

purposes of voting. I agree, however, with the Lord Ordinary's decision upon other grounds.

It has always been my understanding that in a sequestration a creditor might lodge and withdraw affidavits and claims until, as Lord Shand says, they were taken up by the trustee to be adjudicated on, or until they were taken over by him at the valuation put on them. If this be so, the question comes to be, has the creditor not the same power with regard to a second dividend? There is nothing in the statute restricting his right to withdraw. The only restriction is at the end of the 62d section—[reads]. If, then, the creditor can lodge a claim for the second dividend, is he not entitled in doing so to take into account the altered circumstances affecting his security? I do not say there may not be circumstances in which the depreciation of the security is due to the fault of the creditor, but where there is no fault on his part he is in precisely the same position as when lodging his first claim. For these reasons I think the appellants were entitled to re-value their security.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Jameson—Goudy. Agents—Watt & Anderson, S.S.C.

Counsel for Defenders (Respondents)—Dickson—Wood. Agents—Melville & Lindsay, W.S.

Friday, November 27.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

ASSETS COMPANY (LIMITED) v. GUILD (POTTER'S TRUSTEE).

Bankruptcy—Trustee's Commission—Fixing Remuneration of Trustee where only One Creditor—Directors of Limited Company—Ultra vires—Transaction—Bankruptcy (Scotland) Act 1856, secs. 125, 141.

The assets of a bankrupt who had been sequestrated under the Bankruptcy (Scotland) Act 1856, and whose sole creditor was the City of Glasgow Bank and liquidators, became vested, by virtue of a private Act of Parliament, in the Assets Company. The date of vesting was 30th December 1882. Between March 1879 and January 1880 there had been paid to the trustee upon the sequestrated estate four sums of commission, amounting together to £742, which were duly fixed by the commissioners in terms of the Bankruptcy Act. In April and July 1880 the trustee received two sums of £500 each, and in October 1881 and July 1882 two further sums of £250 each, to account of his commission, with the sanction and authority of the commissioners. In January 1881 the trustee received a further sum of £1050, in terms of an agreement with the liquidators of the bank, which was sanctioned by the Court. After the Assets Company had acquired the estates, negotiations were entered upon with a view to the final settlement of accounts between the trustee and the company. As the result of these negotiations, which were conducted by the

manager and law-agent of the company on the one hand, and the trustee on the other, the two former reported to the Finance Committee of the company that £1750 should be paid the trustee "for the balance of his commission." This was approved of by the committee on 12th March 1883, and of the same date confirmed by the company's directors. The trustee took credit for this amount in his accounts.

On 4th November 1884 the Assets Company presented a petition to the Lord Ordinary on the Bills, under section 86 of the Bankruptcy (Scotland) Act 1856, in which they averred that the commission charged was excessive; that the act of their directors in fixing the trustee's commission was illegal, because under the provisions of the 141st section of the Bankruptcy Act the commissioners were the only persons who could legally fix the trustee's commission; that it was *ultra vires* of the directors to do so; and that even if the agreement was valid, the words "balance of his commission" did not imply a ratification by the directors of what had been done in fixing the previous commissions. The petitioners asked the Court to fix the trustee's whole commission at £949, 19s. 3d. From a report by the Accountant in Bankruptcy, to whom a remit was made, it appeared that the commission paid to the trustee amounted in all to more than £5000; that the sums ingathered by the trustee amounted to £114,983, 8s., and that there was also a heritable property, valued at £75,000, which was by agreement made over to the Assets Company. *Held* (1) that the agreement between the directors and the trustee amounted to a transaction which could not be re-opened; (2) that in fixing £1750 as the "balance" of commission the directors of the petitioners' company had ratified the fixing of the previous commissions; (3) that it was not illegal for the directors to fix the trustee's commission, because there was not at the date when they did so a going sequestration in the proper sense of the term, the Assets Company being the only creditor; and (4) that under the articles of association the directors of the company had power, as a necessary act of management, to fix the commission. *Petition refused.*

Opinions expressed that the commission allowed was excessive.

The estates of Lewis Potter, merchant in Glasgow, one of the directors of the City of Glasgow Bank, were sequestrated under the Bankruptcy (Scotland) Act 1856 on 1st November 1878, and J. Wyllie Guild, chartered accountant, Glasgow, was appointed trustee.

The City of Glasgow Bank and the liquidators thereof were ranked as creditors on the estate for £6,356,683. The other claims on the estate amounted to £78,599, 19s., and by an agreement executed in March 1880 these claims were acquired by the bank and liquidators, who were thus left the sole creditors upon Lewis Potter's estate.

By virtue of the City of Glasgow Bank (Liquidation) Act 1882 (45 and 46 Vict. cap. clii.) the Assets Company (Limited) were vested with all the assets of the City of Glasgow Bank, the liqui-

dators having, in terms of the 3d section of that Act, executed a discharge in favour of the company, dated 12th October and recorded in the Books of Council and Session 30th December, both in the year 1882. The date of recording the discharge was by the Act declared to be the date of vesting.

As the realisation of the estate proceeded, the trustee took credit in his accounts for the following sums as commission, viz.:

1879. March 12.	£ 73 13 8
July 10.	277 18 0
Oct. 16.	6 2 0
1880. Jan. 15.	384 10 5
April 15.	500 0 0
July 13.	500 0 0
1881. Jan. 13.	1050 0 0
Oct. 14.	250 0 0
1882. July 11.	250 0 0
1883. March 13.	1750 0 0
	£5042 4 1

The account of charge and discharge of Mr Guild, the trustee from 1st January 1883 to 1st April 1883 bore the following docquet—"Glasgow, 13th April 1883.—We, commissioners on the sequestrated estate of Lewis Potter, merchant, Glasgow, one of the individual partners of the firm of Potter, Wilson, & Company, merchants there, having this day examined the foregoing account, and compared it with the relative vouchers and bank-book, find the same correct, closing with a balance in bank of Two thousand nine hundred and eleven pounds eight shillings and sixpence sterling, and in hands of trustee of Twenty-four pounds seventeen shillings and eightpence sterling.—JAS. CAMPBELL, Comr. JAMES HALDANE, Comr."

The mode in which the various sums of commission were fixed is detailed in the opinion of Lord Shand, *infra*.

This was a petition presented in the Bill Chamber on 4th November 1884 by the Assets Company under the 86th section of the Bankruptcy (Scotland) Act 1856. The said section provides—"The judicial factor, the trustee, and commissioners shall be amenable to the Lord Ordinary and to the Sheriff, . . . at the instance of any party interested, to account for their intrusions and management, by petition served on them." By the prayer of this petition the Court were asked to fix the commission and other charges for which the trustee was entitled to take credit in accounting with the petitioners for his intrusions, at the sum of £949, 19s. 3d., being £4092, 4s. 10d. less than the amounts charged in the accounts; or otherwise, to remit to the Auditor of Court, or other qualified person, to inquire as to the trouble which the trustee had had in the sequestration, and to report what in the circumstances would be a suitable commission.

