Thursday, November 19.

FIRST DIVISION.

[Lord Lee, Ordinary.

PROVOST, MAGISTRATES, AND TOWN COUNCIL OF NORTH BERWICK *v.* LYLE.

Public Officer—Town-Clerk—Tenure of Office—Dismissal—Culpa.

A town-clerk holds his office *ad vitam aut culpam*, and cannot therefore be removed summarily; but if he, either wilfully or through gross negligence, conduct himself in a manner inconsistent with the public service, that will amount to *culpa* which will justify his removal.

Circumstances in which *held* (by Lord Lee, Ordinary) that the conduct of a town-clerk had not been such as to justify removal.

On 20th March 1872 Robert Lyle, notary public, and Thomas Dall, C.A., Edinburgh, were appointed jointly as town-clerks of the royal burgh of North Berwick. On Mr Dall's death Mr Lyle was appointed sole town-clerk of the burgh on 12th April 1880. At this time the town-clerk's salary was £8 per annum, and he also drew fees for conducting certain portions of the business of the burgh though in his official capacity. On 10th January 1881, by minute of the town council, it was resolved that he should receive £35 in name of salary, and in satisfaction of the fees which he had previously drawn, certain special work to be paid for separately. Mr Lyle was also clerk to the police commissioners of the burgh, but although the commissioners as a matter of fact were the same persons as composed the town council, they were a perfectly independent body, and could appoint separate officers of their own, who were not necessarily these of the town council.

In March 1884 a motion was made that the clerk's salary should be reduced to £8, and on 7th July Mr Lyle raised an action against the town council for declarator that he had been appointed town-clerk at a salary of £35, that he held his office *ad vitam aut culpam*, and that the council was not entitled to reduce his salary or alter the conditions of his office without his consent; and on 4th December 1884 Lord M'Laren (Ordinary) pronounced an interlocutor by which, *inter alia*, he granted declarator to that effect.

For some time before the raising of the action now to be reported, the relations between the town council and the town-clerk had been very much disturbed, and in February 1885 the magistrates and council raised this action of declarator that the defender's tenure of the office of town-clerk should cease and determine as at 28th February 1885, under and in terms of a resolution of the pursuers dated 24th November 1884, to the effect—"The magistrates and council having considered the memorial for the town council submitted to the Lord Advocate and Mr Strachan, advocate, and their opinion thereon in reference to the power of the town council to dismiss the town-clerk, and further, considering that the business of the burgh cannot be satisfactorily and efficiently conducted so long as he remains in office, resolve that Robert Lyle, the present town-clerk of the burgh of North Berwick, be dismissed from the office of town-clerk of the burgh, and that his dismissal shall take effect on and from the 28th day of February 1885, being three months hence;" and that the pursuers would thereupon be entitled to appoint another person to the office with all its emoluments. There was also a conclusion for interdict against defender continuing to act as town-clerk, and a conclusion for delivery of all documents in his possession as such. The principal allegation of the pursuers, which was denied by the defender, was contained in Cond. 3—"For a considerable time past the defender has conducted himself in an insolent and disrespectful manner, and manifested feelings of bitter hostility towards a number of the members of the council; he has on various occasions charged them with falsehood without having any grounds therefor; he has made false and slanderous charges against the provost; he has, directly or indirectly, contrary to the desire of pursuers, made public proceedings at private meetings, by supplying erroneous reports thereof to a local newspaper, and endeavoured, by these reports and the publication of a scurrilous and abusive document, to cast ridicule on the provost in the discharge of his public duties, and to hold him up to contempt; in place of assisting the pursuers in the discharge of their duties, he has systematically obstructed, insulted, and annoyed them; he has refused to carry out or obey their legitimate instructions; he has inserted in the minute-book, and made public as a minute of the council, a document which they, the council, refused to approve and never authenticated; he has taken advantage of his position as town-clerk to insult and asperse the character of individual members of the council; he has, by his gross negligence and carelessness in the discharge of his duties, involved the town council in litigation and serious expense; and, in general, he has conducted himself in a manner inconsistent with a proper and faithful discharge of his duties as town-clerk, and so as to render it impossible for the pursuers to continue to discharge the duties of their office with any respect for themselves or satisfaction to the public so long as he continues to hold said office. The course of conduct so maliciously pursued by the defender towards the pursuers in the aggregate, and in many of the individual acts, amounts to a gross and culpable violation of his office and the duties effeiring thereto." The pursuers went on to set forth in detail a dispute which took place with regard to the custody of the Acts of Parliament belonging to the council, which they alleged he kept in his private repositories, and refused to keep in the council chambers to be consulted by them, and to aver that while the provost was reading at a meeting of council a memorial and opinion of counsel on the matter, the defender repeatedly stated that it was untrue, and to charge the provost with falsely stating the facts in the memorial, and to say the council had not acted as gentlemen. They further averred that he had thwarted them in every way in a new water scheme for the burgh, and that he had charged the provost at a meeting of council with "boycotting" and persecution, and had held him up to ridicule and accused him of dishonesty, and had framed minutes of meeting in such a way as to insult the magistrates and council.

