

Saturday, January 12.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine,
and Banff.

M'COMBIE v. THE TOWN COUNCIL OF THE
BURGH OF PETERHEAD.

*Burgh—Gas Commissioners—Access to Books—
Burghs Gas Supply (Scotland) Act 1876 (39
and 40 Vict. c. 49).*

The town council of a burgh having constituted themselves the commissioners for regulating the supply of gas to the burgh under a statute empowering them to do so, appointed a special committee out of their number with full power to transact the business of the commission. Held that a member of the town council, who was as such also a gas commissioner under the statute, although he was not a member of the special gas committee, was entitled to have access to the whole books, accounts, and vouchers connected with the manufacture and sale of the gas.

The Town Council of Peterhead having adopted The Burghs Gas Supply (Scotland) Act 1876 (39 and 40 Vict. cap. 49), became the Commissioners for executing the Act as regulating the supply of gas in the burgh. In terms of section 8 of the Act, they annually appointed a committee of their number, called the "Gas Committee," with full power to transact the business of the commission.

This action was raised on 27th November 1882 by James M'Combie, one of the members of the Town Council in the capacity of one of the Gas Commissioners of the burgh under the statute, against the Town Council as Gas Commissioners, to have them ordained "to give him, as a commissioner foresaid, access (1) to the books and accounts kept by them in connection with the manufacture and sale of gas, under the powers and provisions of the said Act, from 4th November 1881 to this date [27th Nov. 1882]; and (2) to the vouchers of payments; and to exhibit the said books, accounts, and vouchers to the pursuer for his examination at all reasonable times during the hours of business, and for such period as the Court may fix, with expenses." M'Combie was not one of the members of the special committee appointed by the Town Council out of their number under section 8 of the Act. He averred that as a commissioner he was desirous of having the books and vouchers, for the period specified in the conclusions of the summons, kept by the defenders exhibited to him, with the view of ascertaining facts to enable him, as a commissioner, to judge whether gas could not be supplied to the community of Peterhead at a less price than that at which it was being supplied.

The defenders, in answer, explained that under section 15 of the Act the treasurer appointed by them kept the books and accounts, which contained a record of the moneys received and paid in connection with the administration of the Act. There was no provision made in the statute for the exhibition of these books and accounts to individual members of the commission. Section

16 of the Act provided that the Sheriff should appoint an auditor to audit the accounts of the commissioners, and that the whole books, accounts, and documents of the commissioners in relation to their undertakings should be laid before him for the purpose of such audit, and that thereafter the accounts should be submitted, along with the auditor's report, to a general meeting of the commissioners on the second Monday of July annually, and an extract from them printed and published. The Sheriff had periodically appointed an auditor, who had regularly done the work referred to by the statute. The whole books and accounts had been submitted to a meeting of the Town Council on the second Monday of July 1882, at which the pursuer was not present. They further explained that the business of the Gas Commissioners could not be carried on if the books were liable to be continually in the hands of individual commissioners or others, and averred that the action was frivolous and vexatious. Their treasurer was, they averred, willing to exhibit the books at any reasonable time, but the pursuer was not on friendly terms with him, and insisted in ignoring him in the matter.

The pursuer pleaded—"The pursuer being a commissioner under the said statute, is entitled to exhibition of the commissioners' books and vouchers, and decree ought to be pronounced as prayed for."

The defenders pleaded—" (1) The pursuer's averments are not relevant or sufficient to support the prayer of his petition, and the action should be dismissed with expenses. (2) There being no provision either by statute or common law for making the production claimed by the pursuer, the action should be dismissed with expenses. (3) The treasurer being the party required by the Act to keep the books containing the record of the moneys of the commissioners, application should be made to him by the pursuer for permission to examine them, and the present action as regards them should be dismissed."

The Sheriff-Substitute (W. A. Brown) dismissed the action.

"Note.—[After expressing doubt whether the proper remedy was not by action of declarator in the Court of Session.]—While giving judgment for the defenders, there is one point, however, in which they are clear in the wrong. Founding on the 15th, 16th, and 17th sections of the Act of 1876, providing for the keeping of books and accounts, and for the audit and balance of accounts, they urge that these are exclusive of any right on the part of the pursuer to have an opportunity of examining the books, &c., other than that which is provided by these clauses of the statute. I am without hesitation of opinion that that is not so. Whatever the pursuer's rights may be as to access to the books and accounts in question, they are not touched by these clauses of the Act, which are simply designed to place the financial affairs of the trust under distinct statutory control.

