

appeals after the award of sequestration should be competent might have been fairly read as an exclusion of appeals before the award. But then it has been decided in the case of *Marr & Sons v. Lindsay*, 8 R. 784, that that is not the true or the only ground of appeal, and that the real ground is that since this Court had jurisdiction in bankruptcy matters antecedent to the statute, its general jurisdiction to review the judgments of the inferior courts cannot be taken away by implication, but remains untouched, unless it is excluded by the express words of the statute. On the authority of the decision I have referred to, I take it that since there are no such express words in the Bankruptcy Act, the mere fact that appeals after sequestration are authorised cannot exclude appeals before sequestration.

I agree with Lord Adam that it does not follow that we ought to entertain appeals from interlocutors prior to sequestration in all cases. There may be many interlocutors in the course of procedure in which an appeal would be quite unnecessary and probably incompetent. But the objection here is that the Sheriff has gone entirely outside the proper course of procedure, and pronounced an interlocutor which is incompetent and contrary to the policy of the Act. Whether that objection is well founded or not I do not say—that is a question on the merits. But I am clearly of opinion with your Lordship that it is an objection which we are entitled and bound to listen to.

Counsel for the respondent admitted that he could not support the interlocutor of the Sheriff-Substitute.

The Court recalled the interlocutor of the Sheriff-Substitute, and remitted to him to award sequestration.

Counsel for the Appellant—M'Lennan—W. Thomson. Agents—Steedman & Ramage, W.S.

Counsel for the Respondent—Cook. Agents—Turnbull & Herdman, W.S.

Saturday, June 2.

## SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

### DAWSON BROTHERS v. JAMES FISHER & SONS.

*Agent and Principal—Commission—Shipbroker—Charter-Party—Renewal or Independent Charter—Second Contract not in Contemplation of Parties when First Made—Shipping Law.*

By charter-party negotiated on behalf of the owners by a firm of shipbrokers, it was stipulated that the vessel should be hired for six months at £330 per month, with options to the

charterers (1) to cancel the charter on the expiration of the first month, and (2) to continue it for a further period of six months, and that commission of two-thirds of 5 per cent. on the estimated amount of freight should be payable to the shipbrokers. About six weeks before the expiration of the first six months the charterers intimated to the owners direct that they would not continue the vessel at the same rate of hire, and ultimately after negotiations between the charterers and the owners, acting without the intervention of the shipbrokers, a new charter-party was executed. This charter-party was substantially the same as the first, with the exception (1) that the rate of hire for the first six months was £220 per month with an option to the charterers of continuing the charter for another six months at £225 per month; (2) that there was no option to cancel at the end of the first month; and (3) that there was no brokerage clause. *Held* that the second charter party was not a renewal or continuation of the first, but was a separate and independent contract, and that it was not a contract which was within the contemplation of parties when the first contract was entered into, and that consequently the shipbrokers were not entitled to charge any commission in respect of it.

This was an action brought in the Sheriff Court at Glasgow by Dawson Brothers, steamship owners and brokers, Glasgow, against James Fisher & Sons, steamship owners, Barrow-on-Furness, in which the pursuers craved decree for payment of £66, being the amount of commission or brokerage alleged by them to be due by the defenders in connection with the chartering of a steamer called the "Firth Fisher," belonging to the defenders.

Proof was allowed and led.

The following narrative of the facts is in substance taken from the note to the interlocutor of the Sheriff-Substitute (STRACHAN):—In the months of September and October 1898 the pursuers were in negotiations with the defenders and Messrs Harold Nickson & Company of Manchester with the view of arranging a charter between them of the "Firth Fisher." These negotiations resulted in a charter-party being entered into between them, dated 8th October 1898.

By this charter-party Messrs Harold Nickson & Company agreed to hire the said steamer for a period of six months to trade between ports in the United Kingdom and between Hamburg and Brest on the Continent, excluding the various ports and wharves therein specified, and to pay therefor the sum of £330 per calendar month half-monthly and in advance, commencing on the day of delivery of the vessel to the charterers.

It was provided by the said charter that the charterers were "to have the option of cancelling this charter on expiry of first month on giving ten days' notice," and that they also were "to have the option of con-

tinuing the charter for a further period of six months on giving owners ten days' notice previous to expiration."

