

that would have raised a very different question, and one which probably we would not have been able to decide in the same way as we have done the present case. I agree with your Lordship's analysis of the evidence. I think the evidence leaves no doubt that this was a proper partnership, and not an arrangement which is no doubt quite legal but rather unusual especially in businesses of a small class, that of appointing a manager with a salary proportioned to his share of the profits.

LORD KINNEAR—I concur with your Lordship, and also with Lord M'Laren, and have nothing to add.

The Court adhered.

Counsel for Pursuers and Reclaimers—D. F. Balfour, Q.C. — Dundas — Christie. Agents—Simpson & Marwick, W.S.

Counsel for Defenders and Respondents—Asher, Q.C.—Jameson—Wallace. Agents—J. & J. Ross, W.S.

Thursday, March 17.

SECOND DIVISION.

MACDONALD (CLERK OF THE COMMISSIONERS OF THE BURGH OF GOVAN) v. MICKEL AND OTHERS.

Burgh—Police—Assessment—Sewer Rate—Sinking Fund—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), secs. 196 and 384.

The General Police and Improvement (Scotland) Act 1862 provides, section 196, that the police commissioners of a burgh are entitled to "borrow for the purpose of making, enlarging, re-constructing, and maintaining sewers," on the security of the sewer rates, "such sums of money as the commissioners shall deem necessary for that purpose, and to assign the . . . rates in security of the money so to be borrowed," and declares that the provisions of the Act with regard to the borrowing of money and granting of bonds in security shall apply to money borrowed for purposes falling under this section.

Section 384—"It shall be lawful for the commissioners to borrow and take up for any of the purposes of this Act other than the construction, alteration, or maintenance of sewers as hereinbefore provided," any sums of money thought necessary. The commissioners are authorised "to assess all owners, or occupiers of premises within the burgh, respectively liable in the several assessments under this Act, in such additional assessments beyond the sums necessary for such respective purposes as will produce a fund equal to five per centum per annum upon the sum or sums so borrowed respectively, and also to the annual interest of such

borrowed sum or sums, which sum of five per centum per annum the commissioners shall annually appropriate, set apart, and invest . . . as a sinking fund applicable and to be applied by the commissioners from time to time to the repayment of the monies borrowed until the respective debts shall be extinguished."

The commissioners of a police burgh raised a sum of money upon the security of the special sewer rate of a separate drainage district, for the purpose of constructing sewers. The sewers were constructed, and the commissioners believing themselves authorised by section 384 of the General Police Act 1862, imposed an assessment upon the separate drainage district, which in their opinion was sufficient not only to pay the interest upon the borrowed money, but also to form a sinking fund for repayment of the capital within twenty years. Certain ratepayers objected to assessment, on the ground that it was *ultra vires* of the commissioners. *Held* that the assessment was legal, because either (1) section 384 of the statute applied to the matter of borrowing money for making sewers, and the commissioners had acted within the provisions of the statute; or (2) if it did not, section 196 imposed no directions as to the manner of borrowing, or the time within which the money was to be repaid; that therefore the action of the commissioners was not forbidden by the Act, and as an act of administration was within their powers.

Burgh—Police—Assessment—Sewer Rate—Deduction—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), sec. 100.

The General Police and Improvement (Scotland) Act 1862, section 96, provides "that when police commissioners resolve to make a new sewer, they may charge the owners of all the lands or premises liable to contribute to the rates for making the same with special sewer rates over and above any other assessment or rates to which such persons may be liable." Section 100 provides—"Where in the judgment of the commissioners any premises were sufficiently drained before the making of such new sewer, the owners thereof shall be entitled to have such deduction made from the special sewer rates to which they would otherwise be liable in respect of the making of such new sewer, having regard to the cost of making such new sewer and to the value and efficiency of such old sewer." . . .

The police commissioners of a burgh borrowed money on the security of the sewer rates for the construction of a new sewer within the drainage district, and in order to pay the interest on the sum borrowed and the capital within twenty years, the commissioners imposed an assessment of one shilling

and fivepence upon the whole drainage district. The full amount, however, was levied only from owners whose properties drained into the new sewers. The owners of properties which were drained into sewers existing before the construction of the new sewers received an abatement of one shilling and fourpence three-farthings. The ratepayers from whom the full amount was levied objected that the assessment ought to be levied equally over the whole district. *Held* that the abatement was within the competency of the commissioners, and was a matter of discretion with which the Court would not interfere.