The petitioners set forth the commissions charged by the trustee as follows:—

(1) Commissions on sums ingathered by trustee	£2242 4 1
(2) Commission in connection with stocks, shares, and other securities	1050 0 0
(3) Commission in connection with Udston, a heritable property belonging to the estate, &c.	1750 0 0
Total	£5042 4 1

They averred—(1) That this commission of £2242, 4s. 1d. was at the rate of 4 per cent. on sums ingathered, amounting in the aggregate to £55,842, and that the commission if charged in accordance with the table of fees, or with the rates usually charged and allowed in similar business, would only be £769, 6s. 3d.; (2) that the transfer of the stocks, shares, and other securities, amounting in all to £42,532, 12s. 9d., was not a transaction of such a character as to justify any commission, and that a fee of £21 would be ample; (3) that instead of the commission of £1750 the trustee was only entitled to a fee of £52, 10s. for his trouble in connection with Udston, &c., and a commission of £107, 3s. on the balance of his intrusions, amounting together to £159, 13s. These sums amount to £949, 19s. 3d., being the sum mentioned in the prayer of the petition.

The trustee maintained that his duties had been unusually difficult and laborious, that the commissions were reasonable, had been duly fixed, and could not be gone back upon. These grounds of defence appear very fully from the opinions of the Judges *infra*.

The Lord Ordinary (KINNEAR) on 15th January 1885 pronounced this interlocutor:—"Finds (1) that by agreement between the liquidators of the City of Glasgow Bank and the trustee and commissioners on the sequestrated estate of Lewis Potter, sanctioned by the Court, the professional remuneration of the respondent for the realisation and management of the assets, specified in a schedule annexed to the said agreement, was fixed at the sum of £1050; (2) that the sum of £1750, charged by the respondent as the balance of his commission as at 12th March 1883, was fixed by agreement between him and the Assets Company (Limited) as his commission for the management of the estate of Udston, and for all work done by him in the management and realisation of the estate not covered by previous commissions: Finds that the said agreements are valid and binding upon the petitioners and the respondent: *Quoad ultra* remits to the Accountant in Bankruptcy to examine the proceedings in the sequestration, and to hear any explanations which the parties may make to him, and to report whether the commission allowed to the respondent, other than the said two sums of £1050 and £1750, is excessive, and if so, what would be a suitable commission for work done by the respondent in the realisation and management of the estate not covered by either of the said sums.

"*Opinion.*—This petition is presented in very exceptional circumstances. The petitioners are not creditors in the sequestrated estate, but they have acquired right to the whole assets of the estate, which have been transferred to and vested in them by virtue of the City of Glasgow Bank Liquidation Act 1882. They are thus in right of the entire body of creditors, and their right to the assets necessarily carries with it a right to call the trustee to account for his intrusions in the administration of the estate. There is no special provision in the Act for the discharge of a trustee, and nothing to relieve him of the ordinary responsibilities of a trustee in bankruptcy. The petitioners as parties interested, and indeed the only parties interested, in the estate, have in my opinion the same title and interest which all or any of the

creditors would have had if the sequestration had been carried out to its conclusion in ordinary course, to require the trustee and commissioners to account for their intrusions and management in the conduct of the sequestration, under the 86th section of the Bankruptcy Act. It was decided in the case of *Burt v. Bell*, 1 Macph. 384, that a complaint at the instance of a party interested, that a trustee's commission had been fixed at an extravagant rate, was competent under the 86th section, and that it was no answer to say that the commission had been duly fixed by the commissioners under the authority of the statute. I should therefore have had no difficulty in following the course taken in that case, and remitting to the Accountant in Bankruptcy for inquiry. But there are two items of commission which appear to me to stand in an exceptional position, and as to these I am of opinion that inquiry is excluded by agreement binding upon the petitioners.

"The first is the item of £1050 for management and realisation of the assets acquired by the liquidators under an agreement between them and the trustee and commissioners, which was sanctioned by the Court in February 1881. By this agreement the liquidators purchased from the trustee and commissioners the whole unrealised estate of the bankrupt, with the exception of certain heritable properties, at a price of £42,532, 12s. 9d. It was one of the articles of this agreement that 'the professional remuneration of the' respondent as trustee 'for his management and realisation of the assets specified in the schedule' annexed to the agreement 'is fixed at the sum of £1050, which he shall retain from the price to be paid to him.' The agreement was carried out according to its terms, and the stocks and other property thus acquired by the liquidators ceased thenceforward to be part of the assets of the sequestrated estates, and became the property of the bank. If they were still extant, or in so far as they were still extant, when the City of Glasgow Bank Liquidation Act came into operation, they were transferred to the petitioners, not by the 6th section, which transfers assets held in trust for the bank by trustees in bankrupt estates, but by the 4th section, which transfers generally all the assets belonging to or vested in the bank or the liquidators. It is admitted that the price paid by the liquidators has been distributed as dividend. If the petitioners therefore have any interest in the agreement it is that they have taken benefit under it as coming in place of the bank, and they can no more be heard to challenge it than the liquidators could have challenged it, except upon such grounds in law as would justify the reduction of a contract. But no such grounds are averred—it is not said that the liquidators or the Court were deceived, or that any material facts have come to the knowledge of the petitioners which were not before the Court when the agreement was sanctioned. It is said that 'the transaction was not of such a character as to justify any charge of commission.' But this seems to be a misapprehension of the ground on which the payment was made, for it is not allowed as commission on the transaction with the liquidators, but as the respondent's remuneration for realisation and management of the assets purchased for the bank. If the averment that the sum allowed was extravagant were

assumed to be correct it would be irrelevant. But the contrary must in my opinion be assumed, not only because the amount of remuneration was fixed by persons exceptionally well qualified to judge of the matter from their knowledge of the circumstances, but because the agreement received the sanction of the Court, which determines conclusively in my opinion that it was a reasonable and proper agreement. I do not think it accurate to describe the sanction of the Court as *res judicata*, for there was no litigation and no judicial decision. But it supplements the defective authority of the liquidators, and makes the agreement valid and binding upon all parties interested.

