

But that which Lord Robertson means and the Antwerp Congress says gives no countenance to the view that when a collision occurs between two Scotch ships through the fault of one of them, what a pursuer on the other would recover by way of damages would depend on whether he was English, French, or Scotch.

These remarks of Lord Robertson's are the sole foundation for the quite erroneous view that has been put forward, and there is no trace in the great authorities that the law of the pursuer's domicile has anything to do with it.

I therefore hold that the preliminary pleas should be repelled and the action take its ordinary course, which will be an allotment of issues.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

“The Lords having heard counsel for the parties on the defenders' preliminary pleas-in-law, Repel said pleas and appoint the issue or issues proposed for the trial of the cause to be lodged within eight days: Find the pursuers entitled to expenses of the discussion in the Summar Roll, and remit,” &c.

Counsel for the Pursuer and Appellant—Burt. Agents—M'Nab & MacHardy, S.S.C.

Counsel for the Defenders and Respondents—Horne. Agent—Patrick & James, S.S.C.

Wednesday, November 29.

FIRST DIVISION.

TAIT (TOWN-CLERK OF MOFFAT),  
PETITIONER.

*Burgh—Police Burgh—Town Council—Absence of Quorum through Resignation of Councillors—Petition by Town-Clerk—Procedure—Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), secs. 36, 38, 58, 61, 66, 71, and 113—Burgh Police Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 17, 25, and 26,*

A police burgh was governed by a town council consisting of nine councillors, including a provost and two bailies. In November 1905 there fell to be elected four councillors, but no nominations being lodged, no election took place. Thereafter three of the remaining five councillors intimated their intention to resign, with the result of leaving, when their intention should be given effect to, no quorum of the council, which under sec. 71 of the Town Councils (Scotland) Act 1900 consisted of three. Attempts were made to hold a meeting of the council, but the councillors who had intimated their resignation refused to attend, and the business of the burgh was in consequence brought to a standstill.

The town-clerk presented this application, in which he craved the Court either (1) to appoint a special election of seven councillors to be held in manner provided by the Town Councils (Scotland) Act 1900, sec. 36, or (2) alternatively to declare that the burgh was without a legal council, and to remit to the Sheriff of the county to proceed with an election in the manner provided by the Burgh Police (Scotland) Act 1892, secs. 25 and 26, and by the Town Councils (Scotland) Act 1900.

The Court appointed, *hoc statu*, a special election of seven councillors to be held.

The Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 113, enacts—“Wherever it has, from a failure to observe any of the provisions of this Act or any other Act, or from any other cause, become impossible to proceed with the execution of this Act or any part thereof, or wherever difficulty or dubiety exists as to the procedure to be followed in any case, or where any case arises in connection with the election of councillors or magistrates not provided for by this Act, it shall be lawful for the town council, or any seven electors or householders within the burgh, . . . or the town-clerk, to present a petition in manner provided by section 17 of the Burgh Police (Scotland) Act 1892, and the same procedure shall follow upon said petition, and the court to whom the same is presented shall have the same powers as is provided by the said section in regard to applications presented thereunder.”

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 17, enacts—“Wherever in any burgh in existence before the passing of this Act, and which thereafter continues to be a burgh, or in any burgh the boundaries of which have been determined in terms of this Act, it has, from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act, the following provisions shall have effect—(1) It shall be lawful for any seven householders within the burgh to present a petition to the Court of Session, or to the Sheriff Court, setting forth the failure which has taken place to observe the provisions of this Act, or any other Act, or other cause which has made it impossible to proceed with the execution of this Act, and praying the Court to pronounce an order in terms of this Act as hereinafter mentioned. . . .”

William Tait, solicitor, town-clerk of the burgh of Moffat, presented a petition to the Court, in which he stated—“That the burgh of Moffat is a police burgh, originally formed in the year 1864, under the provisions of the General Police and Improvement (Scotland) Act 1862, and is governed by a town council, consisting of nine councillors including a provost and two bailies. The burgh is not divided into wards. At and for some time subsequent to the first Tuesday of November, in the year 1904, the full number of the town council and

magistrates was in existence.

