LORD ARDMILLAN—I concur with your Lordships. The proposed amendment would not exclude all considerations of criminality. I think, however, that we ought to hear further argument as to the competency of the petition, on the ground that the amendment is refused.

The Court therefore refused to allow the amendment.

It was then argued for the petitioner that the petition was competent. For § 86 of the Bankruptcy Act, 1856, provides that "the trustee shall be amenable to the Lord Ordinary and to the Sheriff, at the instance of any party interested, to account for intromissions and management, by petition served on him." Now, the statute here provides a remedy by petition, and it follows from that that such a petition is competent. Again, the trustee is bound to do certain things for the creditors, and the creditors have the right to compel him to do these things. A petition is the most simple form in which this can be done, and is the way contemplated by the statute, as is apparent from the provisions of § 86.

LORD PRESIDENT—This application is not authorised by statute, nor is it competent at common law. It is not authorised by statute, for neither the 84th nor the 86th nor any other section of the Bankruptcy Act authorises a petition of this sort. Then it is not competent at common law, because (1) it is not presented to a competent court, the Bill Chamber having no jurisdiction in a cause of this sort; and (2) because the application, being of a penal nature, requires the concurrence of the Lord Advocate. I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS—I am of the same opinion. It is neither right nor equitable that the trustee should be pulled up to answer to a penal complaint without some previous inquiry.

LORD ARDMILLAN concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the petitioner—The Solicitor General and Scott. Agent—John Walls, S.S.C.
Counsel for the Respondent—Watson and Asher. Agents—Millar, Allardice & Robson, W.S.

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*Monday, November* 18.

## TEIND COURT.

[Lord Gifford, Ordinary.

### REV. JAMES CAMPBELL, PETITIONER.

(*Ante*, p. 22.)

*Glebe Lands (Scotland) Act*, 1866 (29 *and* 30 *Vict. c.* 71), § 17—*Conterminous Proprietor—Right of Pre-emption—Price.*

Circumstances in which the Court fixed the price to be paid by a conterminous proprietor purchasing part of a glebe, under the 17th section of the Glebe Lands (Scotland) Act, 1866, at twenty-five years' purchase of the minimum feu-duties, as fixed by the Court.

In an application made by the Rev. James Campbell, minister of the parish of Balmerino, for authority to feu part of the glebe of the said parish, under the Glebe Lands (Scotland) Act, 1866, the Court held that the building value should be taken as the basis for fixing the minimum feu-duties, and fixed them at the rates proposed by the Lord Ordinary (reported *ante*, p. 22). Subsequently, a conterminous proprietor, Miss Duncan Morison of Naughton, in terms of the 17th section of the said Act, intimated her willingness to buy the part of the glebe proposed to be feued, at twenty-two years' purchase of the feu-duties, or at such other rate as the Court should think proper.

The LORD PRESIDENT said that the Court were of opinion that the price should be twenty-five years' purchase of the feu-duty, at the minimum rate already fixed by the Court, and that the reason of this decision was, that this price, invested at 4 per cent., would give the minister the same return as he would have obtained from the feu-duties. It would also enable him, if he liked, to have the same security, for the price was sufficient to enable him to buy feu-duties of the best sort, giving him as good a return as the feu-duties which he would otherwise have received from the lands.

Counsel for the Petitioner—Thoms. Agent—G. B. Smith, S.S.C.

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*Tuesday November* 19.

## SECOND DIVISION.

[Sheriff G. Bell, Lanarkshire.

### WALLACE. *v.* TODD.

*Agreement—Construction.*

Under an agreement with B, A was bound to supply dross and pay certain wages until coal should be put out and access to the working faces of a coal-pit should have been obtained—B undertaking to clear the pit of water. After two months A ceased to supply the dross, alleging want of due expedition, and also that coals were being put out of the pit—*Held* that no want of expedition had been proved; and, further, that the meaning of the agreement as to out-put of coal had reference to access to the ordinary working faces.