The charter-party further contained a stipulation in the following terms:—"Commission of two-thirds of five per cent. on the estimated amount of freight is due on signment hereof to Dawson Brothers, Glasgow, ship lost or not lost." The charter-party was signed by "Harold Nickson & Company," and by Dawson Brothers as agents "by authority of and for James Fisher & Sons."

The charterers obtained possession of the vessel in terms of the said charter, and proceeded to carry out the same.

In the month of March 1899, about six weeks before the expiry of the first six months after the delivery of the vessel under this charter to the charterers, they communicated with the owners by telephone with regard to the chartering of another vessel called the "Sound Fisher." At the same time they intimated verbally by telephone to the owners that they would not keep on the "Firth Fisher" for a further period after the expiry of the six months at the same rate of hire. On 11th March 1899 the chief clerks of the defenders and Messrs Harold Nickson & Company met at Barrow-on-Furness, in the view of the latter chartering the "Sound Fisher." At that meeting defenders' clerk inquired if Messrs Harold Nickson & Company intended to continue the charter of the "Firth Fisher" for another period of six months. Messrs Harold Nickson & Company's clerk replied that they would only do so in the event of the hire being reduced to £320 per month, and this was ultimately agreed to by the parties. Thereafter a new charter-party, dated 13th March 1899, was entered into between the defenders and Messrs Harold Nickson & Company, whereby the latter agreed to hire the "Firth Fisher" for six months commencing 27th April 1899. This second charter-party was substantially in the same terms as the first, with the following exceptions:—the rate of hire was £320 instead of £330; there was an option given to the charterers "of continuing the charter for a further period of six months at £325 per month on giving notice thereof to owners ten days previous to expiration of first-named term"; the charterers were not given any option of cancelling the charter at the expiry of the first month; and there was no brokerage clause. The charter was signed by "Harold Nickson & Company," and by "James Fisher & Sons."

The defenders regularly paid the pursuers the commission payable under the first charter down till six months from the date thereof, but they refused to make any payment in respect of the hire received by them under the second charter, and in consequence of this refusal the pursuers brought the present action.

On 9th March the Sheriff-Substitute issued the following interlocutor:—"Finds that in the months of September and October 1898 the pursuers were in negotiations with the defenders and Harold Nickson & Company of Manchester for the chartering

by the latter of the s.s. 'Firth Fisher' belonging to the defenders: Finds that these negotiations resulted in a charter being entered into between the defenders and Messrs Harold Nickson & Company, whereby the latter agreed to hire the said vessel for a period of six months, and to pay therefor at the rate of £330 per month: Finds it was provided by the said charter that the defenders had the option of renewing the same for a further period of six months on giving ten days' notice before the expiration thereof: Finds that under the said charter the pursuers were entitled to a commission of two-thirds of 5 per cent. on the estimated freight: Finds that on 13th March 1899 a charter-party was entered into between the defenders and Messrs Harold Nickson & Company whereby they both agreed to hire the same vessel for a further period of six months from the expiry of the first charter, and to pay therefor at the rate of £320 per month: Finds that with the exception of the abatement of the freight, the terms and conditions of the second charter are exactly the same as those of the first, and required no new negotiations between the parties: Finds that the second was a renewal or continuance of the first charter, and that both were equally the result of the pursuers' negotiations: Finds that the pursuers are entitled to a commission of £66 on the estimated freight under the second charter, and that the defenders are liable to them in payment thereof: Therefore decerns against the defenders for payment to the pursuers of the sum of £66 as concluded for with interest as craved," &c.

*Note.*—[After stating the facts]—"It is maintained by the pursuers that the second charter was a continuance of the first for a period of six months in terms of the stipulation to that effect contained therein, and that in any case it was the direct result of their negotiations, and that their commission consequently extended to the freight during the second period.

"The defenders, on the other hand, contend that the second charter was a new one negotiated between them and Messrs Harold Nickson & Company without the intervention of the pursuers on the expiry of the first charter, and that the pursuers have no claim for commission therewith.

