with it, the grounds on which it has proceeded."

Angus Mackay, farm servant, raised an action in the Sheriff Court at Dornoch against John Mackenzie, farmer, for payment of (1) £34 as the amount of wages, &c., due to him, and (2) £20 damages.

After proof the Sheriff-Substitute (MACKENZIE), by interlocutor dated 23rd January 1894, pronounced certain findings in fact, and decerned against the defender for payment to the pursuer of (1) £33, 15s., and (2) £5.

On appeal the Sheriff (JOHNSTON) on 14th April 1894 pronounced this interlocutor:—"Having considered the minutes of debate for the parties, proof, record, and whole process, Recals the interlocutor of the Sheriff-Substitute of 16th January 1894, and assoilzies the defender from the conclusions of the summons," &c.

The pursuer appealed.

When the appeal came on for hearing, counsel for the pursuer drew the attention of the Court to the fact that the Sheriff's interlocutor contained no findings in fact as required by the Act of Sederunt of 15th February 1851, and was therefore bad in form—*Glasgow Gaslight Company* v. *Glasgow Working-Men's Total Abstinence Society*, July 11, 1866, 4 Macph. 1041, and *Melrose* v. *Spalding*, June 25, 1868, 6 Macph. 952.

Argued for defender—The case of *Caird* v. *Sime*, June 13, 1887, 14 R. (H. of L.) 37, showed that although the Sheriff ought to have inserted in his interlocutor findings in fact, yet the Court was entitled, if both parties assented, to hear the appeal as if the interlocutor was correct in form.

At advising—

LORD JUSTICE-CLERK—We must remit the case back to the Sheriff in order that he may pronounce the findings in fact required by the Act of Sederunt.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—

"In respect the Sheriff in the interlocutor complained of has failed to comply with the provisions of the Act of Sederunt of 15th February 1851, remit to the Sheriff to recal the said interlocutor, and to pronounce an interlocutor on the defender's appeal against the interlocutor of the Sheriff-Substitute in the form prescribed by the Act of Sederunt."

Counsel for the Pursuer—Guy. Agent—James Hepburn, S.S.C.

Counsel for the Defender—Kincaid Mackenzie—Glegg. Agents—Macpherson & Mackay, W.S.

Tuesday, June 12.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THE GLASGOW POLICE COMMISSIONERS *v.* DONALD.

Police—Private Improvement Assessment—Recovery of Abortive Assessments—Reparation—Action of Damages by Police Commissioners against Collector for Amount of Assessment—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 106.

The police commissioners of a burgh imposed a private improvement assessment on the owners of property within the burgh, under the powers conferred on them by the General Police and Improvement (Scotland) Act 1862. Section 106 of that Act enacts that a notice stating particulars of the assessment and the dates fixed for payment of the assessment and for hearing appeals, shall be sent by the clerk or collector to the person assessed through the post office at least two weeks preceding the date fixed for hearing the appeal. Notice was sent by the collector to the owner assessed, but on a later date than that required by the Act, and the owner assessed refused to pay the assessment. The police commissioners brought an action against the owner for the amount of the assessment, but the action was dismissed in respect of the notice having been sent too late. The police commissioners then raised an action against the collector for the amount of the assessment, on the ground that they had suffered loss to that extent on account of the collector having failed to perform his statutory duty.

The Court *dismissed* the action as premature, holding that the police commissioners had not proved that they had sustained any loss through fault on the part of the collector, as they had failed to show that they could not recover the assessment from the owner assessed by imposing the assessment anew and giving him timeous notice in terms of the statute.

Opinion by Lord Young that if a person to whom an assessment under the Act applies declines to pay upon the ground that he has not got notice fourteen days before a day appointed to hear his appeal, he was still liable for the assessment, and that in order to enforce his obligation to pay, the proper remedy was for the police commissioners to give him notice anew fourteen days before a day appointed to hear his appeal.

By section 106 of the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101) it is enacted that rates and assessments under the Act "may be imposed and levied yearly, half-yearly, or

at such other periods as the commissioners may think fit, and shall be payable at such times as they appoint; and at the meeting imposing the same the commissioners shall appoint a day on which such rates or assessments shall be payable, and another day on which appeals by any parties complaining that they have been improperly rated or assessed, may be lodged with the clerk or collector, and another day or days on which appeals in reference to such rates or assessments shall be heard by the commissioners; and notice to each party intended to be so rated or assessed, stating the particulars of the intended rate or assessment as regards such party, and specifying the several days fixed by the commissioners as aforesaid, shall be sent by the clerk or collector through the post office at least two weeks preceding the day which may be fixed for hearing the appeal of such party."

