

the ground that the part of the parish thus proposed to be taken from Crawford and added to Leadhills would be very much inconvenienced by the change, and the people would have a much longer road to travel to church than they had at present.

A. R. CLARK and WATSON for petitioners.

The LORD PRESIDENT—The Court are not prepared to sanction the proposed boundary. The sole object of adding these fifteen square miles, containing these fourteen families, to Leadhills district, is to enable the petitioners to carry out their scheme of provision for stipend to the Leadhills minister, and it is plain that but for that purpose no one would have thought of including it in the proposed new parish. It will be for the petitioners to say whether they desire to amend their boundary.

The petitioners were accordingly allowed time for consideration.

Agents for Petitioners—Marshall & Stewart, W.S.

Agents for Objectors—Mackenzie & Kermack, W.S.

Wednesday, June 19.

MINISTER OF CERES v. THE HERITORS.

Teinds — Augmentation — Valuation — Declarator.

Procedure in an augmentation sisted to allow minister to bring a declarator to try the validity of a valuation which had been acted on for a long series of years; following precedents of *Kilbirnie* and *Stracathro*.

The Rev. J. C. C. Brown, minister of the parish of Ceres, in the county of Fife, with a present stipend of 16 chalders, modified in 1823, raised a summons of augmentation, modification, and locality, against the heritors.

DUNCAN, for the minister, asked the Court to grant an augmentation of 4 chalders, stating that, although the last augmentation had been fixed on the footing that it exhausted the free teind, and the minister had for years been accepting less than he was entitled to, on the footing that there were not sufficient teinds, it was now ascertained that the valuation led in 1631, on which, as a good valuation, parties had proceeded, was defective in various respects.

JOHN MARSHALL, for the Earl of Glasgow, opposed.

LORD PRESIDENT—This is in the position of a case which was before this Court not long ago, in the time of Lord Colonsay, when the Court came to the conclusion, after full argument and consideration, that when a decree of valuation had been acted on and recognised for a long series of years, and it was necessary for the minister to set it aside in order to show that there was free teind, the proper course was to sist procedure until an action of declarator was brought by the minister. The course here will be to pronounce an interlocutor in the same terms as that pronounced in the previous case.—(*Minister of Kilbirnie v. Earl of Glasgow*, 19th December 1866, 5 Macph., 195; and *Minister of Stracathro and Dunlappie v. The Heritors*, ante, vol. iv., p. 163.)

Agents for Minister—Adamson & Gulland, W.S.

Agents for Earl of Glasgow—Marshall & Stewart, W.S.

COURT OF SESSION.

OUTER HOUSE.

LORD KINLOCH.

MACKENZIE & SUTHERLAND v. HENDERSON.

Road—Road Trustees—Contractor—Repair. Petition by road trustees to have a road contractor ordained to repair certain alleged defects in the condition of the road at the termination of his contract dismissed, there being no proof of any specific fault on the part of the contractor.

In 1861 Donald Mackenzie, road contractor, entered into an agreement with the Commissioners of Highland Roads and Bridges, represented by Mr Joseph Mitchell, then general inspector, for repairing and keeping in repair the Dunbeath Road, in the county of Caithness, for the space of two years from 1st May 1861. The deed of agreement bore that Mackenzie was to keep and have in repair at all times during the two years the said road, and leave the same at the end of that time in repair, in terms of the annexed specification, and to execute in each year the whole works and repairs therein specified. George Sutherland, farmer, Mains of Thrumster, bound himself as cautioner for Mackenzie. Mitchell, on the other hand, on the part of the commissioners, was to pay to Mackenzie the sum of £970, 4s. in eight equal instalments of £121, 5s. 6d. each, the first instalment to be paid in August 1861, the second in September, the third in December, and the fourth in June 1862, provided certain specified repairs were duly executed at these several dates; and for the remaining year the four instalments were to be paid at the same periods, "provided, on examination and report by any one of the sub-inspectors of the said commissioners, the said work shall have been found to be duly executed; it being hereby expressly conditioned and declared that unless the specified quantities of work are found executed at the period above-named, the instalments then due shall lie over, in the hands of the said commissioners, until the said repairs shall be executed by the said second party, his cautioner, or their foresaids; and also, that unless at the period above-named, and at the expiration of the foresaid space of two years, the whole repairs are properly executed, the defects shall be valued by any one of the sub-inspectors whom the said general inspector shall appoint, and the amount deducted from the agreement price." The agreement declared the true meaning of the contract to be, that the said road and bridges, parapets, breast walls, retaining walls, drains, water-courses, and all other works, were to be put, kept, and left in perfect repair, and so that the commissioners should not have to pay more than the stipulated price for the work. If Mackenzie failed in performing the repairs, or in giving his due personal attention to them—"of all which circumstances the said general inspector shall be sole judge"—the contract might, in the option of the commissioners, terminate at the end of the first year.

