Counsel for the Respondents M'Gregor & Others—John Wilson, K.C.—Constable. Agents—Mylne & Campbell, W.S.

Counsel for the Respondents the County Council of Ayrshire—Cochran Patrick. Agents—Carment, Wedderburn, & Watson, W.S.

Thursday, July 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

COUNTY COUNCIL OF LANARKSHIRE *v.* COMMISSIONERS OF MOTHERWELL.

Burgh—Extension of Boundaries—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 11.

Along three main roads, leading at different points from a burgh, houses had been erected, but little building had been done towards the sides. By a deliverence of the Sheriff in a petition under section 11 of the Burgh Police (Scotland) Act 1892, the boundaries of the burgh were extended by the inclusion of three small and separate areas of about 18, 24, and 60 acres at these three points. The county council, out of whose territory the extension came, appealed. *Held* that no case for revision of the boundaries as contemplated by the statute had been made out, and the deliverance *recalled*.

Prospective extension is not under section 11 of the Burgh Police (Scotland) Act 1892 a ground for revision of the boundaries of a police burgh, but the areas proposed to be added must be certain in character and marked out by extent of building and consequent density of population as properly belonging to the burgh, and in this particular the considerations to be weighed by the Sheriff under this section differ from those under section 9.

Expenses—Burgh—Extension of Boundaries—Opposition by County Council Interested—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 11.

A county council out of whose territory a Sheriff had granted an extension of the boundaries of a police burgh under section 11 of the Burgh Police (Scotland) Act 1892, petitioned against the deliverance, and being successful in having it recalled, asked for expenses in both Courts. The Court *awarded* the expenses of the appeal.

The village of Motherwell was formed into a burgh in 1865, and in 1878, in 1890, and again in 1892 its boundaries were revised and extended. In 1903 a petition was presented in the Sheriff Court of Lanarkshire at Glasgow, under the 11th section of the Burgh Police (Scotland) Act 1892, by its provost, magistrates, and councillors, praying that Court to revise, alter, and extend its boundaries. The areas proposed to be included were at different points where main roads came out of the burgh, and were three in number—viz., (1) An area situated to the north-east of the burgh, extending to 18 acres, called the Coursington Bridge District; (2) an area to the south-west of the burgh, extending to 108 acres, but subsequently restricted to 24 acres, called the Manse Road District; and (3) an area to the south-east of the burgh, extending to 60 acres, called the Flemington District. The petition was opposed by the County Council of Lanarkshire and the Middle Ward District Committee, out of whose territory any extension would come. By a minute of admissions the parties concurred in a statement as to the houses and buildings and the sewers formed and being formed in the various districts, and they renounced probation. The important facts in the admissions are contained in the ground of objection stated by the County Council in the petition in the Court of Session (*infra*).

Upon 10th February 1904 the Sheriff (GUTHRIE) issued an interlocutor making avizandum, with the following notes:—"The Sheriff doubts whether the Burgh Commissioners are well advised in applying at present for extension of their boundaries. Such an application will undoubtedly be required ere long if the burgh increases at the present rate. But it is surely not desirable that the boundaries of a burgh should be always in the course of alteration, and in Motherwell alterations have been tolerably numerous. There may be reasons, however, why an application at the present juncture is expedient rather than the one after the further lapse of three or four years.

"Notwithstanding this doubt, the Sheriff does not propose to refuse the petition. He has, however, some difficulty, arising from the nature of the proposed additions and their involving in some cases what has been called an 'awkward and arbitrary' boundary. Although to some extent this is the case with the Manse Road District, and it makes a tongue of burgh extending into the county, it is not open to any serious objection, and in the circumstances the Sheriff thinks that it is a reasonable extension. The proposed extension at Coursington Bridge presents us with a very awkward-looking boundary, and it is desirable to know whether the parties could suggest anything better. At all events, the Sheriff is at present of opinion that the addition to the burgh should not extend beyond the parish boundary.

"The whole boundaries of the Flemington district are rather awkward. The Sheriff, however, thinks that the greater part of this district should be included in the burgh. It appears that streets have been laid out to a certain extent for feuing, and are laid down on the map, also a considerable number of tenements are already built. Looking to the considerations as to boundaries already mentioned, it would probably be better to restrict this additional territory to the ground north of the Whinnyburn Glen. The only reason for

going beyond that which is the natural boundary at present appears to be the burgh's desire to include in their area one or two houses that have been built on the roadside beyond Burngrange Bridge.