On 13th October 1891 a meeting of the Police Commissioners of Govanhill was held, at which a private improvement assessment under the General Police and Improvement (Scotland) Act 1862 was imposed upon certain owners of property within the burgh, and among others, on Daniel Sommerville, for his proportion of the cost of improvements on Calder Street. The minute of meeting bore, "Said assessments to be paid to Thomas Donald, 83 Renfield Street, Glasgow, the burgh collector, on or before 31st October current, and the collector was instructed to serve notices on the above parties to this effect. The minute further bore that any appeals against the assessment should be lodged before 29th October, in order that they might be considered at a meeting to be held on the 30th.

On 19th October 1891 notice was served by Thomas Donald on David Sommerville. The latter failed to pay the private improvement assessment which had been imposed on him, and which amounted to £28, 0s. 5d.

Under the City of Glasgow Act 1891, which came into operation on 1st November 1891, the police burgh of Govan was assessed to and became part of the city of Glasgow, and the Glasgow Police Commissioners became vested in the property and pecuniary rights of the burgh commissioners.

In June 1892 the Glasgow Police Commissioners brought an action against David Sommerville for £28, 0s. 5d., the amount of the private improvement assessment imposed on him, but in respect of due notice of the imposition not having been given to him by the collector, the action was dismissed by the Sheriff-Substitute (GUTHRIE).

Thereafter the Glasgow Police Commissioners raised an action in the Sheriff Court at Glasgow against Thomas Donald for payment to them of £28, 0s. 5d., with interest from 30th October 1891.

The pursuers averred—"(Cond. 13) The defender in breach of his duty culpably neglected and failed to give the requisite statutory notice of the imposition of the said private improvement assessment to the said David Sommerville as required by the said General Police and Improvement (Scotland) Act 1862. (Cond. 14) In consequence of the defender's said culpable neglect of and failure in his duty as collector, the pursuers have been held not entitled to recover the said £28, 0s. 5d. from the said David Sommerville. (Cond. 15) The pursuers have called on the defender to pay said sum which they have failed to recover through his culpable neglect and failure from the said David Sommerville, but he refuses or at least delays to do so, and this action has been rendered necessary."

The pursuers pleaded, *inter alia*—"(3) The pursuers having suffered loss to the extent sued for in consequence of the defender's culpable failure or neglect of his statutory duty, are entitled to decree as craved."

The defender lodged defences, and pleaded, *inter alia*—"(7) Any loss sustained by pursuers not having been occasioned by or through the negligence of the defender, he ought to be assoilzied."

The Sheriff-Substitute allowed a proof. The proof showed that the defender was not present at the meeting on 13th October 1891. There was a conflict of evidence as to whether the clerk to the Commissioners who was present at the meeting had duly instructed the defender to serve the notices.

On 8th January 1894 the Sheriff-Substitute pronounced the following interlocutor:—"Finds, for the reasons stated in the note, that the pursuers have not proved that they have suffered loss through the fault of the defender as condescended on: Therefore assoilzies the defender, &c.

"*Note.*— . . . There is a question which is not, I think, very clear upon the evidence, whether he was properly qualified and duly instructed by his employers or their clerk, and whether the issuing of the notices was not properly a duty of the clerk. It does appear that it was naturally within the clerk's province, if not to send out the notices, at least to make sure that they were despatched by the collector who was not a lawyer, so as to meet the requirements of the Act, but I should have at least some difficulty in holding that Mr Donald was not duly instructed in this matter by the clerk.

"The case rather presents itself to me in this way. An action of damages cannot succeed unless the pursuer clearly shows that he has suffered a loss by the fault of the defender. In this case it is not established beyond doubt that the pursuers are unable still to recover their private improvement expenditure from Mr Sommerville, the proper debtor. They have been defeated in an action against him, on the ground that the money which they sued for as private improvement assessment had not been duly imposed upon him as such an assessment, but it is not yet established that it is totally irrecoverable as against him. So far as appears—and I have heard a second and full argument on the point—it is still in the power of the pursuers, who

are vested with every right and power possessed by the Commissioners of Govanhill (see the sections cited from the Act of 1891) to allocate and impose the assessment anew, and to allow Sommerville an opportunity of appealing against it under new notices duly issued. I do not know that there is any decision directly to the effect that this may be done, but it is suggested by the Lord Chancellor at the end of his opinion in *Campbell* v. *Leith Police Commissioners*, and no reason has been stated at the bar why inept proceedings upon which this charge against the defender is founded should be a bar in the way of another and regular allocation and notice. Unless this is made clear by the pursuers I am unable to find that they have sustained the loss which they seek to make good."

