fenders are bound to account to the pursuer for his share of the said proceeds, and ordains them to lodge an account thereof," &c.

"*Opinion.*—The action is maintained upon two separate grounds:—(1st), that the defenders' poinding is ineffectual by reason of its having been executed within sixty days of sequestration; and (2d), that if it be effectual the sequestration is equivalent to a poinding executed within four months of notour bankruptcy, and is therefore entitled to be ranked *pari passu* with the defenders' poinding as if both had been used of the same date.

"The first question depends upon the date of the sequestration. The poinding was executed on the 1st of March 1884. A petition for decree of *cessio bonorum* was presented on the 14th of April, and on the 9th of May the Sheriff, on a motion to that effect in the process of *cessio*, awarded sequestration in terms of the 11th section of the Act 44 and 45 Vict. cap. 22. The effect of this deliverance was that thereupon the provisions of the Bankruptcy Acts applied as if sequestration had been awarded upon a petition in terms of section 29 of the Bankruptcy Act 1856. But the deliverance awarding sequestration, and the motion upon which it was pronounced, were both subsequent to the sixtieth day after the execution of the poinding, and it follows that the 108th section of the Act of 1856 which thereupon came into operation cannot have the effect of cutting down the poinding unless some earlier date can be taken as the date of the sequestration in the sense of that section. The pursuer maintains that the first deliverance in the process of *cessio* is to be taken as the first deliverance in the sequestration, and therefore as the date of the sequestration under the 42d section of the Bankruptcy Act. I cannot assent to this contention. The process of *cessio bonorum* differs from a sequestration in many respects, and particularly in this, that it has not the same effect in cutting down preferences which individual creditors may have obtained by the use of diligence, and it is just because of this difference that it may be expedient or necessary in such a case as the present that the *cessio* should be dismissed—to use the words of the marginal title—and sequestration awarded. The process of *cessio* may thus be superseded by a sequestration, but they are not one and the same but two different processes. If it had been intended that the award of sequestration should have a retroactive operation so as to give to the previous proceedings in the *cessio* the same effect in law as if they had been proceedings in a sequestration with the result of cutting down rights already perfected and untouched by the *cessio*, this must in my opinion have been expressly enacted. I conceive therefore that the deliverances before the 9th of May, when the Sheriff was for the first time asked to sequestrate, were deliverances in a process of *cessio bonorum* and not in a sequestration, and that the first deliverance in the sense of the 42nd section was that by which sequestration was awarded.

"But although the poinding is not cut down, I am of opinion that under the 12th section of the Bankruptcy Act the sequestration must be regarded as a poinding to be ranked *pari passu* upon the proceeds of the sale. The enactment of the 108th section that the sequestration shall be equivalent to an executed poinding is absolute and unqualified. It is not for any limited or special purpose, but generally for the purposes for which a poinding may be effectual, that the sequestration is made equivalent to a poinding. There appears to me, therefore, to be no sufficient ground for denying to the sequestration the effect which the 12th section of the same statute gives to poindings in general. The result is that the defenders' poinding is not cut down by the sequestration, but that since it was used at the same date when notour bankruptcy was established, all other poindings within four months thereafter, including the sequestration, are brought up to the same level, and must be ranked *pari passu* on the proceeds of the sale. This is in accordance with the opinion expressed by Lord Deas in *Nicolson* 11 Macph. 179, and although the point was not decided his Lordship's opinion on the construction of the statute is of high authority. It is said that the bankrupt was not insolvent at the expiry of the charge, and therefore that notour bankruptcy was not duly constituted. But the notour bankruptcy is conclusively established by the proceedings in the *cessio* and by the award of sequestration.

"The form of action is in conformity with the provisions of the 12th section of the Bankruptcy Act."

Counsel for Pursuer—Pearson. Agents—Cairns, Mackintosh, & Morton, W.S.

Counsel for Defenders—Trayner—Macfarlane. Agents—Tait & Crichton, W.S.

Monday, March 30.

OUTER HOUSE.

[Lord Kinnear, Ordinary on Teind Causes.

MACECHERN *v.* HERITORS OF INVERNESS.

Church — Obligation of Heritors to Repair or Renew.

Where it appeared from the report of a man of skill to whom the Sheriff remitted to examine the fabric of a church that it could be substantially repaired for much less than the cost of a new church, the Court *refused* to ordain the heritors to rebuild, but ordered them to repair.

This was an appeal to the Lord Ordinary on Teind Causes under the Ecclesiastical Buildings and Glebes Act 1868.

In September 1883 the appellant, the Rev. C. MacEchern, minister of the Gaelic Church, Inverness (who had received from an architect a report stating that the church was in a dangerous and unhealthy state), presented a petition to the Presbytery of Inverness praying for a visitation of that church, and for a finding by the Presbytery as to its condition, and that thereafter the Presbytery appoint the necessary repairs and alterations to be made by the heritors. The petition stated that the seats and woodwork generally were ruinous, insufficient and uncomfortable, and in part unsafe, that the plaster of the roof threatened to fall, that the church was damp and unhealthy owing to part of it at the south-

ern end and western side being below the level of the graveyard; that the vestry was thereby rendered practically useless; that in consequence the church floor would need to be raised; and that the heating arrangements were unsatisfactory and even dangerous.