The relative specification contained the details of the work to be done at the different periods of the year, and stipulated that "the whole of the foresaid works must be performed in a substantial and workmanlike manner, agreeably in all respects

to this specification, and the following statement of quantities of work, and to the satisfaction of the inspector of the commissioners for the time being, who shall be sole judge of the nature and extent of the work that is to be performed under this specification." Then followed a statement of materials.

Mackenzie entered upon the work, and regularly received the first seven instalments on reports by Mr George Rhind, sub-inspector, and warrants by Mr Mitchell, inspector-general, the seventh instalment being paid him in December 1862.

By the Highland Roads and Bridges Act 1862, the roads which had been under the charge of the Commissioners, including the Dunbeath Road, were from 31st December 1862 transferred from the Commissioners to the trustees appointed by the Caithness Road Act of 1860. Section 7 of the Act 1862 enacted that the several contracts for the maintenance and repair of the roads enumerated in Schedule A, appended to the Act (the Dunbeath Road being included in said schedule), entered into by the Commissioners, being then in force, should, from and after the said date, be binding on and enforceable against the parties to whom the several roads were transferred.

Mackenzie's contract terminated on 30th April 1863. He did not receive payment of the last instalment of the contract price. On 27th July John Henderson, W.S., clerk to the Caithness Road Trustees, presented a petition in the Sheriff-Court at Wick, setting forth that Mackenzie had wholly, or in great measure, failed to perform his duty under the said contract; that the drains were choked up; the bridges and parapets not duly pointed; and many other repairs neglected; that the trustees, on learning that Mackenzie had so largely failed in his duty, had withheld from him the last instalment of the contract price, and called on him to put the road and works into repair.

The petition prayed the Sheriff, if the facts averred were denied, "to remit to a person or persons of skill to inspect the said road, the bridges and other works before specified connected therewith, and to report thereon; and thereafter, and on probation or admission of the facts alleged, or if the respondents shall fail to appear, to find" that Mackenzie had failed in his part of the contract, and to ordain him and his cautioner forthwith to implement the agreement; or otherwise to grant warrant to the petitioner to have the repairs executed at the expense of the respondents in the petition. Answers were lodged for Mackenzie and Sutherland. On 8th August Henderson lodged a minute stating that it was of importance to have the state of the Dunbeath Road forthwith inspected under the authority of the Court, so that there might be evidence of its present condition, and craving a remit to a person or persons of skill to examine and report upon the condition of the road and works pertaining thereto, with special instructions to such inspector or inspectors to report whether any existing defect apparently resulted from neglect during the period of the contract of Mackenzie, and prior to 1st May last, or to neglect subsequent to that date. The respondents in the petition objecting to this proposal, no judicial remit was made. The case was then remitted to proof. A great deal of evidence was led as to the condition of the road. Thereafter, on 22d June 1865, the Sheriff-substitute sustained the defences, dismissed the application, and found the petitioners liable in expenses. To this interlocutor was appended an elaborate note going minutely into the evidence, and

stating the whole grounds upon which the Sheriff-substitute held that the complaint in the petition was unfounded.

On a reclaiming petition, the Sheriff reversed.

The contractor, Mackenzie, and his cautioner then brought an advocacy in the Court of Session.