"The other item which I think must be taken as finally determined is the commission of £1750, which was fixed by the petitioners the Assets Company themselves, or, which is the same thing, by the board of directors, as the respondent's remuneration for management in connection with the estate of Udston, and for any other services for which commission had not been already paid. It is admitted, and indeed averred by the petitioners that this sum, was fixed after negotiations between the respondent and the directors which resulted in the minute of 12th March 1883, mentioned in the petition. By letter of the same date Dr M'Grigor, who was then law-agent of the company, intimated to the respondent that the payment of £1750 had been approved of. The respondent accordingly paid himself that amount, and thereafter (in June 1884) executed a conveyance in favour of the company. It is said that this was not done in terms of the Bankruptcy Act. But the petitioners after the transference by virtue of the Act of Parliament had become the owners of the estate, and the only persons having any interest in it except the trustee, and it does not appear to me that any provision of the Bankruptcy Act can strike at an agreement made by them as such owners for the remuneration of the trustee from whom they took over the estate. It is said that the arrangement was *ultra vires* of the directors. But the authority of the directors is regulated by the articles of association, and the 53d article provides that 'the business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by Act of Parliament or by these presents declared to be exclusively exercisable by the company in general meeting or by special resolution.' The fixing of the trustee's remuneration was a necessary act of management in the conduct of the company's business, and it appears to me to be clearly within the power thus committed to the directors. It cannot be suggested that it was a matter to be determined in general meeting. It is said that it was in substance a present to the respondent. But the distinction is obvious. The directors had no power to give away the company's funds without consideration. But it was within their power and was their duty to fix the amount to be paid to the respondent in consideration of his services in the management of the estate. If they fixed his remuneration at too high a rate, that is an error to which the company must submit.

"The respondent maintains that the directors not only fixed the balance of his commission, but by the terms in which they did so homologated

the action of the commissioners in fixing the various amounts to which he had previously been found entitled. I think this contention is not well founded. By fixing the sum in question as the balance of commission the directors plainly implied that it was payment in full for all work done by the respondent not already remunerated by the commissions previously allowed. But it does not in my opinion follow that they thereby ratified what had been done in fixing these previous commissions."

The Accountant in Bankruptcy (G. A. Esson) reported on 4th June 1885 that the commission allowed to the respondent, other than the two sums of £1050 and £1750, was excessive, and that in the opinion of the Accountant a commission of 2½ per cent. on the receipts, other than those covered by these two sums, would be a suitable commission. The Accountant reported on the footing that these receipts amounted to £54,841, 19s. 1d.; the commission therefore to which the trustee was entitled was, on his view, £1371.

It appeared from the note appended to the Accountant's report that the sums ingathered by the trustee amounted in all to £114,983, 8s., and that there was in addition the estate of Udston, valued at £75,000, which was by agreement handed over to the Assets Company. It further appeared that the commission paid to the bankrupt amounted in all to £5118, 17s. 7d.

The Lord-Ordinary (TRAYNER) on 23d June 1885 pronounced this interlocutor:—"Finds the respondent, in accounting with the petitioners for his intrusions, is entitled to take credit, in name of commission and other charges (exclusive of the two sums of £1050 and £1750 referred to in the interlocutor of 10th January last), for the sum of £1371 sterling: Finds no expenses due, and decerns.

"*Opinion.*—The respondent in accounting with the petitioners, as now in right of the estate of the late Lewis Potter, for his intrusions as trustee on that estate, has taken credit for the sum of £5042 in name of commission and other charges, and the petitioners complain that that sum is excessive and ought to be restricted. The sum of £5042 is composed of three items, viz. :—

- | | |
|---|-------|
| 1. Commission on sums ingathered | £2242 |
| 2. Commission in connection with stock, &c. | 1050 |
| 3. Commission in connection with Udston | 1750 |

£5042

"This case, so far as concerns the last two items, has been disposed of by interlocutor of 10th January last, and by the same interlocutor a remit was made to the Accountant in Bankruptcy to examine the proceedings and to report whether the item of £2242 was excessive, and if so, to what extent. The report by the Accountant has now been lodged, and I have heard parties thereon. The result of that report is, that in the opinion of the Accountant the sum claimed or taken credit for by the respondent is excessive, being calculated at about 5 per cent. on the ingathered amount. The Accountant takes the amount ingathered as at £54,841, and on that he is of opinion the respondent should be allowed commission at the rate of 2½ per cent. or £1371. The report shows that the Accountant has considered the matter remitted to him with very great care and attention, and I have heard nothing on the

part of the respondent to induce me to differ from the conclusion which the Accountant has reached. If I gave effect to my own opinion, apart from the report, it would probably be in the direction of still further reducing the amount allowed to the respondent. But the petitioners are contented with the report and its result, and I therefore simply approve of the report and give effect to it in my interlocutor.

"As regards expenses, the respondent was, speaking generally, successful up to the date when the remit was made to the Accountant; since then the petitioners have been successful, if not entirely, at least to a very material extent. Instead of finding each party entitled to expenses, according to the success they have had respectively, I shall deal with the case as one of divided success, and find no expenses due to or by either party."

The practical effect of this judgment was to take £871, 4s. 1d. from the commission.

The petitioners reclaimed, and argued—It was conceded on the authority of *Burt v. Bell*, February 3, 1863, 1 Macph. 384, that a petition such as the present under the 86th section of the Bankruptcy Act was competent. The question of the respondent's commission had been finally settled by his agreement with the directors of the petitioners' company in March 1882, and could not now be re-opened. The word "balance" used in the minute necessarily implied that in fixing the sum of £1750 the directors ratified what had been done in fixing the previous commissions. This agreement was not *ultra vires* of the directors, because the fixing of the trustee's remuneration was a necessary act of management, and within the powers of the directors as specified in the 53d article of association. Nor was what the directors had done illegal in itself, because there was here no going sequestration or bankrupt who possessed a right of reversion, and therefore the rules of the Bankruptcy Act were not applicable. The commissioners whose duty it was under the Bankruptcy Act to fix the trustee's commission were merely the servants of the creditors, and could be dismissed by them—*Bell's Lect.* ii. 321; *Russell v. Taylor & Nicholson*, Nov. 26, 1869, 8 Macph. 219. The petitioners were the only creditors here, and it was in their power to do through their directors what they might have done through commissioners. Besides, if the consent of the commissioners on Lewis Potter's estate was required, they had it in the form of a docquet to Mr Guild's accounts, dated 13th April 1883. The Lord Ordinary had not given due weight to the word "balance," and had assumed that the sum of £1750 was fixed with reference to certain definite intrusions, whereas it was fixed not as a balance of intrusions but as a balance of commission. Valuing Udston at £80,000, then the total realisations amounted to £194,920, and the commission charged was £5042, or 2·58 per cent. This was not an unreasonable rate of commission, looking at other cases, and therefore the Court should not interfere—*Bruce v. Davenport*, July 7, 1825, 4 S. 151; *Boaze v. Craig's Creditors*, Dec. 3, 1829, 8 S. 175; *Thomson v. Wight*, May 31, 1834, 12 S. 660; *Lindsay v. Hendrie*, June 15, 1880, 7 R. 911.

