

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 repairable 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-

tors and yourself encourage me to trust that it has been generously granted in the light of past faithful and lengthened service.—I am," &c.

Letter, Mr Miller, Superintendent of Branches, to the Pursuer.

"City of Glasgow Bank,

"Glasgow, 28th October 1872.

"Dear Sir,—Mr Stronach has handed me your letter of this date, and bids me say that he is quite willing to acknowledge that you have invariably shown yourself zealous for the interests of the bank in all the situations which you have filled. Your length of service also forms a claim upon the indulgence and sympathy of the directors, and it is on those grounds that they have felt themselves warranted in offering you a retiring allowance larger than is usual in such cases as yours.

"It is customary for us in such cases to receive from the retiring official a letter of resignation to be laid before the directors. Will you kindly supply us with this.—I am," &c.

Letter, the Pursuer to Mr Stronach.

"City of Glasgow Bank,

"Govan, 30th October 1872.

"Sir,—I am recommended, on account of failing health, to place in your hands, in behalf of the bank directors, my resignation of the Govan agency. And I now do so with every sentiment of respect and gratitude.—I am," &c.

Letter, Mr Leresche, Secretary of the Bank, to the Pursuer.

"City of Glasgow Bank,

"Glasgow, 31st October 1872.

"Dear Sir,—I have to advise that your letter of the 30th inst., addressed to the manager, offering your resignation as joint-agent at the Govan branch on account of failing health, was submitted to the board at their meeting to-day, and after consideration, and on the report of the manager, your resignation was accepted.—I am," &c.

Excerpt from Minute of Meeting of Directors of the Bank, held on 31st October 1872.

"A letter was read from Mr Donald Fraser, dated Govan, 30th October, offering his resignation of the joint-agency of the Govan branch on account of failing health, which on report of the manager was accepted, and Mr John Rankin, presently joint-agent, was appointed sole agent; and it was remitted to the manager to arrange with Mr Fraser as to a retiring allowance."

The 22d article of the contract of copartnership of the bank was in these terms:—"The said ordinary directors are hereby authorised to nominate and appoint from time to time, by a writing to be engrossed in their sederunt-book, 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 it shall be in the power of the majority of the ordinary directors to suspend or dismiss the said cashier or accountant, or any one or more of the said officers and clerks, when they see occasion, and without assigning any cause for so doing; . . . and it is hereby declared that upon such suspension or dismissal neither the manager nor any of the other officers shall 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."

A retiring allowance of £150 per annum was accordingly made to the pursuer, who enjoyed it down to the stoppage of the bank in 1878. The liquidators, however, declined to continue the payment or to grant a capitalised sum instead. The pursuer in consequence raised this action against them, concluding for the sum of £2025, 1s. 3d., or for payment of the allowance of £150 during the rest of his life.

He pleaded—" (1) The said agreement having been duly entered into and acted upon by the pursuer and the said bank, the pursuer is entitled to decree in terms of one or other of the alternative conclusions of the summons. (2) The pursuer having surrendered a valuable appointment upon the faith of the said agreement, is entitled to prevail in this action to the effect of recovering the said annuity, or otherwise damages for non-performance of the bank's arrangement."

The defenders pleaded—" (1) The said retiring allowance being in lieu of the salary previously drawn by the pursuer as a servant of the bank, was only due and exigible so long as the bank continued to carry on business. (2) The said bank having become bankrupt and been put into liquidation, the defenders should be assoilzied, with expenses. (3) The defenders should be assoilzied, with expenses, in respect (1st) that it was *ultra vires* of the directors of said bank to grant the said retiring allowance; and (2d) that the bank was insolvent, and was known to the directors to be so, at the time they consented to grant the said retiring allowance."

The Lord Ordinary (YOUNG) assoilzied the defenders.

The pursuer reclaimed, and argued—On the correspondence there was no doubt that the annuity had been effectually granted, assuming that such an annuity was not *ultra vires* of the directors. But it was not *ultra vires*—*Marchant v. Lee Conservancy Board*, June 2, 1873, L.R., 8 Exch. 290. But even if it was *ultra vires* of the directors, that irregularity could not affect the pursuer, who had acted in *bona fide*, and had given up a valuable situation in return for the annuity—*Lindley on Partnership* (4th ed.), i. 244 and 248.

Argued for the defenders—The directors had not in fact undertaken to give the pursuer a permanent annuity to last during his whole life, no matter what good fortune might befall him or ill fortune might happen to the bank. There was nothing in the documents produced to show that anything more than a gratuity was intended, to last during the pleasure of the directors. Then as to the argument that the annuity was the price paid to the defender for giving up his situation, that was quite untenable, looking to the power the directors had of dismissing their officials under the 22d article of the contract—(quoted above). He had given no consideration for the annuity. In *Marchant's* case the Lee Conservancy Board had under their Act of Parliament power to grant retiring allowances. See also *contra*, *Innes v. The East India Company*, Jan. 28, 1856, 25 L.J., Com. Pleas, 154. At anyrate, the bank was insolvent when the annuity was granted, and the directors knew this.