The Lord Ordinary (KINLOCH) pronounced this interlocutor:—

"*Edinburgh 9th January 1867.*—The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the process, proof, and productions, Advocates the cause: Recals the interlocutors of the Sheriff brought under review: Finds it proved, that by memorandum of agreement, dated 5th September and 2d October 1861, the advocator Donald Mackenzie became bound, under the conditions and stipulations therein specified, to keep in repair the Dunbeath road, therein described, for a period of two years from 1st May 1861, for a sum of Nine hundred and seventy pounds four shillings, payable in eight equal instalments, as therein set forth: Finds it farther proved that, on reports made as to the sufficiency of the work by the inspector or inspectors employed to take cognizance of the same, the advocator was paid seven of the eight instalments stipulated for, being those falling due down to 31st December 1862, leaving unpaid the instalment effeiring to the period between that date and 1st May 1863, when the contract terminated: Finds it proved that no complaint was made to the advocator at the termination of the contract, nor for some time afterwards, in regard to the state of the road as left by him, except, that on part thereof the sides were higher than the centre, which caused the water to lie at that part; and no judicial step was taken against the advocator prior to 27th July 1863, when the petition now advocated was presented, setting forth certain alleged defects in the condition of the road, which it was alleged the advocator was bound to repair, and praying for a judgment of the Court ordaining the same to be done: Finds it not proved that at the date of presenting this petition there were any specific instances of defect or disrepair in the said road chargeable on the advocator, and warranting the interference of the Court to the effect prayed for: Assoili-zies the said advocator, and the other advocator, his cautioner, from the conclusions of the said petition: Dismisses the same, and decerns: Finds the advocator entitled to expenses, both in this and the Inferior Court: Allows accounts of these expenses to be lodged, and remits to the Auditor to tax the same, and to report.

(Signed) "W. PENNEY.

"*Note.*—The advocator, Donald Mackenzie, became contractor for keeping in repair the Dunbeath road, in the county of Caithness, for two years from 1st May 1861. His contract was made with the Commissioners for Highland Roads and Bridges, who had then charge of the road.

"The sum to be paid the advocator for this two years' repair was £970, 4s., which was to be paid in eight equal instalments of £121, 5s. 6d. each. The periods of payment of these instalments show, what is otherwise abundantly clear, that the heavy part of the work was that done between 1st May and the end of December in each year, the instalments being payable in August, September, December, and then not till June following. As deponed to by Mr Joseph Mitchell, the general inspector of the Commissioners: 'A very large portion of the

repair of the roads always fell to be done during the summer months, as it is during that season that the vegetation comes up, the drains get choked, and it is also the proper season for repairing and pointing the bridges and parapets.' And as he afterwards says, with regard to the work as completed to December 1862, 'Nothing remained for the winter months, but to keep the new metal in its place, scrape off the mud, and to keep the drains right, from the effect of winter floods.'

"The contractor was paid the seven instalments due down to December 1862, on reports made by the inspector as to the sufficiency of the work. This may not be conclusive as to the fact of sufficiency, but it is a circumstance of considerable weight.

"There remained only the period from December 1862 to 1st May 1863, when the contract terminated. The eighth instalment was not due till June following, the object being plainly to afford time for a final inspection before payment was made. Prior to the termination of the contract, but posterior to the payment of the seventh instalment, the road had passed from the management of the Highland Commissioners to that of the Road Trustees for the county of Caithness.

"It was the duty of the Road Trustees, or those acting for them, if not satisfied with the state of matters existing at the termination of the contract, to make or procure inspection of the road immediately thereafter. This was eminently their duty to the contractor, if they meant to raise any difficulty as to the payment of the last instalment in June, for it is plain that within a very short time after the road was handed over to the new contractor, there might be great changes in its aspect (particularly if heavy summer floods took place), which would make it difficult to say what was its precise condition on 1st May. It does not appear, however, that any inspection took place prior to 19th June, when the road was inspected by Mr Cameron, the general inspector of the Caithness roads. He deposes—'My inspection in June was ordered by the petitioner (the clerk to the Road Trustees). I embodied the result of my inspection in a report, which I transmitted to the petitioner. To the best of my judgment it was a correct report.' It is a remarkable circumstance, and one by no means favourable to the case of the respondents, that the report has not been produced, because it is in this report, made in the ordinary course of duty, and prior to the excitement of litigation, that Mr Cameron's most trustworthy impressions were likely to be found. The advocator says that anterior to the judicial proceedings no complaint was made to him on the subject of the road, except what was contained in a letter from the petitioner, to the effect that on part of the road the sides were higher than the centre, which caused the water to lie, a point which does not seem afterwards insisted in. There is no effective contradiction to the advocator's statement on this subject.