The respondents replied—They were willing to acquiesce in the Lord Ordinary's interlocutor, but if the petitioners got behind that, then they would submit that there should be an inquiry

before answer into the whole case except with regard to the £1050. Assuming that there was a concluded agreement between the directors of the petitioners' company and the respondent, that agreement was illegal. There was here a sequestration which required to be carried *modo et forma* to the end according to the provisions of the Bankruptcy Act, although there was only one creditor. The commissioners were the only persons who could fix the trustee's commission, as provided by sections 125 and 141. No doubt if the petitioners' company as a body had made the agreement they would then have been barred *personali exceptione* from objecting, but the agreement would still have been illegal. But the company were not barred from challenging an illegal agreement which had been concluded by their directors. Moreover, even assuming the agreement to be legal, it was *ultra vires* of the directors. The consent of the commissioners had not been given because the docquet of 13th April 1883 was not appended *eo intuitu* to the respondent's accounts. If it had been intended to fix the commission, then there would have been a right of appeal, but a docquet to an account was not appealable. Besides, this commission was fixed by bargain, and not by percentage, which in *Lindsay v. Hendrie*, June 15, 1880, 7 R. 911, at p. 918, is stated to be the proper mode. Assuming that there was a valid agreement, the proper construction was that £1750 was fixed as a sum of commission on the balance of the respondent's intromissions, but it did not follow from that that the directors of the petitioners' company homologated what had been done in fixing the previous commissions.

At advising—

LORD SHAND—The question raised by this reclaiming-note is whether a sum of £871, 4s. 1d. has been properly disallowed from the amount which has been paid or taken credit for by Mr Wyllie Guild as trustee on the sequestrated estate of the deceased Lewis Potter. The total amount of commission which has been paid is £5042, 4s. 1d. Of this amount, Lord Kinnear, by his interlocutor of 15th January last held that two sums, amounting together to £2800, were fixed by agreements binding on the petitioners, and that accordingly any question relating to these sums could not now be raised so as to re-open the amounts of these commissions. In regard to the balance of £2242, 4s. 1d., his Lordship remitted to the Accountant in Bankruptcy to report whether the commission was excessive, and if so, what would be a suitable commission for the work done. The Accountant accordingly, dealing with this balance of £2242, 4s. 1d., has reported that the amount is excessive—that in place of that sum £1371 only should be allowed; and the Lord Ordinary (Lord Trayner) in giving effect to the Accountant's view has thus in effect disallowed £871, 4s. 1d. from the gross amount of £5042, 4s. 1d. paid to Mr Guild.

The various sums which have been paid to the trustee are enumerated in article 7 of the answers to the petition of the Assets Company. The first four of these sums, amounting together to £742, were duly fixed by the commissioners in that sequestration, in terms of the Bankruptcy Act, upwards of five years ago. In April and

each, and in October 1881 and July 1882 two further sums of £250 each—in all, £1500—to account of his commission, with the sanction and authority of the commissioners. The other two sums of £1050 and £1750, making up the full sum paid, were fixed under peculiar circumstances. As to the first of these sums it appears that the City of Glasgow Bank were creditors on Mr Potter's estate for upwards of £6,000,000, while the other creditors' claims amounted only to £78,000, and in these circumstances the bank having acquired the whole claims of these other creditors, became sole creditors on Lewis Potter's estate, and thereby sole owners of the estate under Mr Guild's administration, for obviously the bankrupt, Mr Potter, could never hope for a reversion as a possibility. The state of matters is thus mentioned in the petition by the petitioners, where they say "that the petitioners are now vested in all the assets of the said bank by virtue of the City of Glasgow Bank (Liquidation) Act 1882 (45 and 46 Vict. cap. 152), the liquidators having in terms of the 3d section of said Act executed a discharge in favour of the said company which is dated the 12th day of October, and is recorded in the Books of Council and Session on the 30th day of December, both in the year 1882. The date of recording said discharge was by said Act declared to be the date of vesting." So that this Assets Company, who carried on business under articles of association, and had a body of directors, had become vested with the whole assets of the City of Glasgow Bank, and with the sole right to Lewis Potter's estate under the administration of Mr Guild.

In these circumstances it appears that in January 1881 the liquidators of the bank arranged with Mr Guild that he should make over to them a great part of the bankrupt estate valued at upwards of £42,000 on the terms detailed in the agreement, and by article 3d of that agreement it was provided that "the professional remuneration of the said James Wyllie Guild, as trustee foresaid, for his management and realisation of the assets specified in the said schedule, is fixed at the sum of £1050, which he shall retain from the price to be paid to him under article 1." The agreement was sanctioned by the Court in the liquidation of the bank, and it has not been maintained that the petitioners can re-open the question of commission so far as regards the sum of £1050 so fixed.

Before the remaining sum of £1750 was fixed an important change had occurred. The City of Glasgow Bank in liquidation had ceased to exist, and the petitioners, the Assets Company, under the private Act of Parliament obtained by them in 1882, acquired right to the whole of the bank's assets, including their rights and interests in Lewis Potter's estate. In these circumstances it appears that the Finance Committee of the directors of the petitioner's company took up the question of fixing the amount of the commission due to Mr Guild, and we have a minute of that committee and a minute of the directors of the company, both dated 12th March 1883, which minutes express what was done between the parties. At the first of these meetings, at which there appear to have been present Sir James Watson, Messrs Wilson, Boyd, King, and Readman, all of them as directors of the Assets Company, Mr Cameron, manager, and Dr M'Grigor,

law-agent—Mr Readman in the chair—“Dr M'Grigor reported the result of his meeting along with Mr Cameron with Mr Guild as to his commission to be, that he would recommend £1750 should be paid Mr Guild for the balance of his commission as trustee on Lewis Potter's estate,” and that was approved of by the committee. That approval of the committee was reported to the directors at their meeting held on the same day, and we have an excerpt from the minute of meeting of that day also (12th March 1883), which is in these terms—“Present, Sir James Watson, Dr Kirkwood, Messrs Readman, Mackenzie, Russell, Wilson, Boyd, and King,”—a large representation, I presume, of the number of the directors—“also Mr Cameron, manager, and Dr M'Grigor, law-agent.—Mr King in the chair. The minutes of meeting of Finance Committee, held on 26th ulto., and the agenda of their meeting to-day, were read and confirmed.” Of the effect of these minutes in fixing that sum of £1750, and bearing that the directors fixed that sum, there can at all events be no question. The agenda of the meeting of Committee referred to in the last minute plainly embodies in substance that the Finance Committee did so-and-so, and the act of the Finance Committee became the act of the directors of the company.

Following upon this, Mr Guild, in his next account of charge and discharge, in the same month of March 1883, enters and takes credit for the sum of £1750 in these terms—“1883, March 13.—Trustee's commission in full on sums received by him, and for transfer of Udston estate to Assets Company (Limited), as fixed by the directors of that company, £1750;” and that item is passed in his account by the commissioners, conform to their docket in the following month, thereby implying the approval of the commissioners of the commission so given, for by their docket they bring out a balance in the hands of the trustee of £24, 17s. 8d. on the footing that that commission was to be allowed.