At advising—

LORD PRESIDENT—The pursuer of this action was an agent at one of the branches of the City of Glasgow Bank, first at the branch office at Gorebridge, and afterwards at the branch office at Govan, and he had been in that employment for a very considerable number of years. But in the year 1872 his employment as an agent for the bank was brought to an end under circumstances about which the parties are not agreed, but which I think it quite unnecessary to inquire into for the purposes of this case. He resigned his office in 1872, and at that time it was intimated to him that he should receive a retiring allowance of £150 a-year. He now brings this action for the purpose of enforcing his right to this £150 a-year as a matter of legal obligation upon the part of the bank, and of the liquidators as its representatives, and he contends that there was a transaction entered into in 1872 between him and the directors of the bank, by which they on behalf of the bank came under a legal obligation to pay him an annuity of £150 a-year for life. That is the substance and form of the pursuer's claim. Now, it appears to me that that claim is altogether unfounded. I think there was no transaction between the parties in the year 1872, and that the nature of the proceeding which then took place is very distinctly disclosed in the documents before us. It must be observed that this gentleman was liable to be dismissed at the pleasure of the directors, and when so dismissed he had no claim whatever for any retiring allowance, or for any sum except that which he had earned up to the date of dismissal from the office which he held. That is made perfectly distinct by the 22d section of the bank's contract of copartnery. The directors are there empowered to appoint a manager and every other kind of officer necessary for carrying on the business of the bank, and to suspend or dismiss them, and that without assigning any reason for so doing, and then it is provided that upon such suspension or dismissal neither the manager nor any of the other officers shall have any claim against the company for salary or otherwise, except for the proportion of salary payable at the date of such suspension or dismissal.

Now, the nature of the transaction which Mr Fraser alleges is, that he gave as a consideration for an annuity for life his resignation of his office as a bank agent. It is perfectly plain under that clause of the contract that that was no consideration at all. The directors required no resignation in order to enable them to dispense with his services. On the contrary, they had it in their power under this clause of the contract to dismiss him whenever they thought fit, and it is perfectly obvious from Mr Fraser's own letter of the 28th of October 1872 that he had been practically dismissed—that is to say, he received a suggestion that he ought to resign, which is a very common form of dismissal in such cases. He says—"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 £150. It is my duty to submit in respectful silence to the directors." And what follows is just a letter of

resignation sent in by Mr Fraser, and a minute of a meeting of the directors on the 31st of October 1872 accepting that resignation. Now, I am very far from saying that the directors of the bank did wrong in giving the retiring allowance which they did. It would be exceedingly difficult to say that they had the power to grant such a retiring allowance, if by that is meant that they had the power to bind the bank in an obligation to pay an annuity for the life of the annuitant. That seems quite inconsistent with the 22d section of the bank's contract. But that they should allow such annuity as a gratuity is certainly quite consistent with the ordinary practice of banking companies, and of other public companies, and I should be very sorry indeed to say anything to discourage such arrangements, which I know are of very frequent occurrence. But the notion of granting an annuity for life which shall subsist and be effectual against the bank, not only while it is carrying on business, but after it has ceased to do business and become bankrupt and passed into liquidation, is altogether inconsistent with the relation which subsisted between the bank and this official. In granting a retiring allowance to a superannuated servant, a bank or any other party is merely allowing the retired servant to continue to draw his wages without doing the work of his office. That is really the nature of the arrangement, and that retiring allowance, like the wages or salaries of other officers of the bank, falls to be paid out of the gross profits or revenues of the concern. These things require to be provided for before striking the nett profits available for dividend. In short, it is just part of what may be called the working expenses of the establishment. Certainly the existing salaries to working officials are all of that nature, and it would be a very strange thing indeed if, when a banking or any other company allows an official of this kind to retire, and allows him to continue to draw his salary just as he did when he was working for it, that should confer upon him a higher and more permanent right than belongs to the working officials of the company. It would be the strangest thing in the world if by ceasing to do the work of the office an official thereby acquired a vested right and interest in that salary to which he had no vested right and interest except at the pleasure of the directors while he was actually doing the work of his office. It appears to me that the nature of the proceeding which took place here is quite free from doubt, and that Mr Fraser's right—whatever it may be called—whether a gratuity or anything else—certainly could not subsist except while the bank was carrying on business, and that it constitutes no debt against the bank in liquidation. The effect of holding that it does would be to convert it into a claim of debt enforceable against the private assets of the partners of the bank—a contemplation which I suppose never entered into the mind of anybody dealing with such an affair as this. I am therefore very clear that the Lord Ordinary's interlocutor should be adhered to.