Articles 26, 27, and 28 of the pursuers' condescendence, which, as will be observed *infra*, the Court refused to send to proof, were to this effect. The pursuers alleged that they having resolved to let out their carting work to a contractor, the defender accepted an offer therefor, and that this contract led to a litigation as to whether the work let out embraced both commissioners' and town council work, or the latter only, which litigation caused loss and expense, which was due to negligence and unprofessional conduct on the defender's part, in not making the true contract they intended to make, clear, either in the contract or the council minutes. "This was gross carelessness and negligence, and a failure of duty on the part of the defender as town-clerk of the burgh."

The pursuers pleaded—"(1) The defender's tenure of the said office of town-clerk not being *ad vitam aut culpam*, the pursuers are entitled to dismiss him from the said office on reasonable notice. (2) Assuming the defender's tenure to be *ad vitam aut culpam*, the pursuers are entitled in respect of his conduct and actings above set forth to terminate his appointment on reasonable notice."

The defender pleaded—"(2) The pursuers' averments are not relevant, nor sufficient to support the conclusions of the action. (4) The defender's tenure of office of town-clerk being *ad vitam aut culpam*, the defender should be assoilzied. (5) The defender not having misconducted himself as alleged, he should be assoilzied."

The Lord Ordinary, after a debate as to the relevancy of the action, allowed a proof.

"*Opinion.*—As the authorities stand, the pursuers' plea that the office of town-clerk is not held *ad vitam aut culpam* cannot be sustained, and indeed though not given up, that plea was not maintained in argument before me. I think that the cases of *Simpson* v. *Tod*, 3 S. 150, and *Farish* v. *Magistrates of Annan*, 15 S. 107, 2 Sh. & M'L. 930, are distinctly against it, and that I am bound by these decisions.

"But in rejecting the pursuers' first plea-in-law, I give no opinion that the holder of such an office is constitutionally independent of the magistrates and town council, and removable only on petition and complaint. All that I decide is, that he cannot be removed summarily, and without cause amounting in law to *culpa*, and in this case the conclusions of the summons show that the pursuers did not attempt to dismiss the defender without cause. Their resolution was—'Considering that the business of the burgh cannot be satisfactorily and efficiently conducted so long as he remains in office.'

"The question therefore is, whether the pursuers' allegations disclose a sufficient cause for dismissal? That it is within the competency of the magistrates and town council to dismiss their town-clerk upon sufficient cause I see no reason to doubt. I think that the point was in substance decided in the case of *Hastie* v. *Campbell*, M. 13,132, 2 Pat. App. 277. That case related to the schoolmaster of a royal burgh. But the office of master of a public burgh school was not less a *munus publicum* than the office of town-clerk is, and I know of no authority that the schoolmaster's tenure of office was less secure.

"The objection was taken in that case that the magistrates had no jurisdiction, because by the Act 1693, c. 22, schoolmasters are declared 'liable to the trial, judgment, and censure of the presbytery of the bounds for their sufficiency, qualifications, and deportment in their office,' and it was maintained, in reply to a contention that this Act applied only to parish schools, that Campbelton was not merely a burgh school but a parochial school also. The answer made was that the objection could go no further than to show a jurisdiction in the presbytery cumulative with that of the magistrates.

"The Lords 'repelled the objection to the competency of the magistrates and council,' and in the House of Lords this judgment was not questioned.

"But the authority of Lord Stair is still more distinct. In treating of mandate or commission he says — 'Amongst mandates are all offices which do ever imply a condition resolutive upon committing faults, but not such as are light faults, or of negligence, but they must be atrocious, at least of knowledge and importance. Upon this ground it was that the town of Edinburgh, having deposed their town-clerk from his office, which he had *ad vitam*, the sentence was sustained if the fault were found of the clerk's knowledge and of importance, and it was not enough that no hurt followed, and that he was willing to make it up.'—Stair, i. 12, 16.

"The case of the town of Edinburgh, to which reference is here made, seems directly in point (M. 13,090).