Now, it must be observed that this procedure took place in March 1883. In December 1882 the Assets Company had been vested with the whole assets of the City of Glasgow Bank, and therefore with the right to this estate, and the persons who transacted about this commission in March were, on the one hand, the owners of Potter's estate and the Assets Company through a committee of its directors, and on the other hand Mr Guild, who had made a claim for a larger sum than that which was ultimately allowed. The petitioners the Assets Company presented this petition so recently as 4th November 1884—that is, the petition which is the beginning of the present proceedings—and in it it appears that they demanded that the whole question of Mr Guild's commission should be re-opened. The prayer of the petition is expressed in this way, that the commission should be struck at a sum below £1000, or at such other sum as the Court may consider reasonable, or otherwise to remit to the Auditor of Court to inquire and report as to what would be a suitable commission or remuneration to the trustee for his services. Now, in answer to that petition or demand for a re-opening of the whole question of this commission, the leading question that is raised by the respondent's answers is, whether the Court can to any extent reconsider the amounts which have

been paid to Mr Guild, and should deal with them on the footing of deducting large sums from the payments to him. It is contended on behalf of Mr Guild that the matter of his commission has been finally settled by agreement between the parties, and that that agreement precludes the Assets Company from asking that the whole question of this commission shall be re-opened.

The determination of that point seems to me to depend upon what is to be regarded as the scope and effect of that arrangement between the Assets Company, through its directors, and Mr Guild, by which the sum of £1750 was fixed as the reduced payment of commission to him, or, I should say, as the balance of the commission due to him. I observe that the Lord Ordinary before whom this case originally depended—I mean Lord Kinnear—in his interlocutor of 10th January of this year, finds, as I have already stated, that the sums of £1050 and £1750 just mentioned had been fixed by agreement, and that so far as these sums were concerned the matter could not be re-opened; but his Lordship goes on in the interlocutor thus—“*Quoad ultra* remits to the Accountant in Bankruptcy to examine the proceedings in the sequestration, and to hear any explanations which the parties may make to him, and to report whether the commission allowed to the respondent, other than the said two sums of £1050 and £1750, is excessive, and if so, what would be a suitable commission for work done by the respondent in the realisation and management of the estate not covered by either of the said sums.” And at the close of his Lordship's note he says—“The respondent maintains that the directors not only fixed the balance of his commission, but by the terms in which they did so homologated the action of the commissioners in fixing the various amounts to which he had previously been found entitled. I think this contention is not well founded. By fixing the sum in question as the balance of commission the directors plainly implied that it was payment in full for all work done by the respondent not already remunerated by the commissions previously allowed. But it does not in my opinion follow that they thereby ratified what had been done in fixing these previous commissions.”

Now, as regards the view of the Lord Ordinary in the passage I have just read, I must say for my part that it is a point of considerable nicety. The expression which is embodied in the minute of the directors in March 1883 in regard to the fixing of the balance of Mr Guild's commission is this, that they would recommend that £1750 should be paid to Mr Guild for the balance of his commission as trustee on Lewis Potter's estate. It appears that Mr Guild was claiming a larger sum than that, and that the Assets Company, thinking the claim too great, endeavoured to induce him to accept a smaller sum. But whatever the sum was, it was to be fixed as the balance of commission, and it appears to me to be clear that in so fixing the balance of that commission the persons who were so fixing it must have had regard to the commissions that were previously paid to the trustee, and for this reason, that the previous commissions, with the exception of the £742 which had been fixed by the Commissioners in terms of the Bankruptcy Statute, and the £1050 which had been fixed by the Court in terms of the agreement with the City Bank, con-

sisted entirely of payments to account. There were two sums of £500 paid to account, and two sums of £250 paid to account. I confess I have the utmost difficulty in seeing how gentlemen settling up for the balance of commission could settle that question without looking before them to see what payments had been already given, and if they found these payments given to account only they must have taken these into view before fixing on what they call the balance of commission.

But I should rather be disposed to hold, without a remit to the Accountant in Bankruptcy, and without the light that the Accountant's report has given us, that there was a transaction between Mr Guild and these directors, in which they agreed to pay, and he agreed to accept, the sum of £1750 in lieu of the larger sum he asked as the balance of his commission, taking into view the payments to account, and to account only, that had been made in the previous years.

But it is unnecessary to put my judgment independently of the Accountant's report, for I find that after very careful investigation the Accountant in Bankruptcy reports to us, in substance, that in striking that balance Dr M'Grigor and Mr Cameron, who took the most active part in striking the balance of £1750 then allowed, did take into view the whole of the trustee's intrusions for a considerable time previously, and not the short period of time embraced in the accounts I have already referred to. The Accountant, in the passage which I have been reading from, says—"These gentlemen" (Dr M'Grigor and Mr Cameron) "appeared at a meeting before the Accountant on the 4th of May 1885. From their statements it appeared that they fixed what they considered a suitable commission for the whole intrusions of the trustee from 1st January 1880 down to the date of the agreement with him (12th March 1883), and for his trouble in connection with the estate of Udston, so far as not included in the annual management, for which the commission on the rents remunerated him." It is clear from the report as a whole that the Accountant's view is that that was the footing on which this sum of £1750 was fixed. If that be so, it appears to me to be clear, and I am accordingly of opinion, that the result of that transaction with Mr Guild was that the directors paid the sum of £1750 as the balance of commission due to him for his whole intrusions subsequent to 15th January 1880. And that exhausts every part of the commission except the four smaller sums amounting to £742, which were fixed by the commissioners in terms of the Bankrupt Act at a very early period in the history of this sequestration.

Now, that being the effect of the agreement, it has been maintained on behalf of the petitioners that although this agreement has been made by their own directors, the company are not bound by the acts of their directors, and that the Court shall disregard what the directors have done in the representation of the company in regard to the whole of this question. Now, upon this matter of the powers of the company I see there is a clause in the Assets Company's articles which it is necessary to keep in view, and which is in these terms. A short excerpt from the 53d article will be enough. It provides that "the business of the company shall be managed by the directors, who may exercise all such powers

of the company as are not by Act of Parliament or by these presents declared to be exclusively exercisable by the company in general meeting or by special resolution." Anything more ample in the way of powers given to directors could scarcely be conceived. They have all the power of the company itself, excepting only that they shall not exercise any powers which are not by the Act of Parliament itself or by the articles declared to be exclusively exercisable by the company alone by special resolution. And so, *prima facie* at least, it appears to me that the directors of this company were simply doing what they were authorised to do, and what it was their duty to do in the administration of its affairs. It may be that they have not exercised such vigilance in the fixing of this commission as they ought to have done, and if so, all that can be said is that the Assets Company having chosen these gentlemen as their representatives cannot now repudiate their acts. The only view in which it can be represented that the Assets Company can disregard an act done on their behalf is by alleging that the act performed was illegal in itself, and probably if the company were in a position to show satisfactorily that the directors were acting illegally, and that the matter had not been adopted or approved by the company, the acting must be set aside. But having given the question the best attention in my power, I have formed the opinion that the petitioners' contention as to the illegality of this proceeding is unsound. The point that was stated was this, that this was still a going sequestration, and that the Bankruptcy Statute of 1856 with reference to such sequestration provides special means by which commissions shall be fixed, that the persons to fix commissions are the commissioners who have that duty to perform in terms of the statute, and that if the commissioners disregard this duty the statute provides means for fixing these commissions otherwise. There would have been a great deal in that argument if the petitioners were right in saying that this was a going sequestration with a body of creditors waiting to get a dividend, and with, it may be, the bankrupt having a right of reversion; but taking the case as it stands, and looking to the peculiar position of the sequestration, I think that that argument entirely fails.