“That the election of the town council and magistrates is regulated by the Town Councils (Scotland) Acts 1900 and 1903, and in terms of these said Acts there fell to be elected on the first Tuesday in November in the year 1905 two councillors in place of Messrs William Knight and Thomas Murray, who retired by rotation; one councillor in place of Mr Alexander Thomson, who retired as a councillor *ad interim*; and one councillor in place of Provost James Ritchie MacGibbon, who had died on the 19th September 1905. Accordingly a notice was duly issued on the 16th of October 1905 by the petitioner as town-clerk, intimating the above vacancies, and also intimating that no person could be elected to the office of councillor whose name was not intimated to him before four o'clock afternoon of Tuesday 31st October, and giving the further intimations required by the Town Councils (Scotland) Act 1900.

. . . No nominations were lodged with the petitioner, and accordingly no election of councillors took place. On the 3rd day of November 1905 William Somerville, one of the remaining councillors, intimated to the petitioner his resignation as a member of the council, and on the same date James Davidson, another councillor, made a similar intimation, and on the 4th November John Plant, another councillor, took the same course. . . . Under the Town Councils (Scotland) Act 1900, sec. 38, the said resignations take effect three weeks after the respective dates of intimation. The effect of the said resignations, when they take effect, will be to leave only two councillors, namely, Bailie William Edgar and Bailie George M'Cubbin.

“That by section 36 of the Town Councils (Scotland) Act 1900 it is provided that, in the event of the full number of councillors not being elected at any election, the vacancy so occurring shall be filled up *ad interim* by the town council at a meeting of which notices shall be sent out by the town-clerk within three weeks of the occurrence of such event, and which shall be held not sooner than five days and not later than ten days from the date of such notice. By section 71 of said Act it is provided that one-third of the town council shall constitute a quorum at any meeting thereof. On 3rd November 1905 the petitioner called a meeting, in terms of section 36 aforesaid, to be held on Friday the 10th November 1905 at 11:30 a.m. The aforesaid William Somerville, James Davidson, and John Plant abstained from attending. The said Bailie William Edgar and Bailie George M'Cubbin attended according to said notice, but as they did not constitute a quorum of the council no business could be done. The petitioner called upon the said William Somerville the evening before the said meeting and urged him to attend, but he declined to do so. The petitioner also wrote Messrs Davidson and Plant urging them to attend, but they made no reply. The petitioner also called a special meeting of council, in terms of section 58 of said Town Councils (Scotland) Act 1900, to be

held on the said 10th day of November at 12 o'clock noon, for the purpose of electing a provost, as therein provided, but the said William Somerville, James Davidson, and John Plant abstained from attending this meeting also, and consequently no election could take place. The aforesaid 36th section also provides that, in the event of the said meeting failing to elect, it shall be in the power of the provost, or of any councillors forming among them one-third of the whole council, at any time thereafter to call a meeting for the same purpose and on the same notice. By section 61 the senior bailie is empowered to act as chief magistrate failing the provost. No steps to call any such further meeting have been taken, as in view of the attitude of the resigning councillors it is not probable that they would attend any such further meeting.

“That the said resigning councillors, although their resignation has not yet actually taken effect, abstain from taking any action to enable the business of the burgh to be conducted or any meeting of the Town Council to be held. Their doing so, as they well know, renders it impossible to proceed with the execution of the provisions of the aforesaid Acts. In addition to abstaining from attending the said meeting on Friday, 10th November, they have abstained from attending the monthly meeting of the Council on Monday, 13th November, at which important business required to be transacted. . . . The business of the burgh is accordingly brought to a standstill, and it is impossible to proceed with the execution of the said Acts and of the other Acts under which the business of the burgh is regulated. There is also difficulty or dubiety existing as to the procedure to be followed in the present case, and the case is one not provided for by the said Acts. Section 113 of the Town Councils (Scotland) Act 1900 provides that in these circumstances it shall be lawful for, *inter alios*, the town clerk to present a petition in manner provided by section 17 of the Burgh Police (Scotland) Act 1892, and the same procedure shall follow upon the said petition, and the court to whom the same is presented shall have the same powers as is provided by the said section in regard to the applications presented thereunder. Section 17 of the last-mentioned Act empowers a petition to be presented to the Court of Session setting forth a failure which has taken place to observe the provisions of that Act or any other Act, or other cause which has made it impossible to proceed with the execution of that Act, and praying the Court to pronounce an order in terms thereof, and empowers the Court to pronounce any order which in their judgment will enable the proceedings for the execution of the Act to be continued as nearly as possible as if the said failure or other cause had not taken place, and empowers the Court to pronounce any order as to the expenses and as to the persons or assessments against which they shall be chargeable.

