

prior to the service of the petition. (2) The letter-books of the persons named in article 1 of the petition, that excerpts may be taken, at the sight of the Commissioner, of all letters enclosing to any person a copy of the document printed on pages 2 and 3 of the petition or enclosing forms of application for shares in the company, or offering to any person or proposing or suggesting that he should take shares in the company, between 1st September 1901 and the date of service of the petition."

The respondents objected to these two articles of the specification, and argued that they should not be allowed. The call was for documents which could only be used for the purpose of cross-examination. Letter-books, which only contained copies of letters, could not be recovered in a diligence, unless it was expressly shown that the original letters had been destroyed. Until that was done copies of letters were not admissible in evidence, and nothing that was not admissible in evidence could be recovered in a diligence—[LORD KINNEAR—There is no rule that the documents called for in a specification must clearly be admissible in evidence; the rule is that the diligence will be refused if it is shown that they cannot be evidence.]

Counsel for the petitioner argued that the call was necessary to enable him to recover the principal letters or to obtain copies if these principals had been destroyed. Without the letter-books he had no means of discovering to whom the letters referred to were sent.

The Court (without giving opinions) granted the prayer of the note.

Counsel for the Petitioner—Horne. Agents—Drummond & Reid, W.S.

Counsel for the Respondents—T. B. Morison. Agents—Irvine & Gray, S.S.C.

Tuesday, January 27.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MAGISTRATES OF ROTHESAY

v. CARSE.

Burgh—Public Official—Town Clerk—Dismissal of Town Clerk by Resolution of Town Council—Action of Declarator that Resolution of Town Council Dismissing Town Clerk Valid.

By resolution at a special meeting the Town Council of a Royal Burgh dismissed the Town Clerk from his office on account of alleged drunkenness and gross neglect of duty. As the Town Clerk refused to recognise their right to dismiss him the Town Council raised an action against him for declarator that the resolution was valid and that the defender had been duly dismissed from office at its date. The defender pleaded that the action was incom-

petent because the pursuers required to obtain the authority of the Court before they could validly dismiss him.

Held that while the Town Council had no power to remove the Town Clerk from office without the authority of the Court, the resolution might be treated as a resolution to dismiss the Town Clerk conditionally on the sanction of the Court being obtained after inquiry, and that the action was therefore competent.

This was an action brought by (first) the Provost, Magistrates, and Councillors of the Royal Burgh of Rothesay, acting as such, and as Commissioners for the said burgh, and as local authority under the Roads and Bridges (Scotland) Acts, the Public Health (Scotland) Acts, and the Electric Lighting Acts, and (second) the Rothesay Harbour Trustees, acting under the Rothesay Harbour Act and Orders 1831 to 1898, against James Carse, writer, Rothesay, and William Alexander Stewart, writer, Rothesay, the trustee on the sequestrated estates of the said James Carse.

The conclusions of the summons were (1) for declarator that (a) a resolution passed by the Provost, Magistrates, and Councillors at a meeting held on 21st January 1902, whereby they dismissed the defender from the office of town clerk of the burgh, and (b) a resolution passed by the Provost, Magistrates, and Councillors, acting as such, and as Commissioners and Local Authority foresaid, and by the Rothesay Harbour Trustees, at a meeting held on 21st January 1902, whereby the defender James Carse was dismissed from the offices, appointments, and employments held by him under and in terms of a minute of agreement entered into between him and the pursuers, dated 13th November 1899, were valid and effectual resolutions; (2) for declarator that the defender James Carse had been duly and legally dismissed from the office of town clerk of the burgh and from the other appointments, and that his tenure of the office of town clerk and of the other appointments ceased and determined as at 21st January 1902, and that the pursuers were entitled to nominate and appoint another person or persons to the office of town clerk of the burgh, and to the other appointments as from said date, in room and stead of the defender James Carse, with all the powers, privileges, and duties, and with all the emoluments belonging to these offices; (3) for interdict against the defender James Carse acting as town clerk of the burgh, and also from acting in execution of any of the other appointments, from and after 21st January 1902, and from in any way discharging the duties of the office of town clerk of the burgh, or of the other appointments, or interfering therewith, or with the emoluments pertaining thereto; and (4) for decree ordaining the defender James Carse to deliver over to such person as might be nominated and appointed to the office of town clerk of the burgh, and to the other appointments, or to the interim town clerk, all books, records, minutes, writs, sums of money, documents, papers,

and property of any description in his custody and possession as town clerk of the said burgh, or as holder of the other appointments.