The pursuers appealed to the Sheriff, who on 22nd February 1894 pronounced the following interlocutor:— "Finds that in October 1891 the defender was collector of the burgh of Govanhill, which has since been annexed to the city of Glasgow, and that in the said month of October he failed in his duty as such collector by omitting, notwithstanding instructions received from the Burgh Commissioners, to issue to one David Sommerville a notice of a private improvement assessment in sufficient time in accordance with the provisions of the General Police and Improvement Act 1862 (25 and 26 Vic. cap. 101): Finds that the pursuers, as succeeding to the rights of the said Commissioners in terms of the City of Glasgow Act 1891, have sustained loss through, and in consequence of, the defender's said failure in duty, and that the loss they have so sustained is the sum of £28, 0s. 5d., the amount of said assessment, which through the defender's failure to give the statutory notice is not now recoverable from the said David Sommerville: Therefore, and under reference to note, recals the interlocutor appealed against: Finds the defender liable in damages to the pursuers, to the said amount of £28, 0s. 5d., for which decerns against the defender, with interest at the rate craved from this date."

The defender appealed to the Court of Session, and argued — The defender was not present at the meeting of the Burgh Police Commissioners at which the assessment was fixed, and had not been instructed by the clerk as to the date on which the notice required to be sent, so as to make it effectual. Even if the defender had failed in his duty, there was no evidence that his doing so had caused any loss to the pursuers. The fact that the notice was informal did not absolve Mr Sommerville from liability to pay the assessment. All that the commissioners had to do was to impose the assessment anew, and give notice of having done so to Mr Sommerville within the time specified in the Act. He would then be liable for the amount. — *M'Intosh* v. *Leith Commissioners of Police*, May 18, 1875, 12 S.L.R. 455. Expenses incurred by the Commissioners became a debt due by the owner as soon as the work was completed, and assessment was merely the machinery by which the debt was recovered. —*Currie* v. *W. & D. M'Gregor*, Nov. 16, 1871, 44 S.J. 68; *Hornsey Local Board* v. *Monarch Investment Building Society*, May 15, 1889, L.R., 23 Q.B.D. 149. No damage having been sustained by the pursuers this action should be dismissed.

Argued for pursuers — The Sheriff's judgment was sound. It was by no means clear that the pursuers could effectually reimpose the assessment so as to recover it from Mr Sommerville, and they were not bound to try the point. Through the defenders' failure to perform his duty this loss had been incurred and the defender was liable therefor.

At advising—

LORD JUSTICE-CLERK—In this case we have nothing before us but the fact that this is a private improvement assessment, which is the name given by the statute to a determination of the amount of expenses incurred by the authority in doing certain work which an individual ratepayer was bound to do and has failed to do. It is said in the statute that when the amount of these expenses is ascertained they may be charged as being a private improvement assessment. The object of that is plain. It is to enable the summary machinery of the statute for recovering assessments to be applied for the recovery of such expenses. The facts are that in this case determination was given of the amount, and notice was given after that determination of the date on which an appeal might be stated; and the time for that appeal was fixed, but by some misfortune sufficient notice, viz., a fortnight, was not given to the party assessed of the sitting of the Court of Appeal. Accordingly he objected to pay the assessment on the ground that he did not get sufficient notice of an opportunity for stating an appeal. When an action was raised against him that action was unsuccessful on that ground. The Comissioners have now raised an action of damages against the officer, who they say should have given the proper notice of a fortnight before the day of assessment. They say that they have suffered loss and damage to the extent of the amount of that assessment, which would have been paid by Mr Sommerville, but was not paid, in respect of his not having got that notice. But we have no evidence before us that they have suffered any such loss. They have not taken any steps for recovering that money from Mr Sommerville except those which were based upon the bad notice. It was stated in the course of the argument that if in consequence of an insufficient notice the assessment cannot be recovered under an original levy, the Commissioners would still have power to fix a proper date for an appeal upon the assessment, and also that the assessment which is made upon a particular individual, constitutes a debt due by him. In this case it is plainly a debt due by him, turned into an assessment for the convenience of recovery. Is it to be said that he

will be relieved of his obligation to pay simply from the fact that there has been some blot in the proceedings which prevents it being recovered under the first notice. That question has never been brought up, and has never been decided. When the Commissioners were asked what they had to say about "it" they said, "We are quite willing to hand over our right to press that plea to this defender." But that is not a ground for holding that any damages have been established by the evidence which is before us. Therefore on these grounds I think the general result at which the Sheriff-Substitute arrived was right, although I think he erred in the case in assoilzieing the defender, because that would have practically precluded an action upon similar grounds relative to the same subject. It may turn out that they cannot recover this amount. And if that were so, they might have a right to recover it from their collector as damages. Therefore, while adhering to the practical decision at which the Sheriff-Substitute arrived, we confine ourselves simply to dismissing the action.