“That section 66 of the Town Councils (Scotland) Act 1900 provides that where

any burgh shall from any cause be at any time without a legal council, any seven electors of the burgh may present a petition to the Sheriff requesting him to conduct an election of a council, and thereupon the sheriff is directed to proceed with an election in the manner therein specified. The said section makes provision, however, solely for the case of an election being required of the whole number of the council, and makes no provision for the removal from office of councillors who, though forming less than a quorum, have been legally elected and legally retain office, and it is doubtful if any case has arisen falling under that section. Moreover, no steps have been taken, or, so far as the petitioner is aware, are in contemplation, by any electors to put the machinery of the said section in operation, and the situation created is one of urgency.

“That very great inconvenience arises from the present state of matters. The ordinary administration of the burgh is at present brought to a standstill from the impossibility of meetings of council being held. The assessments for the current year are always imposed at a special meeting of the council in the month of November, and are made payable on the 1st of January following. No authority can be given to impose and levy same, nor to borrow money temporarily from the bank to meet tradesmen’s accounts, outstanding instalments of principal and interest on loans shortly falling due, wages of employees, and other current expenditure, nor to order any other work or thing requiring to be done on an emergency. It is of importance therefore that prompt provision should be made for continuing the ordinary administration of the burgh.”

The prayer of the petition was as follows:—“May it therefore please your Lordships, to appoint this petition to be intimated on the walls and in the minute book in common form, and to be advertised once in the *Moffat News* and *Annandale Herald*, and to grant warrant for serving the same upon each of the said William Edgar and George M’Cubbin and the said William Somerville, James Davidson, and John Plant, and appoint them or any one desiring to oppose the prayer of the petition, if so advised, to lodge answers hereto within eight days from the date of publication or service, or within such other short *inducia* as your Lordships may direct; and thereafter, upon resuming consideration of the petition, with or without answers: In the first place, in the event of and after the said resignations coming into effect, to appoint a special election of seven councillors, to be held on the first Tuesday of December, in the year 1905, or on such other date as the Court may appoint, by the electors in manner provided by section 36 of the Town Councils (Scotland) Act 1900, and to appoint the said William Edgar, being the senior Bailie and acting Chief Magistrate of the burgh, to be returning officer at the said election, with power to him to fix the dates for the issue of all necessary notices, and for lodging and withdrawing nomination

papers subject to the provisions of said section, or, alternatively, to find and declare that in the event of and after the said resignations coming into effect, the said burgh is or will be without a legal council, and the said Bailie William Edgar and Bailie George M’Cubbin will have ceased respectively to hold the office of councillor of the burgh, and thereafter to remit to the Sheriff of the county of Dumfries, to conduct an election of a council and to proceed with an election in the manner provided by sections 25 and 26 of the Burgh Police (Scotland) Act 1892, and by the Town Councils (Scotland) Act 1900, relating to the conduct of elections: In the second place, until a sufficient number of the council to form a quorum is elected under either of the alternative modes above specified, to authorise the said Bailie William Edgar and Bailie George M’Cubbin to do all such acts and deeds, and exercise all such authority, as may be necessary to keep in operation the ordinary machinery of the burgh, and for that purpose to make all necessary payments, sign and endorse cheques upon all bank accounts of the Town Council, employ all necessary officers, workmen, or other employees, and order on the credit of the Town Council all such supplies of goods, and issue all such notices or orders on owners, occupiers, or others as may in their opinion be necessary, and to declare that all such payments and supplies shall, so far as they are within the power of the Town Council be a proper charge, and be defrayed from the funds thereof, as also to authorise them to overdraw the Town Council’s bank account to any extent which may be necessary for the purpose of paying instalments of loans and interest, or meeting other obligations of the burgh or other expenditure incurred as aforesaid, until assessments to defray the same can be imposed; and further, to find and declare that the whole expenses incurred by the petitioner and by the Court or by the Sheriff in the present petition, and in the carrying out of the proceedings thereof, shall be defrayed out of the assessments leviable within the burgh for the current financial year, in proportion to their respective amounts in the same manner as other general expenses of administration defrayed and apportioned among them, and to find any person appearing to oppose the prayer of the petition liable in expenses; or to do further or otherwise in the premises as to your Lordships shall seem proper.”

No answers were lodged to the petition.