The pursuers averred that the defender James Carse was on 26th September 1899 appointed town clerk, and was also appointed to the other offices connected with the various duties which the Town Council performed as Commissioners and Local Authority of the burgh, the terms and conditions of his appointment being specified in a minute of agreement between the pursuers and him dated 13th November 1899. They made various charges against him of drunkenness and neglect of duty, including failure to invest funds held by the Magistrates as trustees. They further stated—“(Cond. 16) During the year 1901 the pursuers became convinced that the interests of the Corporation and of the other public bodies with which the said defender was connected were being so seriously affected by the conduct of the defender that matters could not be allowed to remain as they were. A meeting of the pursuers was held in September 1901 to consider the situation. The charges made against the said defender were communicated to him, and the Provost remonstrated with him upon his conduct, but the defender’s attitude was such as to satisfy the pursuers that stronger measures must be taken. Special meetings were subsequently held in October 1901, and it was ultimately resolved to obtain the opinion of counsel. A memorial was accordingly prepared and submitted to counsel, and counsel advised that upon the facts disclosed in the memorial the pursuers were entitled to dismiss the said defender from the office of town clerk, and from the other offices, appointments, and employments held by the defender under the said minute of agreement. The Provost, Magistrates, and Town Council of the said burgh accordingly, by the resolution of 21st January 1902, referred to in the first conclusion of the summons, dismissed the said defender from the office of town clerk, and the Provost, Magistrates, and Town Council of the said burgh, acting as such, and as Commissioners and Local Authority foresaid, and the Rothesay Harbour Trustees, by the resolution of 21st January 1902, also referred to in the first conclusion of the summons, dismissed the said defender from the offices, appointments, and employments held by him under the said minute of agreement. The pursuers maintain and aver that the said defender was guilty of such gross negligence and *culpa* during his tenure of office as to justify them in dismissing him from the office of town clerk of the said burgh, and from the said offices, appointments, and employments. The said defender, however, declines to recognise the right of the pursuers to dismiss him from the said offices, and the present action has been rendered necessary. The pursuers presented a petition to the First Division craving the Court to appoint an interim clerk pending the decision of the present action, and the Court appointed Mr R. D.

Whyte to act *ad interim*. The defender, notwithstanding the said appointment, continued to act as town clerk, and obstructed Mr Whyte in performing the duties laid upon him by the Court. In order to prevent the defender from so acting the pursuers were compelled to present a note of suspension and interdict, upon which the Lord Ordinary on the Bills granted interim interdict as craved.”

The pursuers pleaded—“(1) The defender Carse having been guilty of gross negligence and *culpa* during his tenure of the office of town clerk and of the said offices, appointments, and employments, the pursuers were entitled to dismiss him, and decree should be pronounced in terms of the declaratory conclusions of the summons. (3) In respect of the said defender’s conduct and actings as condoned on, the pursuers are entitled to decree of declarator, interdict, and delivery as concluded for, with expenses.”

The defender pleaded, *inter alia*, (1) The action is incompetent.

On 17th October 1902 the Lord Ordinary (KYLACHY) repelled the first plea-in-law for the defender, and before answer allowed the parties a proof of their averments and the pursuers a conjunct probation.

The defender James Carse reclaimed, and argued—The action of the Magistrates in first dismissing the defender and then bringing an action to declare that the dismissal was valid was incompetent. The form of summons was based on a misconception of their rights. A town-clerk could not be dismissed at the pleasure of the town council subject to ratification by the Court in the event of the town clerk refusing to take his dismissal. The authority of the Court must be got *before* his dismissal—*Simpson v. Tod*, June 17, 1824, 3 S. 150; *Farish v. Magistrates of Annan*, November 22, 1836, 15 S. 107. The defender not having been competently dismissed, he was still entitled to his salary. The Court could not act retrospectively and confirm an incompetent resolution. The office of a town-clerk was a *munus publicum* and the holder could not be removed summarily from his office without notice or inquiry. The pursuers relied upon the analogy of the case of a burgh schoolmaster, but the office of a burgh schoolmaster was not a *munus publicum*, and the master did not hold his office *ad vitam aut culpam*—*Mitchell v. Elgin School Board*, June 1, 1883, 10 R. 982, 20 S.L.R. 608.