I have referred to the documents to show that the Assets Company were merely proprietors of Potter's estate, and that Mr Guild was in possession of it as trustee for a number of years previously, and in these circumstances what necessity was there for going to the commissioners to fix his commission, when the parties who were entitled to the whole estate, less what Mr Guild was entitled to receive, could have taken it over and allowed him to retain what he was entitled to. I think in the peculiar circumstances in which this sequestration stood, with only one owner of the estate, Mr Guild as administrator was quite in a position to fix lawfully with the Assets Company the amount of his commission, and the directors lawfully to fix it. Accordingly I am of opinion that the argument upon the illegality of the agreement fails; that this agreement has the scope and effect to which I have referred, and closes everything with regard to commission before the balance of £1750 was fixed.

It may be a question whether the £742 which had been paid on the dates at the earlier period of this sequestration which I have mentioned are to be regarded as having been also approved of by the directors of the Assets Company; but I assume that that is of no real consequence in the case, because I am of opinion that these commissions having been fixed by the commissioners under the statute, under the authority of the statute, and at the statutory periods, it would be improper for the Court to interfere with these amounts now. The commissioners had much better means of knowledge in regard to the details of Mr Guild's conduct, and the intromissions he had with the funds of the estate and the trouble connected therewith, than we can have, and as they would, no doubt, have all these before them when fixing these commissions, I think the Court would only proceed erroneously if it were to disturb them. I am therefore of opinion that we are precluded from interfering with or altering these commissions now.

I think it right, however, to say in closing that if this agreement had not been binding in the way in which I think it is, I might have been of another opinion, for I sympathise very much with the view which Lord Trayner has expressed, that the commissions on this estate have been very large indeed. It was stated by the Dean of Faculty at the close of his argument, and it appears from the figures which are given by the Accountant in Bankruptcy in his report, that the gross amount of the estates of Lewis Potter & Company, and of Lewis Potter as an individual, was about £312,000, and of that £312,000 about £75,000 was in heritable property, and yet on an estate of that amount the commissions which had been paid amounted to the sum of £9570, that is to say, £4452 on the company's estate, and £5118 upon the private estate of Lewis Potter, and I must say that it appears to me that that is what I may call an extravagant rate of commission. I quite believe what was said by Dr M'Grigor and Mr Cameron as to the matters regarding these estates involving a great deal of trouble and anxiety, and I do not doubt that it required a good deal of delicate investigation and management on the part of Mr Guild; but I must say that assuming all that, such a sum as nearly £10,000 to be given as commission on the intromissions and other work of the kind I have referred to is much beyond what I should have been disposed to sanction if open to us; but, as I have already said, the amounts of these commissions are fixed, and we are precluded by the agreements from disturbing them.

LORD MURE—The facts of this case as now explained by Lord Shand raise a question of some nicety for our consideration—the question whether the arrangement made in March 1883 by Dr M'Grigor and Mr Cameron, by which the balance due to Mr Guild, the trustee on Potter's sequestrated estate, on his commissions for the intromissions and management had by him in regard to that estate can now be opened up? and I am of opinion that they cannot. That matter appears to me to have been very carefully and deliberately gone about at the time by parties who were very competent indeed to deal with any such question, and in so dealing with it were

acting with the full authority and consent of the Finance Committee of the directors of the petitioners, the Assets Company, who upon a special report deliberately approved of what Dr M'Grigor and Mr Cameron had done. That is very clear indeed from the minutes which have been laid before us, and the proceedings of the petitioners at the time when Dr M'Grigor and Mr Cameron were appointed to deal with the matter, to which Lord Shand has referred, show that after these two gentlemen had carefully and deliberately gone into the whole matter they framed and submitted a report to the directors which was approved of, and we have before us the documents on which that was done in March 1883.

Now, it also appears from the passages to which we were referred during the discussion, and the proceedings before the Accountant, that Mr Cameron and Dr M'Grigor in coming to the conclusion to fix £1750 as the balance due, dealt with it as the balance due to Mr Guild as trustee for managing what they considered an estate of a very anxious and delicate kind. They may have been wrong in the conclusion they came to, but I have looked into the statement they made before the Accountant, and it is quite clear to me that whether right or wrong they most carefully and deliberately went over the whole conduct, intromissions, and management of the trustee before making up their minds that this £1750 was a proper sum to pay to Mr Guild. This they did in March 1883, and nothing more was heard of the matter till this petition was presented eighteen months after, when we have a demand to have the sum so fixed by Mr Cameron and Dr M'Grigor reduced to a sum somewhat under £1000. Now, although I think Mr Cameron and Dr M'Grigor made their calculation on too high a basis, it is perfectly plain that the statement of the petitioners is somewhat low, for they propose to allow somewhere under £1000 for the management of an estate of this magnitude and delicacy.

Then it has been objected that this mode of settling the claim was *ultra vires* of the directors of the company, and that they had no power to have it done in any other way than by going before the commissioners on the sequestrated estate of Lewis Potter to get them to fix the sum due to Mr Guild. Now, I quite concur in the views which have been expressed by Lord Shand to the effect that we are here dealing with a case in which there is this peculiarity, that there are no creditors, or at least only one creditor, and that this creditor is the Assets Company, who had right to the whole estate, and who could pay the trustee his commission without going to the commissioners in the sequestration to fix it. I think the Assets Company were quite entitled to fix Mr Guild's commission and to pay him the amount so fixed.

But further, it is said by Mr Guild that the directors had the power under their articles of association to do what they did here, because the 53d article of their association quoted by Lord Kinnear in his opinion provides that "the business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by Act of Parliament or by these presents declared to be exclusively exercisable by the company in general meeting or by special resolution." And I quite concur in the

view stated by Lord Kinnear, where he says in his opinion "that the fixing of the trustees' remuneration was a necessary act of management in the conduct of the company's business, and it appears to me to be clearly within the powers thus committed to the directors." Now, the company under their articles of association gave express power to the directors to deal with matters of that sort, and it seems to me that they dealt with this matter in this way—that their Finance Committee got a report from Mr Cameron and Dr M'Grigor, the manager and law-agent of the company, as to the way in which they should settle what sum was due to Mr Guild, and thereafter the directors themselves approved of that report and of what was recommended to be done, and accordingly they must be held to be foreclosed now from raising any such question as that now raised here.

On these grounds, and without expressing any opinion on the Accountant's report, I am of opinion that we ought not to interfere with what was done by the Assets Company so long ago, and that that company have now no right to open up this question, and that as the result of that opinion the petition falls to be refused.