This was an appeal arising out of a petition in the Sheriff-court on an agreement entered into between the parties in 1868 by which *inter alia* Todd agreed to pay to Wallace—"*First*, the whole expenses incurred by him in the submission, as these may be taxed, if necessary, and that by bill at three months from the last date of this agreement; *second*, to supply to the said William Wallace, as he may require the same, and that continuously, as much good dross as he may require for the engines to pump the water from the workings in Solsgirth, and that until access to the working faces shall be obtained, declaring always that the said William Wallace shall be bound to use all due expedition in getting said access, and that in any event the obligation to supply said dross and pay said wages shall cease whenever coals are put out from the said pit, being No. 2 Solsgirth, and *third*, to pay to the said William Wallace weekly, the wages of the enginemen during the foresaid operations." Wallace in return to be held bound, on the full implement of the agreement, to assign formally to Todd his claim in the sequestration of James Gardner, coalmaster, under certain specified exceptions.

The petitioner averred that he had as soon as possible commenced, and with all due expedition carried on, the pumping operations, and that the defender after repeated delays in fulfilment of the second and third clauses of the agreement, ceased entirely either to supply the dross or pay the wages from Nov. 16, 1868.

The defender, in a minute of defence dated 18th Dec. 1868, stated that the petitioner had over estimated the amount of dross required weekly and also the wages of the men. He denied that proper pumping apparatus was used, or that there was due expedition in so much as the short stroke of 11 strokes per minute had been worked in the engines in place of 20 strokes per minute, and this moreover despite his complaints. Further, defender asserted—"That the petitioner had always been most negligent and slack in supplying additional pipes for the pumping, as they were from time to time required, and there had been always great delays in his so doing, and frequent complaints on the defender's part, which have been invariably unheeded. That several days before the 16th November last, the petitioner had pumped the water out, as far as the pipes put in by him extended, and, nevertheless, he continued for several days pumping away on air, without attempting to supply additional pipes to enable the pumping to be continued, notwithstanding the defender's repeated remonstrances and threats to stop supplying dross till he were in a position to begin pumping. No attention having been paid to these remonstrances and threat, the defender ceased supplying dross and paying wages. Since that date the petitioner has got access to the working faces, and has been putting out coals for some time from both pits. That the 10-inch pipes supplied by the petitioner are insufficient to keep down the growth, even with the engine working full stroke and speed, and can make no impression on any accumulation of water there may be on the workings. That the defender has offered, and is willing, to continue supplying dross and paying wages till the questions at issue between the parties be judicially determined, under protest that he is not bound to do so, and under reservation of his claim for repetition of the value of the dross so supplied and the amount of wages so paid; but the petitioner has refused to accept dross or payment of wages under any reservation whatever."

