the pursuer's life—a thing which, as shown by the correspondence, they had not in terms done—Defenders therefore *assolviéd*.

Donald Fraser, the pursuer in this case, was in the employment of the City of Glasgow Bank from 1846 to 1872, at first as a clerk in the Edinburgh office and in the head office in Glasgow, and latterly as agent of the Gorebridge Branch from 1855 to 1868, and of the Govan Branch from 1868 to 1872. The following documents relate to his resignation of the last-mentioned office:—

Letter, the Pursuer to Mr Stronach, Manager of the Bank.

"City of Glasgow Bank,
Govan, 28th October 1872.

"Dear Sir,—Mr Miller, superintendent of branches, has conveyed to me that the directors of the bank are pleased to permit me to retire from the Govan agency with an annual retiring allowance of one hundred and fifty pounds. It is my duty to submit in respectful silence to the directors; but in vindication of some claim to the liberal consideration which it is proposed to extend to me, I may be permitted to refer to upwards of a quarter of a century in the service of the bank, and, in particular, to efforts (even at the expense of health and purse) which I am impelled to admit I have made in Govan during the last four years with a view to the bank's extension here; and if from loss of health there has lately been any relaxation to business attendance, I hope the kind indulgence of your direc-