The Presbytery instructed a report to be made by a man of skill, and one was returned stating that the walls were in a dangerous state, that the roof was so decayed and out of repair that it would not resist a severe strain, such as a heavy snowfall, that the gallery timbers were decayed, bent, and unfit for the weight they had to carry, that the wood of the windows and pews was decayed, and that the latter were inconvenient and uncomfortable; that the ventilation was defective, and the church damp and uncomfortable.

The heritors obtained a report from an architect, who was of opinion that certain repairs were required, the cost of which if substantially executed he estimated at £350 to £380.

This report was laid before the Presbytery on behalf of the heritors. Meantime there had been a visitation by a committee of the Presbytery appointed to visit and inspect the church and report upon its state. They, in consequence of what they saw at their visitation, and of the reports of men of skill, reported to the Presbytery that the church was ruinous and dangerous and unsafe, and that the present building was incapable of being repaired so as to be rendered safe and suitable.

A new committee of Presbytery was appointed on 4th March 1884 to confer with the minister of the parish and the committee of heritors with the view of bringing about an amicable and satisfactory arrangement.

On 1st July 1884, in pursuance of a recommendation by this committee, the Presbytery instructed Mr Lawrie, architect, to report on the condition of the fabric of the church.

Mr Lawrie reported that it was in considerable disrepair but not ruinous, nor, except the main ceiling, dangerous. He reported that repairs and improvements were needed, which (exclusive of a new heating apparatus which he also recommended) would cost £800 to £900.

At a subsequent meeting of Presbytery there was laid before the Presbytery a minute of the heritors' committee stating that while considering that many of the things recommended by Mr Lawrie did not fall within the legal obligation they were resolved to adhere to a resolution come to at a joint meeting of the committees of the heritors and presbytery—viz., that the church be substantially repaired at the sight and to the satisfaction of Mr Lawrie. Consideration of the matter was adjourned.

Thereafter the Presbytery on 4th November 1884 renewed consideration of the matter and a motion was made to "Find, on taking a conjunct view of said reports, that said church is in a ruinous and dangerous condition, and unsafe for the attendance of parishioners on Divine service, and that it is incapable of beingrepaired so as to be rendered safe and suitable for the purpose; further, that the present site of the church is unsuitable and improper; that the church must necessarily be removed to a more suitable and convenient situation; and therefore decern and ordain the said church to be taken down, and a new church of modern design to be built for the said united parishes of Inverness and Bona, capable of affording accommodation for 1200 sittings; to design and set apart a piece of ground in a convenient situation and of proper dimensions and quality as a site for the church; to ascertain the value of the said piece of ground, and to ordain the persons in possession to remove therefrom, and agreeably to such plans as may be approved of by the Presbytery; and appoint the petitioner, or the heritors of the parish, to procure the necessary plans, specifications, and estimates, in order to the rebuilding of said church in a proper and central situation, and to lay the same before the Presbytery at a meeting to be held by them here upon Tuesday the 2nd December next, with certification." This motion was carried.

The heritors appealed to the Sheriff-Substitute under the Ecclesiastical Buildings and Glebes (Scotland) Act 1868, craving him to stay the proceedings before the Presbytery and dispose of the same himself.

The Sheriff-Substitute (BLAIR), before answer, remitted to Mr Maitland, architect, to visit and inspect the church, and having regard to the previous reports of men of skill above referred to, to report (1) "whether the church be capable of repair, and at what expense; (2) At what expense a new church can be built sufficient to accommodate the same number of persons as the old church, *minus* the value of the materials of the old church capable of being sold or usefully employed in building the new one, and further, to report any point or points touching the alteration or repair of the church or the building of the new one that may appear to be proper to be kept in view, or that either party shall suggest as material to the issue."

Mr Maitland reported that the church was quite capable of repair, but that it required extensive repairs in the interior, including a new floor, new seating, and a new gallery. To improve ventilation he recommended also certain alterations on the ground surrounding the walls.

He estimated the cast at £1060, not including a new heating arrangement, it being undecided whether heritors are bound to provide such.

As regards the second question remitted to him, he reported that a new church such as was suggested in that question, and on the same site, would cost £2500.

The Sheriff-Substitute interdicted the proceedings complained of, and found that the church was capable of being repaired so that it could be made a safe and serviceable church, and that the heritors were bound to repair it. He further ordained them to give in plans, specifications, &c., for its repair.

"*Note*—It is always a question of circumstances whether a church is capable of being repaired, or whether it must be taken down and rebuilt. When the old church admits of proper repair, the Court never sanctions a new one. On the other hand, when the fabric has become ruinous, or can only be repaired at a cost equal or nearly equal to the expense of rebuilding, the Court refuses to allow a repair. The Court is generally guided as to this by the report of skilled persons, and when a report is deliberately resorted to and obtained in this way, it is the evidence on the subject reported on, and unless good objections can be substantiated against it, it must be taken as the verdict of the proper

tribunal for the ascertaining of the facts forming the subject of the remit. (*Bertram, &c.* v. *Presbytery of Lanark*, 20th July 1864, 2 Macph. 1406).