After a voluminous proof, extending from March 1869 to November 1871, the Sheriff-Substitute, by interlocutor of 12th January 1872, dismissed the petition; on appeal the following interlocutor was pronounced, April 20th 1872, in which the Sheriff-Depute (BELL) finds that—"by minute of restriction, No. 15, the pursuer, in respect access to the working faces of the pit in question was obtained on 14th June 1869, restricted the conclusions of the petition to the reservation therein asked, and to the craving for expenses: Finds that the original conclusions of the petition, which was presented on 7th December 1868, were founded on the terms of the mutual agreement No. 7/1; finds that the defender had ceased to supply dross to the pursuer, as stipulated for in said agreement, from about 16th November 1868, that is, for about three weeks before the action was raised: Finds, however, that for about a fortnight before that period, the pursuer, in consequence of the subsidence of the water in the pit through the pumping operations, was able to take out coal to keep the pumping engine going, not from the working faces which were still under water, but from a part called the 'lodgment,' where a considerable amount of coal remained unworked: Finds that, in these circumstances, the defences stated were two-fold,—*first*, That the defender's obligation to supply dross was at an end before the action was brought, in respect of the output which had become available, and was actually taken by the pursuer; and *second*, that he (the defender) was justified in ceasing to furnish any more dross a few days before the output was begun, in respect of the untradesmanlike and dilatory manner in which the pumping operations were being conducted by the pursuer: Finds, as regards the first of said defences, that it is well-founded, seeing that it is made an absolute condition of said agreement, that 'in any event, the obligation to supply said dross and pay the said wages shall cease whenever coals are put out from the said pit,' which words cannot be construed as referring only to coals put out from the working faces, but must be held as extending to coals put out from any part of the pit, especially if sufficient for the supply of the pumping engine, which it is not denied the coals taken from the lodgment were, the reasonable interpretation of said agreement being, that the pursuer's right to exact dross from the defender was to cease as soon as its place could be supplied by coals from the pit: Finds, as regards the second of said defences, which it is now necessary to consider only as affecting the question of expenses, that a proof at large of the averments on which that defence is founded was allowed by the interlocutor of 22d January 1869, and a voluminous proof was thereafter led accordingly; finds that the said proof, though it does not establish to their full extent the defender's averments, nevertheless establishes that, even if there had been no output of coals from the pit, the defender would have been justified in stopping the supply of dross until the pursuer made arrangements to conduct the pumping operations with greater expedition, and with less imperfect and inefficient apparatus, so as to save the extension of the defender's obligation over an unnecessarily protracted period, contrary to the spirit of the agreement: Therefore, upon the whole case, sustains the defences, and finds that, had the primary conclusions of the petition been insisted in, the defender would have been entitled to absolvitor, and said petition falls now, at all events, to be dismissed *simpliciter*, and dismisses the same accordingly: Finds, as regards the question of expenses, that the Sheriff-Substitute, whilst finding for the defender on the merits, has held him entitled to only one-fourth costs, on the ground that, while the pursuer was willing to agree to a remit being made to a person of skill, as suggested in the note to the Sheriff's interlocutor of 22d January 1869, the defender refused to consent to such remit, thereby rendering a long proof necessary; but finds that although a remit might have had the effect of shortening procedure, it is doubtful that it would have altogether superseded the necessity for proof, and, at all events, so large a modification of the expenses to which the defender would have been otherwise entitled seems too high a penalty for merely exercising his discretion in refusing to assent to a remit; therefore alters the interlocutor appealed against as regards expenses, and finds the pursuer liable in expenses to the defender, subject to modification to the extent of one-fourth of the taxed amount."

The petitioner appealed.

At advising—

LORD JUSTICE-CLERK—The minute of agreement

provided certain conditions under which Wallace agreed to assign over to Todd his claim in Gardner's sequestration. After two months Todd declined to carry on the supply of dross, and alleged that the complainer did not use proper expedition in the pumping operations, and moreover, that the stage of 'putting out coal' as contemplated by the agreement had been reached. I think that, even if the defence be a relevant one, the want of due and reasonable expedition has not been proved. It was shown that some of the machinery was not new; there was not however any obligation to use the best machinery, but only to proceed with due expedition.

With regard to the putting out of coal, I think that it was meant by this that the pit should be left in good workable condition. The putting out of coal from the "lodgment" (or reservoir half-way down the pit-shaft used in pumping up the water) was caused by Todd's failure to supply dross, and consequently did not bear upon the circumstances contemplated by the agreement.

Lord Cowan concurred, and said that by "working faces" are meant those faces marked on the plan as having been so worked; there is no such "face" marked at the "lodgment."

Lords Benholme and Neaves concurred.

The Court pronounced the following interlocutor:—

"Find it proved that the respondent, on or about 16th Nov. 1868, ceased to supply dross in terms of the agreement No. 12 of process: Find that it is not proved that the appellant failed to use due expedition in conducting the pumping operations at the pit in question; find it proved that coals were taken from a lodgment in the said pit in order to supply the place of the dross which the respondent was bound to have furnished, but find the respondent's obligations under the contract were not thereby terminated; therefore sustain the appeal, alter the judgment appealed from; find it unnecessary to pronounce any further judgment on the merits of the petition; find the appellant entitled to expenses in this and in the Inferior Court, and remit to the Auditor to tax and report, and decern."