"In my opinion the second charter was in reality a continuance of the first. It was entered into during the currency of the first, and its duration ran only for the same period as the charterers had the option of renewing it. It was not the result of any renewed negotiations between the parties. No such negotiations were required, and in point of fact none took place. The terms and conditions of the second charter, the ports to which the vessel was to trade and those she was to avoid, and the period of duration were all the same as in the first charter. The only difference was a reduction of freight from £330 per month to £320. That was settled in a few minutes' conversation between the clerks of the respective

parties. I am not aware of any principle or authority for holding that slight reduction of freight had in itself the effect of breaking the continuity of the charter. There does not appear to have been any necessity for a second charter being entered into. The slight alteration in the freight could very easily have been given effect to by an endorsement on the first charter. If this had been done I do not see how it could be maintained that there was no continuance of the charter, and there is just as little room for that contention when the alteration has been made on a separate document. It is said that the charter was only to be continued for a further period of six months on the charterers giving ten days' notice previous to the expiration, and that as no such notice was given the charter must be held to have expired. The parties having arranged for the renewal of the arrangement in March, the ten days' notice prior to the expiry of the first charter was thereby superseded and rendered unnecessary.

"But even if the second should be held to be a new charter, that would not in my opinion have the effect of excluding the pursuers' claim for commission, as I think it clear from the circumstances that the second charter was equally with the first the direct result of the pursuers' negotiations.

"It seems to be entirely a question of circumstances whether a broker who has negotiated a charter is entitled to a commission on a new charter-party being entered into on the expiry of the first.

"A material consideration in such a case is whether or not the second transaction was in the contemplation of the parties when the first was entered into. It has been held that an agent can claim commission for the re-letting of a house if it was owing to an express term in the contract allowing the tenant to renew that this happened—Wright on Agency, 162. In the case of *Tribe v. Taylor*, 1 C.P.D. 505, when an agent had obtained a loan for a principal, and the lender in about a year afterwards became partner in the principal's business, and made a large additional advance, it was held that the agent was not entitled to commission on the second advance. It was admitted that this advance was not contemplated at the time of the original advance. Again, in the case of *White v. Baxter & Co.*, 1883, 1 Cab. & Ellis, 199, the question was left to the jury whether the business was contemplated at the time of the introduction.

"It cannot, I think, be disputed in this case that the continuance of the charter for a second period of six months was in the contemplation of the parties at the time it was entered into. The charter itself contains a special provision for its continuance for six months, and the endurance of the second charter is limited to that period. It does no more therefore than carry out what was in the contemplation of the parties when the first charter was entered into. There was no necessity for renewed negotiations, the terms and conditions of both charters with the

exception of the slight abatement of the freight being the same. The connecting link between them is thus quite distinct. The option to renew led to the second charter being entered into, and it seems to me therefore that the second is as much the result of the pursuers' services as the first.

"It would appear from the authorities that the mere fact of a principal changing his terms does not affect the broker's claim for commission—Mecham on Agency, s. 967. But in any case it would in my opinion be unreasonable to hold that a slight abatement of freight could have the effect of depriving the broker of the commission to which he would otherwise be entitled. By the first charter the charterers had the option of terminating it on the expiry of the first month on giving ten days' previous notice. If the charterers had given notice to the defenders in course of the first month that they would not continue the charter unless they got a deduction of £5 per month, and a new charter was in consequence entered into reducing the freight, could it be reasonably contended that in such a case the pursuers should thereby be deprived of their commission? And what is the difference between such a transaction at the end of the first month and the expiry of the sixth? There does not appear to be any, the principle being precisely the same in both cases. I have no difficulty therefore in holding in the circumstances that both charters are equally the result of the pursuers' negotiations, and that their claim for commission in the second is well founded.

"It is averred by the pursuers that the substitution of the new charter was a fraudulent device to deprive the pursuers of their justly earned brokerage, and by that device both the defenders and the charterers were benefited. The result certainly is that in consequence of excluding the brokerage the defenders are actually receiving more freight under the second charter than they did under the first notwithstanding the reduction of £10 per month. I am not prepared to hold that the second charter was a fraudulent device on the defenders' part, but I am bound to say that in my opinion it was unnecessary, and that the exclusion of the brokerage clause was contrary to the good faith of the contract to which the parties were parties."

The defenders appealed to the Court of Session.

The arguments sufficiently appear from the note of the Sheriff-Substitute and the judgment of Lord Trayner.