"It was not till 27th July 1863, nearly three months after the termination of the contract, and when the summer and the summer operations must have materially affected the condition of the road, that a petition was presented to the Sheriff, at the instance of the clerk to the Road Trustees, alleging great defects in the repair of the road, attributable to the advocator, and praying for a judgment to the effect of having these repaired by the advocator, or at his expense.

"On the 8th August thereafter, the petitioner

lodged a minute praying for a remit to a man of skill to inspect and report on the condition of the road. It has been the subject of much remark that the motion to this effect was resisted by the advocator. It certainly appears that the advocator did not accede to it, and the petitioner does not seem to have pressed the motion to a judgment, but to have been content with an order for proof. The advocator explains that he did not consider himself bound to peril his case on the report of any one scientific nominee, or thereby to exclude himself from the benefit of a formal proof.

"A proof was allowed to both parties on 2d September 1863, which was not completed till April 1865. Into the details of this proof it is unnecessary to enter minutely, as the judgment of the Sheriff, acquiesced in by the petitioner, has proceeded on the avowed ground that he could not find sufficient materials to pronounce to any effect in terms of the prayer of the petition. All which the Lord Ordinary finds it necessary to say in explanation of his interlocutor is, that he considers the petitioner to have failed in making good any specific instances of defect or disrepair existing at the termination of the contract, and chargeable on the advocator. The whole proceedings in the proof on the part of the petitioner seem to the Lord Ordinary eminently unsatisfactory. The first witness examined is not examined till 9th December 1863, five months after the presentation of the petition, and three months after the allowance of proof. The inspection on which the chief witnesses rest their evidence was not made till the very end of October previous. The principle on which the whole evidence proceeds is that of not so much considering any defects arising during the two years of the advocator's contract (far less during the time from 31st December 1862), as of looking to the abstract sufficiency of the road as it presented itself to the eyes of the witnesses. One of the witnesses, Daniel Shearer, says expressly: 'In my opinion, the present condition of the bridges at Ousdale must to a great extent be attributed to want of proper construction of the road at first, and I would not attribute the present condition of these bridges to any mismanagement of these bridges on the part of the respondent during the two years of the contract.' Avowedly, the witnesses took into view the condition of the ditches, even when the proper care of these lay with the adjoining proprietor, and not with the contractor at all. There seems throughout to have been an entire forgetfulness of the fact that the contractor was not bound to maintain a good road abstractedly, but merely to keep in repair the road which was actually given to him. The whole evidence is vague and unspecific in the extreme, and this where the proof eminently required to be distinct, pointed, and precise.

"On advising this proof, the Sheriff-substitute sustained the defences, and dismissed the petition, finding the petitioner liable in expenses. He subjoined to his interlocutor an able and elaborate note, well deserving attentive consideration.

"The Sheriff, on appeal, recalled this interlocutor. He did not, however, do so to the effect of to any effect pronouncing in terms of the prayer of the petition. On the contrary, he 'finds it incompetent to proceed further in the cause.' But he finds the advocator and his cautioner liable in expenses, afterwards taxed and decreed for, to the large amount of £142, 10s. 1d. The Sheriff considers the proof to afford strong grounds for *presuming* that

at the termination of the contract the contractor left the road in disrepair in many respects; and he 'sustains the petition, as having been competently and relevantly brought.' He then 'finds that as the respondents (advocators) were bound to have left the said road and whole works "in perfect repair," as at 1st May 1863, when the contract terminated, or to pay for the same if held to have been defective, as there is room for presuming it was, a warrant would in ordinary circumstances have now been granted to the petitioner for enforcing his rights, but as such cannot now be done in respect the state of disrepair of the road, &c., existing as at 1st May 1863, is now mixed up with defects and disrepair which must have arisen in the subsequent two years, for which the respondents cannot be responsible, and though there may be elements in the process for so far determining the money value of the disrepair as existing at the termination of the contract, yet, as the form of the prayer of the petition precludes the possibility of extricating matters here, by making any relevant findings under it to fix such money value, finds it therefore incompetent to proceed further in the cause; but in respect such a result might have been prevented by the respondents consenting at the outset, as they ought to have done, to the judicial remit to ascertain the state of the road at the termination of the contract, finds them liable for such result. Therefore repels the defences, finds the respondent liable in payment to the petitioner of the expenses of process (above sustained), allows an account thereof to be lodged, and remits the same, when given in, to the auditor of Court to tax and report; reserves to the petitioner his right to further action, if so advised, and to the respondents their defences as accords, and decerns.'