LORD YOUNG—I do not think there is any practical distinction between dismissing an action such as this and assoilzieing the defender from its conclusions. But on the case itself my opinion is entirely with the Sheriff-Substitute, and against the views upon which the Sheriff has proceeded. The case is based really upon these words of clause 106 of the General Police Act—"And notice to each party intended to be so rated or assessed stating the particulars of the intended rate or assessment as regards such party, and specifying the several days fixed by the commissioners as aforesaid shall be sent by the clerk or collector, through the post office at least two weeks preceding the day which may be fixed for hearing the appeal of such party." The Sheriff-Substitute says—"There is a question which is not I think very clear upon the evidence, whether he was properly qualified and duly instructed by his employers, or their clerk, and whether the issuing of the notices was not properly a duty of the clerk. It does appear that it was naturally within the clerk's province if not to send out the notices, at least to make sure that they were despatched by the collector, who was not a lawyer, so as to meet the requirements of the Act, but I should have at least some difficulty in holding that Mr Donald was not duly instructed in this matter by the clerk." I think the evidence is doubtful upon this point, and although I should, with the Sheriff-Substitute, not have been prepared to find that Mr Donald was not instructed, I am not prepared upon the evidence to affirm that he was. Not being at the meeting, he was not to know when the assessment was imposed and the appeal day appointed, but the clerk was, and there is a conflict of evidence as to whether the clerk duly instructed the collector to send notice through the Post Office, and unless we are able to affirm that the collector was properly instructed, there would be an end to the case entirely upon that ground, and I, for my part, am not prepared to affirm it.

But irrespective of that, I agree with the Sheriff-Substitute in holding that on the assumption that the collector was bound to issue notices fourteen days before the day appointed for the appeal, and was duly instructed to issue them, and that he failed, there is no case stated and no case proved that any damage arose to the Commissioners or their constituents in consequence. I think it is abundantly plain that if a party to whom an assessment applies declines to pay upon the ground that he has not got notice fourteen days before the day appointed for hearing an appeal, that the proper remedy which is quite competent under the Act of Parliament is to give him notice under fourteen days before a day appointed to hear his appeal. But I do not know that it is necessary for us to decide that here, or that we could decide it effectually as in a question with Mr Sommerville, Mr Sommerville not being present and not being a party to this case.

But unless we determine that the assessment is lost for all time in respect that the defenders' failure to give notice was an irremedial slip, the case of damage relied upon by the pursuer fails. For it may be, for anything that we can decide in this case in Mr Sommerville's absence, that the assessment is recoverable, and that the only damage occasioned to anybody will be the damage to the commissioners, or as many of them as are necessary to form a quorum, meeting upon another day upon which to hear this appeal. That may be no stateable damage at all. My impression is, as I have already indicated, that if Mr Sommerville was here, and we could determine the question, I should be inclined for my part to hold that he was still liable for the assessment although he was entitled to have fourteen days notice of a day appointed for hearing his appeal, if he chose to lodge one. In his absence we cannot certainly make affirmative findings which will affirm that in point of fact his assessment is lost through the fault of the collector.

Whatever may be the proper form of findings, I am quite prepared for my part to revert to the Sheriff-Substitute's judgment, holding that this action cannot be sustained.

LORD RUTHERFURD CLARK — I am of opinion that this action is premature, as it has not yet been determined that the assessment cannot be recovered, and I should prefer that it should be dismissed.

LORD TRAYNER—This action of damages is based upon the statement and plea for the pursuers that they have suffered loss to the extent sued for through the defender's fault. I think the alleged fact upon which the section was based is not substantiated, and that the pursuers have not proved that they have suffered any damage through the act of the collector. Upon that ground I am for dismissing the action.