At advising—

LORD TRAYNER—The facts out of which the present question arises are already stated by the Sheriff-Substitute, and do not need to be repeated. The question we have to decide is one of fact, because the parties are agreed that if the second charter-party was merely a continuation of the first, and was entered into in respect of the option to continue which the first charter-party

contained, then the pursuers are entitled to succeed, whereas if the second charter-party was a separate and independent contract, then the pursuer's claim cannot be maintained. I think it is immaterial whether the contract contained in the said charter-party was set forth in a separate instrument or was indorsed on the back of the first charter-party. Wherever its terms are to be found the question is the same: Was the second charter-party a continuance of a forner one, or a new contract altogether? On that, which is really the only question in the case, I am unable to agree with the Sheriff-Substitute. During the currency of the first charter-party the defenders intimated to the shipowner that they would not continue to hire the vessel under its terms. They thus declined to exercise the option given to them to continue the then current charter for six months longer. In that intimation the shipowners acquiesced, but they offered the same ship to the defenders for hire on different terms. The terms of the first charter were, payment of £330 per month with the option to the charterers to (1) cancel the charter at the end of the first month on giving notice, or (2) to continue the charter for six months at the same rate of hire. The second charter gives the charterers no option to cancel the charter at the end of the first month; it fixes the hire for six months at £320 per month, and gives the option to continue the charter for six months at the rate of £325 per month. I think these differences show that the two contracts are different in material respects, and that the one cannot be regarded as a continuance of the other. It was said that the difference between the contracts as regards the amount to be paid for hire was small, and so it is. But that is a mere accident. If there had been a sudden rise or fall in freight, as happens occasionally, the difference between the rate of hire in the two contracts would no doubt have been greater than it is. But great or little does not vary the question. I think the second charter-party was a separate and independent contract, and is not a continuance of the first contract which was stipulated for. Nor do I think that the second contract was one within the contemplation of the contracting parties when the first contract was made. The only thing then contemplated was a renewal for six months of the one contract on the same terms. What was contemplated as possible or probable has not occurred. The terms of the first contract have been set aside, and a new contract made on terms which were not in contemplation. I am therefore of opinion that the appeal should be sustained and the defenders assoilzied.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court pronounced this interlocutor—

“Recal the interlocutor of the Sheriff-Substitute of Lanark dated 9th March 1900 appealed against: Find in fact (1) that the charter-party dated 13th March

1899 was not a continuance or renewal of the charter-party dated 8th October 1898; and (2) that the said charter-party mentioned was not the result of any negotiations on the part of the pursuers: Find in law that the pursuers are not entitled to charge any commission in respect of the said first-mentioned charter-party: Therefore assoilzie the defenders from the conclusions of the action, and decern,” &c.

Counsel for the Pursuers—Clyde. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defenders—Salvesen, Q.C.—A. S. D. Thomson. Agents—Whigham & MacLeod, S.S.C.

Friday, June 15.

## SECOND DIVISION.

(Lord Kyllachy, Ordinary.)

### POLLOCK v. NORTH BRITISH RAILWAY COMPANY.

*Railway—Accommodation Works—Claim of Damages at Common Law for Failure to Provide Accommodation Works Timeously—Substituted Road—Level-Crossing—Private Farm Road—Interference with Road—Special Damage—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), secs. 46, 48, and 60.*

A farm having been divided into two parts by a railway line, compensation for lands taken and for severance was paid to the proprietor upon the footing that a level-crossing was to be provided by the company as a means of communication between the steading and the fields on the further side of the line. A level-crossing was accordingly formed at a place where the railway was crossed by a farm road which had existed before the railway was made. The part of this road which crossed the line at the level-crossing was duly paid for and acquired in property by the company. The line was originally constructed and for some years was used as a single line for local traffic, and during this time the level-crossing afforded a sufficient means of communication. The railway company subsequently obtained an Act of Parliament under which they were empowered to double their line and to extend it to join a main line. The tenant of the farm, after operations under this Act had been commenced, made a demand upon the railway company for an accommodation bridge and approaches in place of the level-crossing, upon the ground that when the line was doubled and connected with the main line, the number and speed of the trains would be so much increased as to render the level-crossing useless. The railway company refused to comply with this demand, and litigated the question for more than a