"The Sheriff would be glad either to hear parties shortly on these points or to receive their assistance in writing with the view of adjusting the boundaries in terms of these notes."

And upon 21st April 1904 the Sheriff (GUTHRIE) issued an interlocutor, whereby he extended the boundaries of the burgh so as to include the areas defined in the petition as restricted, with the exception of portions of areas (2) and (3).

Note.—"The Sheriff's general view of the application has already been expressed in the notes issued after the debate of 10th February, and it is unnecessary to recapitulate. The joint-minute for the parties shews how the burgh is growing, and to what extent works, such as sewers and new roads for feuing purposes, have been executed near it, and in consequence of its neighbourhood. The suggestions in the notes referred to receive effect as far as appears to be possible."

The County Council of Lanarkshire and the Middle Ward District Committee presented a petition in the Court of Session under the 13th section of the Burgh Police (Scotland) Act 1892 against the deliverance of the Sheriff, in which they stated, *inter alia*, the following ground of objection:—"The said areas are not offshoots from, and in no sense belong to the burgh of Motherwell, nor are they more densely populated than many other parts of the county of Lanark which are strictly rural in character. In the Coursington district, area No. 1, which extends to 18 acres, there were at 24th October 1903 only sixty-eight houses and shops, including those under construction, and the houses are almost entirely separate villas and not tenements. In the Manse Road district, area No 2, which extends as restricted to 24 acres, there were at the same date only fifty-six houses and shops, including those under construction, and there again the houses are, for the most part, separate villas and not tenements. In the Flemington district, area No. 3, which extends to 60 acres, there were at said date only 164 houses and shops. None of these areas are densely populated, nor can they fairly be described as urban in character, or as properly forming part of the burgh."

The Provost, Magistrates, and Councillors of Motherwell lodged answers, in which they stated:—"The petitioners' averment that the 'said areas are not offshoots 'from, and in no sense belong to the burgh of Motherwell,' is denied. The density of the population, even including the new areas, when compared with thirty-three other well-known burghs is greater than twenty-six of them. The density of the population of the burgh has been and is steadily increasing. . . . The new areas are wholly dependent on the burgh for fire prevention, watching, and lighting. . . . There is no provision by the county for the sanitation of the areas in questions or for removal of refuse and contents of ashpits. By inclusion in the burgh these areas will have daily attention as regards those matters. The new areas are also dependent on the burgh for schools and churches and public library and for halls for public meetings. Their general interests would best be served by inclusion in the burgh."

The Burgh Police (Scotland) Act 1892, section 9, which provides for the formation of a burgh enacts—. . . "The sheriff or sheriffs . . . shall . . determine whether the area included in the application, or any part thereof, considering the number of the dwelling-houses within it and the density of the population and all the circumstances of the case, is in substance a town and is suitable for being formed into a police burgh . . . In defining the boundaries of a populous place it shall be lawful for the sheriff or sheriffs to include the whole area which in their judgment properly belongs to and forms part of the same town with a reasonable margin for extension, if they think proper." . . .

Section 11, which provides for the revision of the boundaries of a burgh, enacts — . . . "The sheriff or sheriffs in revising the boundaries of a burgh shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to and ought to form part of the burgh and should in their judgment be included therein." . . .

Argued for the petitioners—The Sheriff had misunderstood the statute. Its meaning was not to constantly follow the growth of population by enlarging the burgh boundaries, but to wait until such time as a general revision was required, and then consider the whole boundaries. It was impossible that wherever and whenever a few houses had stretched out into the county that piece of ground was to be put into the burgh. Such nibbling at the county would make county government impossible, for it could not be known what to provide. But even if that were wrong, there was nothing to justify the inclusion of any of the areas in this case, for they did not come up to the requirements of the statute. The building and density of population was prospective—*County Council of Dumbartonshire* v. *Clydebank Burgh Commissioners*, November 14, 1901, 4 F. 111, 39 S.L.R. 57, and *County Council of Lanarkshire* v. *Govan Burgh Commissioners*, January 28, 1902, 4 F. 479, were referred to.

Argued for the respondents—This was an administrative duty performed by the Sheriff, and the Court would not interfere with what he had done unless it was clearly shown he had erred in some material point (*Govan* case, *cit. sup.*) Here the admitted facts were sufficient to support the Sheriff's deliverance. The ground included was urban in character, and did not properly belong to the burgh.