LORD DEAS—It is not in the least necessary in this case to determine whether if the bank had been going on the pursuer would have had a claim for payment of this retiring allowance, nor

is it necessary to determine what the nature of that claim would have been. It is, as your Lordship has said, the practice of banks—and a very commendable practice—to give retiring allowances. In that way they can supersede a man who may have spent the best part of his life in their service without any of those hardships which otherwise might have led them not to dispense with his services at all. That is an advantage to the bank, and it encourages the officers of the bank to continue as long as possible in its service, thereby giving it the benefit of their great experience. In short, in that system of giving retiring allowances there are various advantages of very great value to the bank, and that would require to be taken into consideration if the question were whether a retiring allowance was binding. But in this case I agree with your Lordship that it is not necessary to enter into any question of that kind at all, because supposing we assume that previous to the stoppage of the bank this gentleman would have had a claim which he could have enforced in a court of law, I think with your Lordship that it is quite clear that when a bank comes to an end and can no longer carry on business so as to yield profit, but, on the contrary, when it has suffered great loss, such a claim cannot be held to subsist, and that ground alone is in my opinion sufficient for the disposal of this case.

**LORD MURE**—I am of the same opinion. The action is founded upon this statement, that at the date when this gentleman retired from the bank he entered into an arrangement with the manager and directors by which he resigned his appointment upon the condition of his receiving an annuity of £150 a-year for the rest of his life. Now, I am unable to see in the correspondence which then took place that the directors of the bank entered into any such obligation, or that any such condition was stipulated for. The pursuer after some communication with the inspector of bank agencies resigns his situation on the score of his health, but he submits that he has some claim on the indulgence and sympathy of the directors, and on these grounds they offer him this retiring allowance. I see nothing in the correspondence or in the minute following upon it which amounts to a legal obligation on their part to pay that retiring allowance for the rest of his life; and I think it very unlikely that they should have entered into such an arrangement, having regard to the 22d section of the contract, by which power is given to suspend or dismiss any of the officers at pleasure, with a positive provision that the officers should have no claim against the company for any retiring allowance in such circumstances. That being so, I think it would have been a strong step on the part of the directors to enter into any such binding and positive obligation as is here alleged, for I think the clear implication of the 22d section is that when the bank came to an end the salaries of all the officials were to come to an end also. Therefore I agree with your Lordships that the pursuer has failed to instruct that there was any such obligation undertaken by the directors as he alleges, viz., an obligation to pay him £150 a-year during his life in any event.

**LORD SHAND**—I am of opinion with your Lord-

ships that the pursuer has failed to show that the sum here sued for constitutes a debt or obligation against the bank which can be ranked upon the assets in the liquidation. It is not stated precisely on record what the salary was which the pursuer had as bank agent, but we were informed by both parties that it was £160 a-year. He had no permanent right to that salary; the bank might have ceased to pay it by dismissing him at any time; but on his resigning office he says the directors arranged to give him £150 a-year. That is, I think, very much as your Lordship has stated, that he was to get his salary without giving any services in return for it. The arrangement, even as he stated it, is one by which he gave no consideration whatever. What the bank gave him, therefore, was of the nature of a gratuitous gift. In these circumstances, and looking to the correspondence and the minutes which we have here, I am of opinion with your Lordships that this cannot be regarded as a debt or obligation, and that the payment which he received was not given him under any onerous or enforceable contract. It is no doubt in many cases only just and reasonable that banks and other public bodies should reward their officials for past services by giving them allowances of this kind, and that is often recognised by the shareholders as a desirable and proper thing, but in a case of this kind I certainly cannot hold that such a payment could be enforced by action on the ground that a permanent legal obligation had been created. Apart, however, from that view, and even supposing that an action could be maintained on the footing that there was here an undertaking for the payment of an annual sum, I agree with your Lordship and Lord Deas that it must be taken as an inherent condition of the arrangement that the company should be a going company, that the business should be a continuing one, and that if the company came to an end by bankruptcy as in this case, or ceased in any other way, there can be no continuing obligation on its partners to pay a sum of this kind. On both grounds I am of opinion that this action cannot be maintained.

The Court adhered.

Counsel for Pursuer — Macdonald, Q.C. — M'Kechnie—Lang. Agents—Macbrair & Keith, S.S.C.

Counsel for Defenders — Solicitor - General (Balfour, Q.C.) — Kinnear — Low. Agents — Davidson & Syme, W.S.

Friday, June 18.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

HANDON *v.* CALEDONIAN RAILWAY  
COMPANY.

*Railway—Deposit for Safe Custody—Conditions on Back of Left-Luggage Ticket—Condition Exempting from Responsibility—“Cloak-room or Warehouse.”*

A passenger deposited two articles of luggage for custody with the officials of a railway company, one of which—a very large