The burgh of Govan was constituted in 1864 under the General Police and Improvement (Scotland) Act 1862, and thereafter the commissioners of the burgh managed its affairs under the provisions of that Act, including the construction, maintenance, and repair of the sewers in the burgh. In terms of section 185 of that Act the burgh was divided into separate drainage districts.

The special sewer rate within district No. 1, for the construction of new sewers, for the year 1884-85 was twopence per pound, subject in the case of the great majority of ratepayers to an abatement of one penny three-farthings per pound.

In 1884 and 1885 the commissioners resolved to construct two new sewers within the drainage district No. 1. The portion of this district which these sewers were intended to drain was then and at the date of this case mainly unbuild upon, but it was resolved to construct the sewers with the view to their serving the future requirements of that district, and in anticipation of the district being thereafter covered with buildings.

The cost of the construction of the sewers amounted to about £3080. In order to raise money the commissioners upon 12th October 1885 imposed a special sewer rate of sixpence per pound for the year 1885, the whole rate being payable only by such proprietors as used the sewers, the other proprietors being allowed an abatement of fivepence three-farthings in the pound.

In 1889, at the request of certain ratepayers within No. 1 district, the sewers were extended at a cost of £850. The whole amount expended the commissioners borrowed upon the security of the special sewer rates of the district. On 14th October 1889 the commissioners resolved to create a sinking fund to repay within twenty years the capital sum required to construct the sewers, with interest thereon. To provide that sum and interest the rate of assessment upon the ratepayers was fixed at one shilling and fivepence per pound. In arriving at this figure the commissioners had it in view to make the ratepayers whose property drained into the new sewer and its branches, and also the other ratepayers whose properties did not drain into the new sewers, bear the whole cost of construction, as follows—the former to pay the full rate of one shilling and

fivepence in the pound, and the latter to have a deduction of one shilling and fourpence three-farthings per pound leaving them to pay the rate which they had formerly been paying, viz., one farthing in the pound.

Objection having been made by certain ratepayers to the assessments imposed, this special case was presented by (1) Alexander Macdonald, clerk to and as representing the Police Commissioners of the burgh of Govan; (2) Robert Mickel, timber merchant, Glasgow, and others, whom the commissioners sought to make liable in the full assessment of one shilling and fivepence; and (3) John M'Intyre, portioner, Govan, who was assessed at the rate only of one farthing per pound.

The rental of the proprietors assessed at one shilling and fivepence was £3538, and the rental of those assessed at one farthing was £62,117.

The questions for the consideration of the Court were—“(1) Are the assessments of 1s. 5d. per £1 of rental imposed by the first parties legal assessments, and are the second parties bound to make payment of the same to the first parties? (2) Is the said assessment of 1s. 5d. subject to an abatement of 1s. 4d. imposed by the first parties upon the third party a legal assessment, and is the third party bound to pay the same to the first parties?”

The second parties stated that “they have represented to the commissioners that the said rate is very oppressive, indeed more than doubling the rates formerly imposed on their property; and if it must be imposed on them for twenty years it will prove a very serious financial burden. They have further represented that they are apprehensive that the magnitude of the rate will have the effect of preventing other proprietors from building on the vacant ground which the sewer was intended to drain, and thus deprive them of the relief which otherwise in course of time they might expect from the erection of new buildings and an increased assessable rental. . . . The second parties admit that the rate of one shilling and fivepence is fair if the proprietors who drain into the sewer and its branches are alone bound to defray all the cost, if the borrowed money must be repaid in twenty years, and if they must meet both principal and interest. The second parties, however, maintain that section 100 of the Act applies only to the case of a sewer which is constructed in place of an already existing sewer, and that the abatement of one shilling and fourpence three-farthings per pound allowed by the commissioners to the majority of the ratepayers in the district is not authorised by that section; and that if authorised, the section does not sanction an abatement which virtually amounts to a total exemption. Further, the second parties maintain that in respect that the sewer was constructed to supply the wants of a district which as yet is to a great extent unbuild upon, it is *ultra vires* of the commissioners to throw the whole expense of the sewer on the few proprietors who have buildings at