At advising, the judgment of the Court (the Lord President, Lord Adam, Lord M'Laren, and Lord Kinnear) was read by

LORD M'LAREN—This is an appeal from an order of the Sheriff of Lanarkshire extending the boundaries of the burgh of Motherwell. The application was at the instance of the Provost, Magistrates, and Council of Motherwell under the powers conferred by the 11th section of the Burgh Police Act 1902. The appeal is taken by the County Council of Lanarkshire, and the District Committee of the Middle Ward.

The clause of the 11th section which defines or prescribes the conditions of burgh extension is necessarily somewhat general, because the clause is applicable to all burghs in Scotland, and a large discretion is given to the Sheriff.

If in our opinion a case for extension had been established we should not have been disposed to interfere with the boundaries prescribed in the Sheriff's deliverance. But the order is challenged by the County Council on the ground that there has been no such development of the suburban districts surrounding Motherwell as to call for a new delimitation as between town and county, and it is therefore necessary that we should consider the policy of the statute in this respect, and the principles that are to regulate burgh extension so far as these can be gathered from the series of clauses 7 to 14 which are covered by the sub-title "Boundaries." Comparing the 9th section, which relates to the constitution of new burghs, with the 11th section, which relates to the extension of burghs, the conditions of the statutory power appear to be substantially the same, because in either case the Sheriff is directed to consider the number of dwelling-houses within the area in question, the density of the population, and all the circumstances of the case, in the first case for determining whether the area "is in substance a town and is suitable for being formed into a police burgh;" in the second case for determining whether the area "properly belongs to and ought to form part" of the existing burgh.

It may, however, be observed that in defining the boundaries of a new burgh under section 9 the Sheriff is empowered to include "a reasonable margin for extension," but these words are not repeated in the 11th section. I do not think that this difference of expression was undesigned. I think it was designed to mark a restriction of the right of the burgh authorities to demand a revision of the boundaries. In the case of an application to constitute a burgh it is assumed that the conditions as to population and density are satisfied, and that there is to be a burgh. It is only in defining the boundaries that the question of a margin for extension arises. But it was perhaps foreseen that a burgh corporation ambitious of extension might endeavour to make a case by including areas that have only prospective value as building ground. In any case prospective extension is not, under the 11th section, a ground for revising the boundaries of any burgh; the areas or area to be added on revision must be urban in character, they must be built on, and the extent of building and consequent density of the population in these areas must be such as marks them out as properly belonging to the burgh in contradistinction to the more thinly peopled suburban districts which are found exterior to all populous places, and which may properly be left to county government.

Passing now to the circumstances of the present case, I begin by observing that this is not the case of a town which has extended in a definite direction giving rise to a compact populous district adjacent to the town. The proposal is to revise the boundary by including three small areas (small, I mean, in relation to the size of the town), situated respectively at the south, south-east, and north extremities of the town. As regards the first of these areas the greater part of it is unbuilt-on land. In the notes appended to the Sheriff's deliverance the Sheriff expresses a doubt whether the burgh commissioners are well advised in applying for extension, and observes that in Motherwell alterations have been tolerably numerous. As regards all the three proposed extensions the learned Sheriff points out that the effect of the extensions is to present a very awkward-looking boundary. As regards the area marked II. on the plan he has disallowed the greater part of it, but apparently upon a view of the statute he had not considered that he would be justified in refusing the application altogether. Now, it seems to me that if we only look to buildings and population and leave out of view the possibilities of future extension, the case for revision is very weak indeed. It comes to this, that on three main roads leading in different directions out of the town houses have been put up for the accommodation of people who prefer a suburban villa and garden to a house in the town. But this is just what happens in the neighbourhood of every prosperous town, and if this were a sufficient reason for the revision of burgh boundaries, the revision would have to be made from year to year, or in any case at intervals not exceeding a few years. The burgh would then take the form of a central area with long arms extending in various directions. These are "circumstances of the case" which have to be taken into account, because in fixing the boundaries of a burgh regard must be had to considerations of symmetry and convenience.

In the case of the third or Flemington district there are indications of latent extension, while in the two other districts the extension is almost entirely linear. But the Flemington district is in my opinion too small in itself to justify a revision.

I have not been able to find in the other facts of the case reasons which outweigh the practical disadvantages to which I have referred. It is pointed out in the petition of the County Council that the proposed extension would not affect the administration of water supply and police.