Counsel for Petitioner and Appellant—Fraser and R. V. Campbell. Agent.—R. Finlay. S.S.C.

Counsel for Defender and Respondent—Scott and M'Laren. Agent—A. Kelly Morrison, S.S.C.

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*Tuesday, November* 19.

## SECOND DIVISION.

[Lord Mackenzie, Ordinary.

### M'INTYRE AND ROSE *v.* ANDERSON.

*Lease—Construction—Damage.*

Circumstances in which an outgoing tenant found liable in damages to the incoming tenant for loss through non-implement of an obligation in the lease to roll in grass seeds sown among his waygoing corn crop.

The pursuers in this action are John and Donald M'Intyre, joint tenants of the farm of Meikle, Kildrummie and Moss-side, in the county of Nairn, and Major Rose, proprietor of Kilavrock; the defender is Robert Anderson of Lochdhu, formerly tenant of the farm of Meikle Kildrummie and Moss-side; and the summons concludes for payment of "£350 sterling, as loss and damage which the said John M'Intyre and Donald M'Intyre, pursuers, have sustained by and through the defender's failure to roll in the grass seeds sown by him, on the employment and for the behoof and at the expense of the said pursuers, in the spring of 1870, among the defender's waygoing corn crop immediately after green crop, and that part of the said waygoing corn crop of the said farm of Meikle Kildrummie and Moss-side with which it is customary to sow grass seeds, in terms of the defender's lease of said farm, dated 10th November and 11th and 16th December 1857, which expired at Whitsunday 1870 as to the houses and pasture, and at the separation of crop 1870 from the ground as to the arable land, and in conformity with the custom or practice of the district."

On 22nd May 1872 the Lord Ordinary (Mackenzie) pronounced the following Interlocutor.—"The Lord Ordinary having heard the counsel for the parties, and considered the Closed Record, Proof, and process, Finds it established as matter of fact, 1st, that by the lease of the defender as tenant of the farm of Meikle Kildrummie and Mossside, in the county of Nairn, he was bound to allow the landlord or the incoming tenant, in the last year of the said lease, to sow grass seeds among such parts of his away-going corn crop immediately after green crop as the incoming tenant might desire, and to harrow and roll in the same without any remuneration; 2d, that in the spring of 1870, being the year of the defender's away-going crop, the defender, on the employment of the pursuers, John M'Intyre, and Donald M'Intyre, as the incoming tenants, who paid him for doing so, sowed grass seeds delivered to him by them on 86 acres 2 roods and 33 poles or thereby of the said farm; 3d, that the defender failed to fulfil his obligation to roll in the said grass seeds; 4th, that it is established by a preponderance of evidence that the defender's failure to roll in the grass seeds was injurious to the growth of certain portions of the said grass seeds; and 5th, that the said pursuers suffered loss and damage thereby to the extent of £25: Finds that the defender is responsible for the said loss and damage: Decerns against the defender for payment by him to the said pursuers of the sum of £25: Finds the defender liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor, to tax and to report.

"*Note.*—The land on which the pursuers' grass seeds were sown was in numerous parts covered with stones, many of them being of a large size, the expense of removing which would have been considerable. The pursuers maintained that under the obligation in his lease to harrow and roll in the incoming tenant's grass seeds sown with his away-going crop of corn after green crop, and by the practice of the district, the defender was bound to remove the whole stones from the land which could interfere with the beneficial operation of the roller. The Lord Ordinary is of opinion that the lease imposes no such obligation upon the defender, and it was proved by a great preponderance of evidence that by the practice of the district the defender, as outgoing tenant, was not bound to remove the stones.

"It is not disputed by the defender that he did not roll in the grass seeds; but he maintained that the spring was very windy,—that the rolling of the ground would, owing to its light and sandy nature, have increased the risk of the seeds being blown away, that the pursuers, being aware of this, did not insist on the seeds being rolled in,—that they