present within the district; that it is not expedient nor equitable on the part of the commissioners to limit the period for repaying the borrowed money to twenty years, and that there is no obligation upon the commissioners by statute or otherwise so to limit it. On the contrary, the second parties contend that section 384, while it provides for a sinking fund to repay borrowed money, expressly excepts money borrowed for the purpose of defraying the cost of construction of sewers, and that in any case an assessment to provide a sinking fund is a separate assessment from special sewer rate assessment, and must be levied equally from the ratepayers within the burgh, and at all events within the district. The second parties also contend that even if the commissioners are bound to repay the borrowed money in twenty years they are entitled, and in fairness bound, to relieve the second parties and those ratepayers in the same situation as much as possible. They contend that the statute does not impose an obligation upon the commissioners to repay money borrowed to defray the cost of construction of sewers out of the special sewer rate alone, and that the commissioners are entitled to give the relief asked for by levying part of the cost of construction of the sewer as 'general sewer rate.' These arguments, so far as they affect the ratepayers whose properties do not drain into the new sewers, are opposed by the third party, who maintains that, failing total immunity from special sewer rate being conferred on such ratepayers, as contended for in the preceding article, the restricted assessment already imposed on such ratepayers by the commissioners exhausts their statutory powers."

The General Police and Improvement (Scotland) Act 1862, sec. 96, provides—"They (the commissioners) may charge the owners of all the lands or premises liable to contribute to the rates for making the same, with special sewer rates over and above any other assessment or rates to which such persons may be liable under this Act, and such rate shall, for the purposes of this Act, be called the 'Special Sewer Rate.'

Section 100—"Where, in the judgment of the commissioners, any premises were sufficiently drained before the making of such new sewer, the owners thereof shall be entitled to have such deduction made from the special sewer rates to which they would otherwise be liable in respect of the making of such new sewer, having regard to the cost of making such new sewer, and to the value and efficiency of such old sewer; and whenever any old sewer is enlarged, or open sewer closed, the expense of such enlargement, or of closing such open sewer, shall be defrayed in like manner as if it had been incurred in making a new sewer."

Section 196—"It shall be lawful for the commissioners to borrow for the purpose of making, enlarging, re-constructing, and maintaining sewers, and on the security of the said special sewer rates and general sewer rates, such sums of money and at

such times as the commissioners shall deem necessary for that purpose, and to assign the said special sewer rates and general sewer rates in security of the money to be so borrowed; and the provisions of this Act, with respect to the borrowing of money and the granting of bonds therefor, and the transference and recording of such bonds, shall be applicable to the borrowing of money for the purpose of making, enlarging, re-constructing, and maintaining sewers; and the bonds to be granted for the money so to be borrowed shall, *mutatis mutandis*, be in the form, as near as may be, set forth in this Act, for bonds to be granted for money borrowed under the general powers of this Act, and shall constitute a lien over the special sewer rates and general sewer rates thereby assigned, and shall entitle the creditors therein to recover the sums thereby due from the commissioners and their officers out of the first and readiest of the said special and general sewer rates."

Section 384—"It shall be lawful for the commissioners to borrow and take up, for any of the purposes of this Act other than the construction, alteration, or maintenance of sewers as hereinbefore provided, or for repayment of any monies borrowed for such purposes under this or any former Acts, which shall have fallen due to the lenders thereof, such sum or sums, and at such time or times as the commissioners shall deem necessary for such purposes: Provided always that in all cases where it shall be necessary to borrow any sum or sums for the said purposes of this Act, it shall be lawful for the commissioners, and they are hereby authorised and required at their first annual meeting for assessment after such borrowing, if the respective rates of assessment then leviable do not amount to the respective maximum rates by this Act authorised, to assess all owners or occupiers of premises within the burgh respectively liable in the several assessments under this Act in such additional assessments beyond the sums necessary for such respective purposes as will produce a fund equal to five per centum per annum upon the sum or sums so borrowed respectively, and also to the annual interest of such borrowed sum or sums, which sum of five per centum per annum the commissioners shall annually appropriate, set apart, and invest at the highest rate of interest which can be had for the same, in the public funds, or in any chartered or other bank, or on heritable security, as a sinking fund, applicable, and to be applied by the commissioners from time to time to the repayment of the monies borrowed until the respective debt shall be extinguished."