LORD ADAM—I agree with your Lordships in thinking that the commissions allowed to Mr Guild were very extravagant, and if I could have seen my way to have the matter opened up and inquired into, I should have been very willing to do it.

I think the arrangement that was come to in March 1883, whereby the balance of Mr Guild's commission was fixed at the sum of £1750, is the only matter that we have to deal with here. Now that £1750 was paid by the company to, and was accepted by, Mr Guild as—I think the words are—the balance of his commission.

Now, there are two views or constructions of that agreement, that the balance may refer to the balance due subsequent to January 1880, after which date certain payments had been made to account, the one view being that it represents the balance at the date of the account, and the other view is that it goes back to the beginning of the matter and represents the balance of the whole commission paid to Mr Guild. These are the two possible constructions of the agreement.

If the first view be right, viz., that it only goes back to 1880, then it would include what has not been included in the sum of £1050, and that seems to me to be conclusive as regards that view.

If the second view is right, then it is quite clear that it was intended to cover the whole intrusions of the trustee from the beginning of the sequestration—that is, that he was to get this sum of £1750 in addition to what he had got before.

But then if the other is the correct view, I think with Lord Shand that the sum of £742 which was paid in four several sums down to 1880 were fixed by the commissioners on the sequestrated estate, and cannot be inquired into, and that the £1050 is in the same position. I think it is too late to have these matters opened up, and to have inquiry in regard to them. And in the other view, I think that the balance of £1750 was fixed by a concluded and binding agreement.

Now, if I understand it right, the contention

as to this agreement is this, that it was an agreement to fix the commission of a trustee in a sequestration; that when it is necessary to fix the commission of a trustee the proper parties to do that are the commissioners; that if it could have been properly done by the commissioners, then it would have been illegal for anybody else to do it; that the directors of the company got no power from the company to fix the commission; and that if it had been a properly going sequestration, with creditors claiming and waiting for a dividend, the commission ought to have been fixed by the commissioners. I think there would have been a great deal in this argument if the directors had gone out of their way to fix what they had no power to fix, viz., the commission due to the trustee, and a great deal to say in favour of the view that that was *ultra vires* of the directors. But that is not the case we have here. The case that we have here is that there is only one creditor. It is only a sequestration in name, where the whole estate belongs to the sole creditor the Assets Company. If you take that view of it, then I think the fixing of the amount of the commission to be paid to Mr Guild was a mere act of administration, and that it was not *ultra vires* of the directors to do so, and not being *ultra vires* of the directors, I am of opinion that it is a binding agreement, and that we cannot touch the commissions thereby fixed, and that the interlocutor of the Lord Ordinary must be reversed and the petition refused.

LORD PRESIDENT—The petitioners the Assets Company are the assignees of the City of Glasgow Bank and its liquidators. They took over, under the authority of their Act of Parliament, the whole remaining assets belonging to the City of Glasgow Bank, and among other assets which they thus acquired was a reversion which in reality was the entire estate belonging to the firm of Lewis Potter & Company and the individual partners of that company. Now, that estate was under sequestration, and Mr Wyllie Guild was the trustee, and when the Assets Company came to deal with that asset they found, in the first place, that it consisted to a certain extent of a sum of £42,000, which had been already paid over by Mr Guild as trustee to the City of Glasgow Bank, and under a minute of agreement by which that part of the estate had been transferred to the City of Glasgow Bank the commission of Mr Wyllie Guild in respect of that transaction was fixed at a thousand guineas. That agreement was submitted to this Court for approval, and was approved, and the whole matter in regard to that was completely fixed and settled before the Assets Company had acquired this estate at all. It is not said that that can be gone back upon.

But then there were other commissions that had been paid to Mr Wyllie Guild in respect of his services as trustee, and these consisted of several sums settled and fixed by the commissioners upon the sequestrated estate between March 1879 and January 1880, amounting in all to £742. That was one set of commissions that had been received by Mr Guild. Besides that there were also four different sums amounting in all to £1050 which had been paid to Mr Guild to account.

Now, in these circumstances, and with a view

to the final settlement of accounts between Mr Guild and the Assets Company, and to the complete realisation and transference of Potter's estate to the petitioners, negotiations were entered upon for the purpose of ascertaining whether any, and if so what, balance was still due to Mr Wyllie Guild in respect of his services as trustee upon the estate. These negotiations were conducted by Mr Cameron, the manager of the Assets Company, and Dr M'Grigor, the lawyer of the company, on the one hand, and Mr Guild, on the other. We do not know anything about the details of the negotiations between them, but it is quite apparent that there must have been a good deal of bargaining, if I may say so, between the parties, the result of which was that Mr Cameron and Dr M'Grigor reported to their constituents, the Finance Committee, that they were of opinion that there was still due to Mr Guild a balance of £1750 on his commission as trustee. Such are the terms of the minute of the Finance Committee, dated 12th March 1883. This was approved by the Finance Committee, and their approval was again submitted to the directors on the same day, and it was confirmed.

Now, the first question is, What is the construction of the arrangement thus completed and approved of? I think it amounts to a transaction, and if so, it cannot be set aside except on the ground of fraud. It is a transaction for this reason, that it proceeds upon the footing of giving and taking. One party is claiming a large sum, and the other party contend for a lower sum. At last they come to an agreement—whether it is by dividing the difference, or something else, still they come to an agreement—that the sum shall be fixed at £1750. That therefore, I think, cannot be gone back upon.

But then what does it mean? That the Assets Company undertook to pay £1750 as the balance of Mr Guild's commission. What does that mean? A balance means generally, if not always, a balance upon an account which has two sides, and such, I think was the intent and effect of these proceedings. They struck the balance between the value of Mr Guild's services on the one hand, and the amounts hitherto paid on the other, and the balance they found due was £1750. I think it is impossible to give that transaction any other meaning, and therefore it appears to me that the result, if it was a legal and effectual proceeding, must be that Mr Wyllie Guild was entitled to everything that he had previously received, and this sum of £1750 as the balance still due to him, just the same as if there had been an account of debit and credit made out, having on the one side the value of Mr Guild's services at the different periods at which they might be stated in the course of the sequestration, and upon the other side the amounts hitherto paid.

The only question then that remains is, whether this was a legal proceeding upon the part of the directors of the Assets Company? The Assets Company have by the 53d article of their association given to their directors very large powers indeed. They have given them power to do everything which is not either by Act of Parliament or by articles of association required to be done by a general meeting of the company, and if this is a legal proceeding there can be no doubt

at all that it fell within the powers so given to the directors.