"But the power of the magistrates and town council is only to cognosce in the first instance the town-clerk's conduct, and to remove him upon sufficient cause. The question raised by this record is, whether sufficient cause can be shown against the defender?

"What is *culpa* justifying the dismissal is, in the case of a public servant, a question of much difficulty. Stair says it must be atrocious and against knowledge. I agree, however, with the opinion expressed by Lord Deas in the case of *Whyte* v. *The School Board of Haddington*, that moral blame is not essential to it. If it appears that he has either wilfully or through gross negligence misconducted himself in a manner inconsistent with the public service required of him, I apprehend that is enough. If instead of doing his best to assist the magistrates and town council in their endeavours to discharge their public duty, a town-clerk is found flaunting his independence, and searching about for reasons to withstand and defeat the resolutions of the corporation, I think that it must be a question of circumstances and degree whether he is not *in culpa* warranting dismissal. For the public service must be attended to; and the magistrates and council must be allowed to regulate their proceedings, and to discharge their duties in their own way, so long as they do so faithfully and in a lawful manner. Incapacity, arising from want of temper, may be as fatal to the public service, and as inexcusable, as incapacity from intemperance in the use of stimulants; and the abuse of an office, such as that of the town-clerk, to the effect of preventing business being done, or lawful resolutions being carried out, may in some cases amount to malversation. I am far from saying that a town-clerk can never be justified in refusing to carry

out the wishes of the magistrates and town council. If he were ordered to destroy or tamper with the burgh records, or do anything which he considered against the law of the land, I should think he would be within his duty in refusing to give his services. But making difficulties where no difficulties need have been; charging the provost or other members of the council with being actuated by corrupt or unworthy motives in their public conduct; writing and reading in public minutes of a grossly offensive character about the provost or councillors; and contumacious disobedience of the lawful orders of the magistrates and town council—these are things which, if proved, would in my opinion amount to culpable misconduct in office justifying dismissal.

"In the present case the record contains allegations—to some extent supported by admissions—of a kind not to be set aside without inquiry. They seem to shew, on the part of the defender, the assumption of an attitude towards the provost and town council as a body quite unbecoming the relation which subsisted between them, and rendering almost impossible the transaction of the business of the corporation. The original dispute about the collection of Acts of Parliament may have been superficially healed. Litigation at that time was avoided. But the quarrel which had occurred, 'the words of high disdaining' which seem to have been spoken, are perhaps admissible in explanation of the relations subsequently existing between the pursuers and the defender. It was contended for the defender that the allegations as to what passed at meetings of the police commissioners were irrelevant. This action relates solely to the defender in his capacity of town-clerk. But it appears from the pursuers' allegations, if true, that the defender had himself referred at the council board to his proceedings at the police commissioners' meetings for explanation of his charge of personal animosity and corrupt motives against the provost. In this way the alleged speech of the defender—'I need not remind you how the provost, to serve his own ends, mixed me up in it,' &c.—seems not irrelevant; and I cannot exclude it from consideration and inquiry. In like manner the terms of the minute set forth, and the defender's conduct in regard to the letter, are admissible evidence in the question as to the defender's fitness for the office of town-clerk. The conduct of the defender as to the burgess ticket may admit of some explanation, or may have been mere pettishness. But it is not easy to see how business could go on under such conditions as are alleged; and I think that as to this matter also there must be inquiry.

"On the whole, my opinion is that there must be inquiry as to the alleged conduct of the defender; and that it is not possible at this stage to exclude from the inquiry any of the matters referred to on record."

The defender reclaimed, and argued that the statements in the record were not sufficient to justify dismissal, and also that no averment should be admitted to proof relative to the defender's conduct as clerk to the police commissioners.

At advising—

Lord President—In this case I am prepared to adhere to the interlocutor of the Lord Ordinary. If the allegations contained in this record were taken separately, and not in combination, there might be a good deal of difficulty regarding the relevancy of some of them, but this is one of those cases in which the whole history of the connection between the defender and the Magistrates and Town Council of North Berwick must be taken into account as disclosed in the averments. I do not think it at all desirable to make any detailed comments on the averments, nor upon the nature of the case generally, but I adopt one sentence in the Lord Ordinary's note as explaining, I think, very distinctly the grounds upon which he has proceeded, and the grounds upon which I am prepared to go along with him. He says—"In the present case the record contains allegations, to some extent supported by admissions, of a kind not to be set aside without inquiry. They seem to show on the part of the defender the assumption of an attitude towards the provost and town council as a body quite unbecoming the relations which subsisted between them, and rendering almost impossible the transaction of the business of the corporation." That is the ground upon which I am prepared to sustain the relevancy here and allow a proof. There is just one slight exception to that opinion—that is, as regards articles Nos. 26, 27, and 28 of the condescendence, which I do not think are relevant, and would be better out of the case.