The control of the water supply is vested by Act of Parliament in the District Committee of the Middle Ward, and the County Council furnish the police of the burgh. As regards drainage, the effect of the extension would be to vest the control of the drainage in a joint committee. This may be very proper if it be assumed that revision of boundaries is necessary, but it is not in itself an argument in favour of revision. For these reasons I suggest to your Lordships that the order of the Sheriff appealed from should be reversed, and that the existing boundaries of the burgh should be found to be the proper boundaries for the purposes of the Burgh Police Act 1892.

While we are under the disadvantage of not having the same knowledge of the locality as is possessed by the Sheriff of the county, it is satisfactory to know that our judgment gives effect to the impression of the Sheriff as to the merits of the application, although in the Sheriff's view of his duties under the statute he had not felt free to give effect to that impression.

Counsel for the petitioners moved for expenses in both Courts (*Clydebank* case, *cit. sup.*)

Counsel for the respondents opposed this motion (*White* v. *Magistrates of Rutherglen*, January 18, 1897, 24 R. 446, 34 S.L.R. 387).

The Court recalled the order of the Sheriff and found the petitioners entitled to the expenses of the appeal.

Counsel for the Petitioners — Clyde, K.C.—Blackburn. Agents—Ross Smith & Dykes, S.S.C.

Counsel for the Respondents—Wilson, K.C.—Wm. Thomson. Agents — Bruce, Kerr, & Burns, W.S.

Thursday, July 7.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

M'NAB *v.* FYFE.

Process—Appeal for Jury Trial—Proof or Jury Trial.

An action under the Employers Liability Act 1880 having been appealed from the Sheriff Court to the Court of Session for jury trial, the Court *refused* the appeal and *remitted* the case to the Sheriff for proof, upon the ground that on the face of the record the case was a small one and more suitable for proof in the Sheriff Court than for jury trial in the Court of Session.

Neil M'Nab, painter, 30 Hinshaw Street, Glasgow, brought an action against Robert Fyfe, painter, 61 St George's Road, Glasgow, in the Sheriff Court of Lanarkshire at Glasgow, under the Employers Liability Act 1880, concluding for payment of £300.

The pursuer was a journeyman painter in the employment of the defender, and averred that he was sent by the defender along with some other men to paint certain pillars in New City Road, Glasgow, and that to do so he had to go to the top of a 26-foot ladder.

The pursuer further averred—"(Cond. 2) Defender's foreman, following the usual custom in the trade in similar circumstances, posted another man below at the foot of the ladder to steady it. This was absolutely necessary for the safety of the man above, as the pillar was a round one, and afforded no firm or sufficient grip to the ladder, which required to be kept steady by a man below. (Cond. 3) While pursuer was painting said pillar as aforesaid his foreman ordered away the man at the foot of the ladder and replaced him by a young boy, who was not able to hold the ladder steady, with the result that it slipped from the pillar and fell to the ground, a distance of 26 feet, bringing the pursuer violently to the ground also, and severely injuring him. (Cond. 4) The said foreman or superintendent (whose name is unknown to the pursuer) is a person whose sole or principal duties are those of superintendence, and who is not ordinarily engaged in manual labour, and is also a person whose orders the pursuer and his fellow-labourers were bound to conform to. Said foreman was negligent in removing the man who was steadying the ladder, and replacing him by a young boy, who was manifestly unable to steady such a long and heavy ladder with a painter at the top, and it was in consequence of his negligent orders that the accident to the pursuer occurred. Pursuer was not aware of any alteration having been made, and continued at his work till the accident happened . . . . (Cond. 7) Pursuer sustained severe and extensive bruising of his right side, which has since totally incapacitated him from work of any kind. He has also sustained a very severe shock to his system, and has since the date of the said accident been under medical treatment, and it is likely that he will be incapacitated for work for a considerable time to come."

The defender denied the material averments of the pursuer, and pleaded that the action was irrelevant.

The Sheriff-Substitute (STRACHAN) allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

In the Single Bills the defender objected to the cause being tried by a jury, upon the ground that the averments of fault on the part of an unknown servant alleged to be a foreman were vague; that the injuries condescended on were trifling, and that in the whole circumstances it was not right that the defender should be subjected to the expense of a jury trial.

LORD PRESIDENT—On the face of the record this is a small case, and more suitable for proof in the Sheriff Court than for