Counsel for the petitioner stated that the present application was made under section 113 of the Town Councils (Scotland) Act 1900. Section 17 of the Burgh Police (Scotland) Act 1892, did not meet the circumstances of this case, for the power therein given was confined to seven householders. Under the Act of 1862 applications had in fact been made, but they had been refused—*Anderson v. Widnell*, November 6, 1868, 7 Macph. 81, 6 S.L.R. 92; *Tod v. Anderson*, January 23, 1869, 7 Macph. 412, 6 S.L.R. 265; *Muirhead’s Police Government in Burghs*, p. 33, note. So far as counsel

could discover, there had been no applications under the Burgh Police (Scotland) Act of 1892. Section 113 of the Act of 1900 had been passed to meet such a case as the present. The prayer of the petition was alternative, and the first alternative might in the meantime be granted. Reference was also made to *Newhaven Local Board v. Newhaven School Board*, June 12, 1885, L.R. 30 C.D. 350.

[LORD M'LAREN—Might not the Court in such a case as the present appoint managers?]

The Court pronounced this interlocutor:—

“ . . . Appoint *hoc statu* a special election of seven Councillors to be held on Tuesday, 19th December 1905, by the electors in manner provided by section 36 of the Town Councils (Scotland) Act 1900, and appoint William Edgar, being the Senior Bailie and acting Chief Magistrate of the burgh, to be returning officer at the said election, with power to him to fix the dates for the issue of all necessary notices, and for lodging and withdrawing nomination papers subject to the provisions of said section; and decern: *Quoad ultra* continue the petition. . . .”

Counsel for Petitioner—W. J. Robertson. Agents—Cuthbert & Marchbank, S.S.C.

Thursday, November 23.

#### FIRST DIVISION.

WEMYSS COLLIERIES TRUST, LIMTD.  
v. MELVILLE AND OTHERS.

*Company—Articles of Association—Construction—Rearrangement of Capital—Powers of Directors—Payment to Reserve Fund—Detriment of Preference Shareholders.*

The directors of a company, whose capital consisted of preference shares entitled to a cumulative preferential dividend as well as ordinary shares, had power under the original articles of association to apply out of the profits, before recommending any dividend, such sum as they thought proper to reserve fund. On a rearrangement of the capital, whereby the ordinary shares were divided into preferred ordinary and deferred ordinary, the preference shareholders received under certain new and additional articles of association, a right to, *inter alia*, an additional non-cumulative dividend of 1 per cent. if the profits were sufficient to meet certain other interests to which they were postponed *quoad* this increase of dividend. In 1904 the profits were sufficient to provide for these prior interests and to leave a surplus of £2884, 0s. 6d. The directors, however,

proposed to apply to reserve fund £2500, the exact amount required to pay the additional non-cumulative 1 per cent. to the preference shareholders.

In a question with the preference shareholders as to the construction of the articles of association, held that the new articles of association giving the preference shareholders the increase of dividend did not derogate from the directors' power under the original articles to apply profits to reserve, and that the directors were entitled so to apply this sum, although thereby the preference shareholders were deprived of their additional 1 per cent. of dividend.

The Wemyss Collieries Trust, Limited, a company incorporated under the Companies Acts 1862-1890, for the purpose, *inter alia*, of acquiring the minerals and mineral rights in the estate of Wemyss, and having its registered office at East Wemyss, in the county of Fife, (*First Party*), and James Melville, accountant, Alloa, and others, holders of a number of the company's preference shares, (*Second Parties*), presented this special case for the opinion and judgment of the Court.

As originally constituted, the capital of the company was 25,000 4½ per cent. cumulative preference shares of £10 each and 25,000 ordinary shares of £10 each.

Article of association No. 7 was—“The holders of the preference shares shall be entitled to receive out of the profits, after payment of interest on debentures or debenture stock, and providing for a sinking fund for the redemption of such debentures or debenture stock in terms of any trust deed thereanent, a preferential cumulative dividend at the rate of 4½ per centum per annum on the amount for the time being paid up on the preference shares held by them respectively.”

No. 8—“The surplus profits in each year, after providing for all interest due on any debentures or debenture stock, the said sinking fund for the redemption of debentures or debenture stock, and the dividend upon the said preference shares, shall be applicable to the payment of dividends to the holders of the ordinary shares in proportion to the capital paid up, and in proportion to the time during which such capital shall have been paid up.”

No. 128.—“In the case of both ordinary and preference shares no larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.”

No. 129.—“No dividend shall be payable except out of the profits arising from the business of the company, and the declaration of the board as to the amount thereof shall be conclusive. The directors shall out of profits, in the first place, pay the preferential cumulative dividend. And before declaring any dividend on the ordinary shares, the directors shall also provide out of profits for renewals and for depreciation. In cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one