"Apart from this, there appear to me to be two general grounds on which the defenders are entitled to prevail, viz.—(1) that the pursuer has not averred a relevant case entitling him to the remedy he asks, assuming it to be competent for the Court to grant it; and (2) that he has not set forth a relevant case justifying him in appealing

to a court of law at all. I think that to qualify his right to the large demand which the pursuer makes in this action, he must be in a position to say something more than merely that an examination of the books and accounts will 'enable him, as a commissioner, to judge whether gas cannot be supplied to the community of Peterhead at a less price than that at which it is at present supplied.' It may be an altogether unfounded apprehension which the pursuer entertains. He alleges nothing by means of which the probability of his suspicion—for it amounts to little more—can be tested, and I apprehend a court of law will not be moved to grant a remedy of so extraordinary a character without some evidence or reasonable assurance that there is a wrong to be redressed. No doubt the pursuer urges that it is the withholding of the books from him that explains the dearth of his information; but it seems to me that in order to warrant a court of law in granting such an application there must be some specific dispute or question, not in a depending process (for the summary application would not then be necessary), but *de facto* in existence, which without access to the books and documents founded on could not be brought to a practical issue. In short, I am of opinion that it is not relevant to justify the interference of a court of law in the affairs of a statutory body such as the defenders, to allege merely that a probable result of inquiry will be to show that they are not administered with the highest advantage to the public. But the second of the general grounds above referred to appears to me to be a much simpler and safer basis on which to rest the judgment in the case." [*His Lordship then referred to the correspondence between the parties, and expressed the opinion that prior to the raising of the action the defenders had not distinctly refused to give the access claimed, and that the pursuer's proceedings were therefore premature.*]

The pursuer appealed, and argued that at common law he had a right, as one of the commissioners whose the books were, and as responsible to the inhabitants of Peterhead in the capacity of a commissioner for regulating the gas supply, to have access to the books, accounts, and vouchers in the defenders' possession relative to the manufacture and sale of the gas.

The Court, after hearing counsel, intimated that it was their opinion that the pursuer was entitled to access to the books of the defenders as concluded for, and continued the case.

On the 12th January the case was re-enrolled, and counsel for the pursuer, after stating that the access craved had been given to the pursuer in terms of the opinion of the Court, moved for expenses.

The Court thereupon pronounced the following interlocutor:—

"The Lords having heard counsel for the parties in the appeal, Sustain the same: Recall the interlocutor of the Sheriff-Substitute appealed against: Repel the first and second pleas-in-law for the defenders, but in respect access to the books and documents libelled has now been given, find it unnecessary to pronounce any order thereanent: Find the pursuer entitled to expenses in the Inferior Court and in this Court."

Counsel for Pursuer (Appellant) — Comrie Thomson. Agent—Alex. Morison, S.S.C.

Counsel for Defenders (Respondents) — Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, January 12.

FIRST DIVISION.

[Sheriff of Stirlingshire.

CLARKE v. MULLER.

Process — Expenses — Caution for Expenses — Bankrupt.

An action of damages for slander, raised by a bankrupt pursuer whose trustee declines to sist himself, is, though said to be raised for vindication of character, within the ordinary rule that a pursuer in such circumstances must find caution for expenses, but it is within the discretion of the Court to dispense with such caution being found. Circumstances in which held that an undischarged bankrupt, whose trustee refused to sist himself, was not entitled to sue an action for defamation of character without finding caution for expenses.

This was an action in the Sheriff Court of Stirlingshire at Falkirk, at the instance of Patrick Clarke, Glenyards, Greenhill, against C. W. M. Muller, Glenyards, Greenhill, concluding for £3 of damages in respect the defender had illegally deprived the pursuer of the use of certain premises let to him, and for £500 in name of damages for defamation of character.

The pursuer averred that on a date mentioned, the defender, who was his landlord, assembled his tenants at Glenyards farm, and read to them a letter purporting to have been written by the pursuer complaining of trespassers; that the defender then said in presence of certain persons— "Isn't that a nice complaint from a d—d scamp like that, that ran away from his former place at 12 o'clock at night without paying his rent, and that steals anything he can get about the place;" and stated that pursuer was a dishonest and dangerous person, and that "they," meaning pursuer and his family, were "bad" people. Further, that the defender, on a date mentioned, and in presence of certain persons named, said that the pursuer was a member of and belonged to a secret society, meaning thereby that the pursuer was a disreputable person and belonged to an illegal society.

The pursuer was an undischarged bankrupt, and the trustee on his sequestrated estate refused to sist himself as a party to the case.

The Sheriff-Substitute (BELL) ordained the pursuer to find caution for the expenses of process within a certain time.

"*Note.*—The general rule that a sequestrated bankrupt is not allowed to proceed as pursuer in an action without finding caution for expenses has been fully recognised—Bell's Com., 7th ed., vol. ii. p. 324–5, and cases therein quoted; also *Stephen v. Skinner*, May 31, 1860—and although it lies within the discretion of the Court to allow an exception from the general rule, the Sheriff-Substitute