At advising—

LORD TRAYNER (who delivered the opinion of the Court)—The questions submitted to the Court under this special case relate to certain rates or assessments which the first party has imposed on the second and third parties in respect of new sewers which have been laid down in the burgh of Govan. No question is raised as to the

regularity of the proceedings adopted by the first party either as to making the sewers or imposing some assessment therefor. The point raised by the first question is as to the right of the first party to impose an assessment for the new sewer at such a rate as will enable them to pay off the whole expense incurred in connection therewith in twenty years; and the second question relates to the deduction allowed off the assessment so imposed to persons whose property was sufficiently drained before the new sewer was made.

The answer to the first question depends upon the meaning and effect of sections 196 and 384 of the General Police Act of 1862 which has been adopted (at least so far as concerns questions of drainage) by the burgh of Govan. The first of these sections (196) makes it lawful for the first party to borrow money for the purpose of making sewers on the security of the sewer rates, and declares that the provisions of the Act with respect to the borrowing of money and granting security therefor shall be applicable to the borrowing of money for the purpose of making new sewers. The only clause of the Act which makes provision for the borrowing of money and granting security therefor is the 384th, and it authorises persons in the position of the first party in fixing their assessments with a view to pay off the expenditure made or debt incurred, to impose such additional assessment (under a certain limit which has not here been exceeded) "beyond the sums necessary for such respective purposes as will produce a fund equal to five per centum per annum upon the sum or sums so borrowed respectively," that is—in other words to impose such assessments as will enable them to create a sinking fund which in twenty years will be sufficient to pay off the debt and interest thereon. If this clause is applicable to the expense incurred by the making of new sewers then the first party has acted admittedly within the powers conferred by the Act, and the first party has, as is stated in the case, acted on the footing that that section is applicable. But this clause (384) commences with the declaration that it applies to the borrowing of money "for any of the purposes of this Act (other than the construction, alteration, and maintenance of sewers as hereinbefore provided," which makes it difficult to hold that the provisions of that clause apply to the borrowing of money for the purpose of constructing sewers which is in terms excepted from the operation of the clause. The Act therefore presents this difficulty.—It authorises the borrowing of money for making sewers, according to the provision made with reference to the borrowing of money for other purposes under the Act, and in the clause making these provisions it excepts from its operation the borrowing of money for the construction of sewers. I suppose the exception in clause 384 was inserted *per incuriam* under the idea that the matter thus excepted, had already been specially provided for in an earlier clause. However that may be, I think this pecu-

liarity in the provisions of the Act does not present any formidable difficulty in reaching the proper answer to the first question. Either clause 384 applies to the matter of borrowing money for making sewers, or it does not. If it does, there is an end of the question; the first party in that case have acted strictly according to the direction or provision of the Act. If it does not, then under section 196 the first party is authorised to borrow money to meet the expense of making sewers, and to pledge the sewer rates therefor without any direction whatever as to the manner of borrowing or the time within which the borrowed money is to be repaid. In that case the proceeding of the first party in imposing an assessment sufficient to pay off the borrowed money by means of a sinking fund in twenty years is not forbidden by statute, and as an act of administration would be within their power, and does not in itself seem open to any good objection.

The second parties further object to the full assessment being laid upon them, while a mere fraction of the assessment, practically, is imposed upon other proprietors or ratepayers in the same drainage district, while these last-mentioned proprietors or ratepayers (represented by the third party) object to their being burdened with any part of the assessment. This brings me to the second question.

The power of the first party to impose the special sewer rate in respect of the construction of any new sewer, on all owners within the drainage district where the new sewer is made, cannot be questioned. Such power is directly conferred by section 96. The whole assessment in question could therefore have been validly imposed on the class represented by the third party, unless they could shew that in the circumstances they were entitled to some deduction therefrom. But section 100 provides for such a deduction. It provides that the owners in the drainage district in which the new sewer is made, and whose premises were "in the judgment of the commissioners" sufficiently drained before the making of the new sewer, shall be entitled to a deduction from the assessment, and in fixing upon the amount of the deduction to be allowed the commissioners are directed to have regard to the cost of making the new sewer, and the value and efficiency of the existing drainage. Now, it appears to me that the first party have acted in precise conformity with these statutory directions. They have imposed the assessment upon all the owners in the drainage district, but to those whose drainage was in their judgment sufficient before the new sewer was made they have allowed the deduction which the statute authorises. It would appear at first sight as if the commissioners in the present case had allowed such a large deduction in favour of the third party as to amount to an exemption practically from the assessment altogether. Even had this been so, I think the Court could not have interfered with the judgment and discretion of the commissioners