Argued for the respondents—The objection taken was technical and had no foundation in the law of Scotland. The Magistrates were not entitled to dismiss the defender except for some just and reasonable cause, but they were entitled to dismiss if they thought *culpa* had been made out against him—*Thomson v. Town of Edinburgh*, February 14, 1665, M. 13,090. The same rule had been applied in the case of a burgh schoolmaster—*Magistrates of Montrose v. Strachan*, January 18, 1710, M. 13,118; *Campbell v. Hastie*, April 11, 1772, 2 Paton App. 277; and a kirk-session clerk—*Harvie v. Bogle*, July 27, 1756, M. 13,126. The cases

of town-clerk and burgh schoolmaster had been held by Lord Lee to be analogous in *Provost, &c. of North Berwick v. Lyle*, November 19, 1885, 23 S.L.R. 214. There was no authority in the law of Scotland that the holder of a *munus publicum* was independent of his own employers. Even if it were the law that the authority of the Court was required in order to validate the dismissal of a town-clerk, that authority was asked for in the present action.

At advising—

LORD JUSTICE-CLERK—I am of opinion that a Town Council, while it has no power to remove the town-clerk from his office at their own hand, and must have the sanction of the Court to his dismissal, is not taking an incompetent course in resolving that he ought not to hold office and that he should be dismissed, and then coming to the Court with an action such as we have here, that the facts may be ascertained and the judgment of the Court taken upon them, by which an operative action may be obtained. And this it appears to me is truly what the action is intended to effect. I am therefore in favour of adhering to the judgment of the Lord Ordinary, and remitting to him to proceed. I think it, however, right to say that I consider that in the event of the defender being removed his removal can only operate as regards his emoluments from the date of the judgment of the Court in the action, subject it may be to such expenses as may have been necessary for obtaining temporary fulfilment of the duties of the office by another person pending the final decision.

LORD YOUNG concurred.

LORD TRAYNER—I think it is quite a settled point that the pursuers could not at their own hand, or, as the authorities put it, without process at law, dismiss the defender from the office which he held. They might, however, quite competently resolve that the defender by reason of his conduct had forfeited his right to that office, and come to the court to have that resolution given full effect to. The pursuers by their minute, no doubt, in terms dismissed the defender, but they have come to the Court to have their action approved. I am therefore disposed to treat the pursuers' minute as expressing only their opinion and resolution, and in that view I think we may now in this action competently inquire whether the pursuers' resolution was justified. I observe that the pursuers conclude for declarator that the defender ceased to be town-clerk as at 21st January 1902, being the date of their minute dismissing him. Whether the defender ceased to be town-clerk at that date, or if not then at what date, is a matter on which at present I would rather not express an opinion. It has yet to be ascertained whether the defender's conduct was such as to warrant his dismissal. If it did not, then the date of his dismissal is obviously a question which will not arise. I therefore agree that the interlocutor of the Lord

Ordinary should be affirmed and the proof taken which his Lordship has allowed.

LORD MONCREIFF—In the view of at least the later decisions, and especially *Simpson v. Tod*, 3 Sh. 150, and *Farish v. Magistrates of Annan*, 15 Sh. 107, we must hold that a town-clerk cannot be arbitrarily removed from office by the magistrates and that he cannot be turned out without process of law, that is, without the authority of the Court. The pursuers have recognised the necessity of obtaining the sanction of the Court by raising the present action. It may be doubted whether, strictly speaking, the conclusions of the summons are in proper shape, because the Court is asked not to dismiss the defender but to approve of two resolutions passed by the pursuers whereby they dismissed the defender as at 21st January 1902. But I think that those resolutions may be treated as simply resolutions to dismiss the defender conditionally upon the sanction of the Court being obtained after inquiry.

I have no doubt that if the Court should after proof come to be of opinion that the defender ought to be dismissed, the Court will be able in its judgment in this process to do complete justice between the parties as to the presumed date and consequences of the dismissal.

I am therefore of opinion that the interlocutor of the Lord Ordinary allowing a proof before answer should be affirmed.

The Court adhered.

Counsel for the Pursuers and Respondents—Ure, K.C.—Hunter. Agents—Simpson & Marwick, W.S.

Counsel for the Defender and Reclaimer James Carse—Guthrie, K.C.—A. S. D. Thomson. Agents—St Clair Swanson & Manson, W.S.

Wednesday, January 28.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

ALEXANDER'S TRUSTEES v. MUIR AND OTHERS.

Superior and Vassal—Feu-Disposition—Construction—Duplicandor Triplicand—Obligation “as also to Pay the Double of the Yearly Feu-Duty every Nineteenth Year.”

A vassal held under a feu-di-position granted in 1807 which stipulated for a yearly feu-duty of £248, 18s. 2d., and which contained the following clause:—
“As also to pay to me (the superior) and my foresaids at the term of Whitsunday 1824 the sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the said whole subjects, and also to pay to me (the superior) and my foresaids every nineteenth year (counting from