But it is said the commission of a trustee upon a sequestrated estate can by Act of Parliament be fixed only by the commissioners in the sequestration, and to that proposition I assent. But then the question comes to be, whether in the present case, and at the date at which this arrangement was made, there was in fact a going sequestration, with the requisite machinery for fixing the commission of the trustee according to the forms required by the Act of Parliament? Now, we know in point of fact that at this date there was nobody interested in the estate of Lewis Potter & Company or Lewis Potter except the Assets Company, and they had absorbed the whole of it. It appears to me therefore that there could hardly be a going sequestration in any proper sense of the term, and just as little could there be commissioners duly representing the interests of a body of creditors, because these are the commissioners who are appointed by the Act of Parliament to fix the trustee's commission. The object of the Act is to prevent any underhand proceedings in the way of fixing remuneration of trustees, and to have a set of commissioners who shall represent not one body of creditors but the whole creditors in the sequestration. Now, were there such commissioners in existence at the date of the proceedings we are considering? I think not. I think there were no commissioners representing the body of creditors. If there were any commissioners at all, they seem to me to have been commissioners representing the Assets Company, who are the only creditors.

But the true view of the case in my opinion is that this is not a sequestration which is in a position to be regulated by the provisions of the Bankruptcy Act. It had passed that; and it had passed into this condition, that the trustee who had been trustee in the sequestration had become, by the operation of the clauses of the Act which we have seen, really trustee for the Assets Company, and for nobody else. Now, if that was the case there can be no doubt at all that the only party who was interested in fixing the commission of the trustee was the Assets Company, and I do not see how it could have been fixed in any other way than by agreement between these two parties, the only parties interested. And if that be so, then that removes altogether the supposed illegality of the procedure of the directors. If it had been an illegal proceeding—if there had been a going sequestration and commissioners in existence who could have fixed the commission of the trustee—I do not think the directors could have bound the company by entering into such an illegal transaction. But then the illegality disappears, I think, when you come to consider what is the true position of what had been the sequestrated estate, and the position of the trustee, and the sole remaining creditor of Lewis Potter & Company.

For these reasons I entirely agree with your Lordships in holding that the whole of this matter is settled by the transaction of March 1883; and we cannot therefore interfere, whether the remuneration which this trustee has received is extravagant or excessive or not. It certainly *prima facie* presents an aspect of extravagance, and if I am not mistaken, the percentage upon

the estate which this trustee has received is something over 3 per cent., about 3½, which is certainly far beyond anything that has ever been allowed on estates of this kind, taking the company's estate and that of the individual partner, Lewis Potter's, together. And therefore if we had not been precluded from investigating this matter I should have been prepared to go into it, but I am certainly not prepared to sanction what has been done without at least considerably more inquiry than we have had. But it is needless to pursue this consideration further, for we are all of opinion that the petition must be refused.

Petition refused.

Counsel for Petitioners—D. F. Balfour, Q. C.
—R. Johnstone. Agent—J. Smith Clark, S. S. C.

Counsel for Respondents—Gloag—Lorimer.
Agents—Davidson & Syme, W. S.

Friday, November 27.

SECOND DIVISION.

[Sheriff of Renfrewshire.]

PATERSON v. LINDSAY.

Reparation—Operations by Proprietor on his Own Ground causing Danger to a Neighbour—Blasting—Reasonable Precautions for Safety of those in the Neighbourhood.

A proprietor held liable for the result of blasting operations performed in his own grounds without sufficient care to prevent injury to persons in adjoining grounds.

James Paterson, who was employed as gardener in the Kilmalcolm Hydropathic Establishment, raised this action of damages for £100 against Robert Lindsay, in respect of injuries sustained by him, caused by some blasting operations which were being carried on by the defender on ground belonging to him and adjoining the Hydropathic establishment. The defender was engaged in making a new road to the farm belonging to him, and in order to do this blasting was necessary. His servants—Holmes and M'Killop—were in the habit of taking certain precautions in the blasting operations, partly by covering the blasts with planks and brushwood, and partly by making an "outlook" whereby they could see into the Hydropathic grounds, and they also made warning cries of "fire." On the 18th December 1884 the pursuer, when about 88 yards from the ground where blasting was going on, heard the cries of "fire," and being nervous from having previously repeatedly observed a fall of stones following the explosions, and uncertain as to the time which would elapse till the shot went off, he did not run to the tool-house, where he usually took refuge, but threw himself down behind a small dung-heap. He was struck by a piece of falling rock, and very seriously injured.

He averred that the accident happened owing to the negligence, carelessness, and fault of the defender, or of those for whom he was responsible.

The defender answered that the pursuer, although timeously warned, had unnecessarily and carelessly exposed himself, or at least failed to

take ordinary precautions to get out of danger or protect himself, and that his carelessness and negligence materially contributed to the accident.

Proof was led, in which, in addition to the facts contained in the foregoing narrative, it was established that the blasts were not sufficiently covered, that the "outlook" did not command the whole of the Hydropathic grounds, that the pursuer's position in the grounds was not seen on this occasion before the shot was fired, that no special warning was given to the pursuer that the shot was going to be fired, although M'Killop knew the pursuer was usually working in the garden.

The Sheriff-Substitute (SMITH) found, *inter alia*, as follows—" . . . (2) That the defender's servants, who were conducting the operations, did not take the precautions necessary to prevent danger therefrom; that they failed to ascertain the pursuer's proximity, although they knew that the charge could not be exploded without danger to anyone in the place where he was unless it was more efficiently covered. . . . (4) That the defender has failed to prove any fault on the part of the pursuer himself causing or materially contributing to the accident: . . . Finds in law that the defender is responsible for the conduct of his servants in exploding the charge without adopting the precautions necessary to obviate danger." He awarded £100 as damages.

On appeal the Sheriff (MONCREIFF) affirmed the judgment.

Note.—The Sheriff-Substitute has decided this case on the footing that negligence has been proved on the part of the defender's servants, who were conducting the blasting operations which resulted in the injuries to the pursuer which are complained of. The fault which he finds proved is twofold—first, that they failed to cover the charge effectually; and secondly, that although they knew that the charge could not be fired without danger, they did not take care to ascertain whereabouts the pursuer was before they fired it. After a careful consideration of the evidence the Sheriff is satisfied that these views are well founded. The mere fact of the occurrence of the accident affords in the circumstances *prima facie* evidence of negligence, the stone which hit the pursuer having struck him at a distance of about 100 yards, and descended upon him nearly vertically. It may be added that this was not a solitary occurrence, as it is abundantly proved that stones from the defender's property had frequently fallen before in the grounds in which the pursuer was working. Now, when the evidence is carefully examined, it will be found that practically the only witness brought to speak from his own knowledge to the sufficiency of the covering on the occasion is the witness M'Killop. Holmes, the defender's foreman, says—"I gave no instructions in regard to the preparation or covering of the blasts. M'Killop took all that in his own hands. He was a practical borer and blaster and quarrier." Now, M'Killop himself says that he would not have fired the shot if he had seen anyone at all in the Hydropathic grounds, as he would have been afraid of their getting hurt. Now, no special warning was given to the pursuer, although it was well known to M'Killop that he was usually working in the garden.