in that matter—a matter left to their judgment by the statute, and one which they are better able to determine from local knowledge than the Court could be. But from explanations given at the bar it appears that the class represented by the third party actually pays (on the reduced assessment) about two-thirds of the whole assessment, while the second parties burdened with the whole rate only pay the remaining third. On the whole matter, therefore, it appears to me that the proceedings of the first party have been quite regular and within their competency, and that both questions put to us should be answered in the affirmative.

The other Judges concurred.

Counsel for the First Party—Salvesen.
Counsel for the Second Party—Shaw.
Counsel for the Third Party—C. N. Johnston.
Agent—Marcus J. Brown, S.S.C.

Wednesday, March 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

FALCONAR STEWART v. WILKIES.

Succession—Disposition of Property under Conditions—Real Burden—Obligation.

A person disposed heritable estate to persons in a certain order of succession “under this declaration, burden, and condition, that in the event of any part of the said lands and estate . . . that may remain unsold at my death being thereafter sold or disposed of or exchangd by any proprietor or possessor of the same, or adjudged or attempted to be adjudged or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands . . . if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of G. F. as may then be in existence, or to their heirs equally to and among them, the sum of £10,000.” . . . One of the proprietors of the estate under this disposition gratuitously disposed it to a line of heirs so that shortly the estate would be given to a person not within the line originally pointed out.

Held that there was an obligation upon such person on succeeding to the estate to create a real burden over it for the sum of £10,000 in favour of the children of G. F. or their heirs.

Miss Elizabeth Dalyell died unmarried upon 18th April 1861. She was proprietrix of one-half of the estate of Binns in Linlithgowshire, her brother Sir William Cunningham Dalyell having acquired right to the other half. After her death, however, it was agreed between her trustees and Sir

William Cunningham Dalyell, with concurrence of all concerned, that the whole estate should be settled in the manner directed by her trust-disposition and settlement dated 21st November 1853, and with codicils dated respectively 12th March 1860 and 3rd May 1860 registered 26th April 1861. That trust-disposition and settlement, by which after satisfying certain other purposes the liferent of the free residue of the estate was given to Sir William Cunningham Dalyell, contained the following clause—“And upon the death of the said Sir William Cunningham Dalyell I direct and appoint my said trustees to dispone, convey, and make over the lands and estate, and others before described, or such parts and portions thereof as may now or then remain unsold, and shall be adjudged and belong to or be vested in them or their foresaids as trustees foresaid, or to which they shall have acquired right as aforesaid, to and in favour of Robert Dalyell [Sir William’s son] and his heirs, whom failing to and in favour of Osborn Dalyell [another son of Sir William] and his heirs, but with and under this declaration, burden, and condition, that in the event of any part of the said lands and estate of Binns and others that may remain unsold at the time of my death being thereafter sold or disposed of or exchangd by any proprietor or possessor of the same, or adjudged or attempted to be adjudged or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands adjudged, and to be conveyed by my trustees in manner aforesaid, if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of George Falconar as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000 sterling. . . . And with this declaration, that in the event of a sale or excambion of any part of the said lands and estate of Binns and others that may remain unsold at the time of my death, or of the same being adjudged or attempted to be adjudged as aforesaid, the said two bequests to the children of the said George Falconer, and their heirs, and [another bequest] shall then be real preferable liens and burdens upon such parts and portions of the said lands and estate as are now directed to be adjudged and conveyed, and are to be adjudged and conveyed by my said trustees in manner foresaid, or upon the price thereof, if sold: And all these burdens, conditions, and declarations shall be inserted in any conveyance whatever of the same to be made and granted by my said trustees or their foresaids, as above directed, and shall be appointed by them to be inserted in all future transmissions and investitures of the said lands and estate for ever, and shall be inserted in the instrument of sasine to follow upon said conveyance by my said trustees or their foresaids, which instrument of sasine shall forthwith be expedd, completed, and recorded by and at the sight of my said trustees or their