"Mr Maitland reports that the repairs necessary to render the present building safe and serviceable will cost £1060, leaving out of account the introduction of a new system of heating by hot-water pipes, which may, perhaps, be superfluous, and that the expense of a new church of the same character and accommodation as the old one would cost £2500, after making allowance for the old materials capable of being sold or usefully employed in building a new one. It thus appears that the expense of repairing is £190 less than one-half of the cost of rebuilding. In these circumstances this case must be ruled by the case of *Murray* v. *Presbytery of Glasgow*, 11th December 1833, 12 S. 196, and the heritors held not bound to rebuild. See also *Gordon* v. *Gordon*, 21st January 1846, 16 Jur. 595."

The Rev. Mr MacEchern appealed to the Lord Ordinary on Teind Causes.

The Lord Ordinary (Lord Kinnear) dismissed the appeal and affirmed the Sheriff's interlocutor.

"*Opinion.*—Mr Maitland's report establishes that the church can be repaired at a cost of less than half of the cost of erecting a new church, and if so, it is clear in law that the obligation of the heritors will be satisfied by the execution of the necessary repairs. It is said that for other reasons it would be more expedient to build than to repair. But that is a question for the heritors. I agree with the Sheriff in the view which he has taken of this legal obligation.

"I also agree with him in thinking that the grounds on which the report is impugned are insufficient. All the points taken in the objections were under the consideration of the reporter, and his report, which was issued after hearing parties and inspecting the fabric, must be accepted as a conclusive determination of the question of fact in dispute.

"It is said that certain of the reporter's recommendations will involve an interference with the graves, to which the parties interested will not consent. But it is to be observed that the Sheriff's interlocutor determines nothing as to the manner in which repairs are to be executed, but merely that the church is capable of being repaired."

Counsel for Minister—C. N. Johnston. Agent—J. B. M'Intosh, S.S.C.

Counsel for Heritors—Begg. Agents—Gordon, Pringle, & Dallas, S.S.C.

LANDS VALUATION COURT.

Wednesday, April 15.

FLEMING, REID, & COMPANY, APPELLANTS.

(*Ante*, vol. xxi. p. 594, May 29, 1884.)

Valuation Cases—Water Rights—Right of Mill-owner to Water for Mill—Occupier.

The proprietors of a mill had a right, under the feu-contracts by which they acquired the ground on which their mill was built, to a supply of water from an aqueduct passing through the ground, in such manner as not to diminish the supply of water. For this right they were bound to pay a certain "rate or duty or ground annual," which was declared to be a real burden on the ground. The aqueduct and the water supply belonged to a Water Trust, who were rated thereon. The Magistrates and Council having taken into account in the valuation of the mill the amount annually paid by the proprietors of the mill for water rights as being the annual value of an assessable subject—*held* by Lord Lee that this judgment was *right*, by Lord Fraser that it was *wrong*. The Judges being thus divided in opinion the valuation *stood*.

At an adjourned meeting of the Magistrates and Town Council of Greenock, held on 30th September 1884, to hear and dispose of appeals against the valuations of the assessor under the Lands Valuation Acts, Messers Fleming, Reid, & Company, worsted spinners in Greenock, appealed against the entry in the valuation roll for the burgh of Greenock, of the Shaws Water Worsted Mills, of which they are owners and occupiers, at £1867, for the year ending Whitsunday 1885, and craved that the amount of valuation should be fixed at £750.

The circumstances of the case are fully stated in the previous report. It was explained that the circumstances of the present appeal were the same as those submitted in the case there reported.

Witnesses were examined on behalf of the appellants. The appellants stated that the annual cost of their water-power would be £1540 if they required to use 488 horse-power, the amount of power taken by the assessor for comparison purposes, which sum of £1540 was made up as follows:—Water rent, £1220, being £2, 10s. per horse-power; interest at 5 per cent. upon £3000, the value of their water plant, £150; wages of engineman, £120; and oil, £50—this annual cost being equivalent to £3, 3s. per horse-power. Mr Jack, engineer, one of the witnesses, estimated the annual cost of a steam-engine of 488 horse-power at £1282, 5s., or £2, 12s. 6d. per horse-power; Mr Birkmyre, Gourock Ropework Company, at £1258, 19s., or £2, 11s. 7d. per horse-power; Mr Rankin, engineer, at £1059, 12s., or £2, 3s. 6d. per horse-power.

The assessor maintained that the evidence adduced for the appellants was irrelevant. It was not a question as to the relative value of steam and water power, but the value of ground with motive power as against the value of ground without motive power.

The Magistrates and Council, by a majority, sustained the appeal to the extent of reducing the valuation from £1867 to £1720; and they arrived at this result by deducting 25 per cent. from the value of the rent for water-power, and by taking the buildings at £991, as valued by the assessor.

The appellants craved a Case.

A member of the appellants' firm argued the case in person.

At advising—

Lord Lee—We had a very full argument by counsel on this case last year. The present case informs us that the circumstances are the same, but we have been favoured with additional