"The Lord Ordinary cannot affirm this interlocutor. He cannot punish the advocator as the Sheriff has done for exercising his legal right of not consenting to a remit to a man of skill, more especially where it does not appear what would have been the result of such remit, and whether it would or would not have been unfavourable to the advocator. He cannot 'repel the defences,' where the case of the pursuer is found not proved, nor find the defender liable in expenses, where he cannot pronounce judgment against him. He thinks that any delay to be complained of is far more attributable to the petitioner than to the advocators. He views the case as presenting the simple everyday aspect of an action which the party who brought it has failed to sustain by sufficient evidence. The action must be dismissed, and in the view of the Lord Ordinary, dismissed with expenses to the defenders.

(Initd.) "W. P."

Henderson reclaimed, but subsequently lodged a minute stating that it was not his intention farther to insist in his reclaiming note. The Court accordingly refused the prayer of the reclaiming note and adhered to the interlocutor of the Lord Ordinary.

Counsel for Advocators—The Lord Advocate (Gordon) and C. G. Spittal. Wm. Mitchell, S.S.C., Agent.

Counsel for Respondent—The Solicitor-General (Millar) and J. Marshall. G. L. Sinclair, W.S., Agent.

HOUSE OF LORDS.

Monday, May 20.

WESTERN BANK v. ADDIE.

Et à contra.

(In Court of Session, 3 Macph., 899.)

Fraud—Restitution—Damages—Partnership—Bank.

A party who had been a shareholder in a joint-stock banking company for sometime, bought 135 additional shares from the bank in 1855. In November 1857 the bank stopped payment, and was subsequently registered and wound-up voluntarily. In 1859 the purchaser brought an action against the bank, concluding for *restitutio in integrum*, or otherwise for damages, on the grounds of essential error and fraudulent misrepresentation by the bank directors. Held (rev. C. S.) that the pursuer had not averred a relevant case entitling him to go to trial. Opinion—(1) That the respondent could not have relief by way of *restitutio in integrum* unless he was in a position to restore the very thing he purchased, and that, he having been a party to proceedings whereby the company from whom he purchased was put an end to, the remedy of restitution was no longer open to him. (2) That an incorporated company cannot, in its corporate character, be called on to answer in an action on fraud; but if, by the fault of its agent, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by the fraud. Opinion (*per* Lord Chancellor), that in a Court of equity it is not a valid objection to a suit to set aside a contract for fraud that the complainant was a member of the company by the fraud of whose agent, technically imputed to the company, he was drawn into the contract.

These were appeals against certain interlocutors of the First Division of the Court of Session pronounced in an action in which Mr Addie, the respondent in the first appeal, was pursuer, and the appellants, the Western Bank of Scotland, were defenders.

The action in question was raised in November 1859, at the instance of Mr Robert Addie of Viewpark against the Western Bank, and concluded for reduction of certain transfers by which 135 shares of the capital stock of the Bank were made over to the respondent; for repetition of £27,188, 10s. 2d., being the amount of the price and of certain calls which had been paid by him, with interest, but under deduction of dividends and interest thereon; or otherwise for payment of £26,000 in name of damages. The ground of the demand on the part of the respondent was, that he had been induced to purchase the shares by the fraudulent misrepresentations of the directors of the Western Bank at the date of the purchase. It appeared that, prior to 1855, Mr Addie had been proprietor of 15 shares, and that, in the months of November and December 1855, he had made those purchases of which he now sought to be relieved.

The respondent proposed the following issues:—"It being admitted," &c. (Here followed admission of the sale of the shares by the Bank at the price stated, and of the payment by the respondent of the price and calls.)