The Court pronounced the following interlocutor:—

"Finds that it has not yet been determined whether the sum of £28, 0s. 5d. sued for cannot still be imposed as a private improvement assessment on David Sommerville, and received by the pursuers from him, and that the pursuers have not as yet proved that any loss has been sustained by them through fault on the part of the defender: Therefore sustain the appeal, and recal the interlocutor appealed against, as also the interlocutor of the Sheriff-Substitute dated 8th January 1894; dismiss the action, and decern."

Counsel for the Pursuers — Lees—Deas. Agents—Campbell & Smith, S.S.C.

Counsel for the Defender—Strachan—A. S. D. Thomson. Agent — John Veitch, Solicitor.

Tuesday, June 12.

FIRST DIVISION.

[Sheriff of Argyll.

MACDONALD AND OTHERS *v.* CAMERON AND ANOTHER.

Crofter—Heritor—March Fence—Act 1661, *cap.* 41—*Title to Sue.*

Held that crofters, notwithstanding the Crofters Act of 1886, are not heritors within the meaning of the Act 1661, cap. 41, and have no title to sue an action to have their landlord ordained to unite with them in erecting a march fence between the common pasturage of the crofting township and another part of the estate.

The Act 1661, cap. 41 (ratified by the Acts 1669, cap. 17, and 1685, cap. 39), provides that "Where enclosures fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains in building, ditching, and planting that dike which parteth their inheritance."

In 1893 James Macdonald and others, all crofters in Plocaig, Ardnamurchan, within the meaning of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict cap. 29), and occupying their holdings under John James Dalgleish, Esquire of Ardnamurchan, brought an action in the Sheriff Court at Oban against James and Allan Cameron, tenants of the farm of Glendryen, Ardnamurchan, and against the said J. J. Dalgleish, Esquire. In said action they craved the Court "to ordain the defenders jointly and severally, or severally, to unite with the pursuers in erecting a march fence or dyke between the common pasture of the township of Plocaig and the farm of Glendryen on the estate of Ardnamurchan, and that to the extent of one-half thereof; and failing the defenders, jointly and severally, or severally, complying with the above prayer within such period as the Court may appoint, to grant warrant to and authorise the pursuers to erect the said march fence or dyke at the sight of such skilled person as the Court may appoint, and on said march fence or dyke being erected, to ordain the defenders, jointly and severally, or severally, to pay to the pursuers one-half of the cost thereof."

The pursuers averred that there was no march fence between the farm of Glendryen and the common pasture of the township of Plocaig, that in consequence cattle strayed across the march, and that it was for the interests of all parties that a march fence should be erected. They pleaded, *inter alia*—"(3) The pursuers being crofters within the meaning of the Crofters Holdings (Scotland) Act 1886, are proprietors of their respective holdings within the meaning of the March Fence Acts, and the defenders, jointly and severally, or severally, are bound to concur with the pursuers in the erection of a march fence as craved.

The defenders pleaded—"(2) The action being incompetent and irrelevant, ought to be dismissed, with costs. (3) The pursuers being merely crofters or tenants have no title to sue either by statute or common law, and the action ought to be dismissed, with expenses."

Upon 21st November 1893 the Sheriff-Substitute (MACLACHLAN) pronounced the following interlocutor — "Finds that the pursuers are crofters within the meaning of the Crofters Holdings (Scotland) Act 1886, and occupy holdings on the estate of Ardnamurchan, the property of the defender John James Dalgleish, including common grazing ground adjoining the farm of Glendryen, also on said estate but not separated from it by a march fence: Finds that this action is one calling upon the said John James Dalgleish as proprietor and the other defender as tenants of the said farm of Glendryen to unite with the pursuers in erecting a march fence or dyke bounding the said common pasture, but finds that neither by statute, nor by common law have the pursuers any right or title to make this demand: Therefore finds the action irrelevant and dismisses the same; finds the pursuers liable in expenses."

"*Note.*—This is an action by four crofters in the township of Plocaig, on the estate of John James Dalgleish of Ardnamurchan, against the tenants of the farm of Glendryen on said estate, and also against the proprietor, to have them ordained to unite with the pursuers in erecting a march fence or dyke between the common pasture of the township and the said farm. The farm adjoins or marches with the common pasture ground, but there is no march fence, so that, as the pursuers say, the cattle both of the pursuers and defenders stray into each other's territory, and not only cause damage, but are liable to be cruelly ill-used and even maimed in being driven back to their own ground. If this is true it shows a very unfortunate and unpleasant state of matters, which I have no doubt the erection of a good strong and substantial march fence would go a long way to remedy,