Lord Mure—I am of the same opinion. As the matter has to be gone into I abstain from expressing any opinion of my own about any particular portion of the averments, but I think the whole case is one for inquiry on the grounds stated by the Lord President.

Lords Shand and Adam concurred.

The Court adhered except as to articles 26, 27, and 28.

A proof was then taken. The facts proved fully appear from the note of the Lord Ordinary.

His Lordship assoilzied the defender.

"*Opinion.*—It is necessary in deciding whether the pursuers have substantiated their case to keep in view what that case is. No unfaithfulness in the office of town-clerk is alleged against the defender, excepting that he instigated or was a party to the publication of a report of the private meeting of council held on 8th August 1884 with reference to the burgess-ticket of Mr Balfour of Whittinghame. As it was proved that the defender had nothing to do with the publication of that minute, this point is out of the case. The conduct of the defender as clerk to the commissioners of police, in allowing or not taking steps to prevent the publication of a report of a private meeting of that body, is matter for separate consideration. It involves a charge of unfaithfulness, but not as town-clerk, and therefore it only enters into this case as affecting the defender's fitness for any office of public trust. The case against the defender is in substance entirely founded upon alleged unfitness for office, indicated by culpable and unbecoming misconduct during the period from August 1883 to November 1884. The meeting at which the resolution to dismiss the defender was passed took place on 24th November 1884, and the resolution was in the following terms:—'The magistrates and council having considered the memorial for the

town council submitted to the Lord Advocate and Mr Strachan, advocate, for their opinion thereon, in reference to the power of the town council to dismiss their town-clerk; and further, considering that the business of the burgh cannot be satisfactorily and efficiently conducted so long as he remains in office—resolve that Robert Lyle, the present town-clerk of the burgh of North Berwick, be dismissed from the office of town-clerk of the burgh, and that his dismissal shall take effect on and from the 28th day of February 1885, being three months hence.'

"Prior to August 1883 the defender had been doing the duties of the office for some years apparently with acceptance. His salary had been raised by the unanimous vote of the council in 1881. He was also clerk to the magistrates and council in their capacity of police commissioners of the burgh, and it appears to have been at a meeting of this body on 8th October 1883, connected with a scheme for bringing in a new supply of water, that the conduct of the defender first seriously roused the disapproval of the provost and a majority of the councillors. There had been previously, in the month of August, a correspondence with the provost about non-attendance at a meeting of the Works Committee (at which it appears the clerk was not always required or expected to attend), but I found it impossible to believe that that matter justified or really indicated any grave displeasure on the part of the provost with the conduct of the clerk. I think that it was the proceedings connected with the water question that began it. This led to the dispute about the custody of the Acts of Parliament, and it is not difficult to trace all the discreditable scenes which subsequently occurred to the disagreeable relations then produced between the provost and the town-clerk.

"This renders it necessary to consider how far the defender was to blame for these relations, and for the deplorable results which are depicted in the newspaper reports of the meetings. Because it is impossible to decide whether the resolution of dismissal was well founded without ascertaining whether it was the defender who was responsible for the state of matters which is said to have caused so much difficulty in conducting 'satisfactorily and efficiently' the business of the burgh.

"It is startling to find at the outset of this inquiry that the preamble of the resolution ('the magistrates and council having considered the memorial,' &c.) is not supported but contradicted by the undisputed reports of the proceedings at the meeting. The resolution bears to proceed upon consideration of a certain memorial and opinion. The opinion was read at the meeting, and that part of it which related to the town-clerk personally was that 'if the memorialists are in a position to establish their statements in the memorial with reference to the conduct and actions of the town-clerk, they are, in our opinion, entitled to dismiss him whatever the tenure of his office may be.' But it appears the memorial was not read, and that when one of the councillors asked that it might be read, in order that they might know whether the facts had been correctly stated in it, this most reasonable and proper suggestion was put aside. 'The provost said he did not think it would be desirable to read the memorial at present. There would be a motion made which would perhaps suit Mr Easton's views in that respect. The members would have an opportunity of reading the memorial afterwards.' Mr Easton said—'The whole thing may be settled before we see the memorial.' Bailie Kendal said—'No, no. You will see it to-morrow.' Another attempt to get the memorial read was made after the opinion had been read, but without success; and after the resolution had been moved by the provost, Mr Easton pointed out that it was 'wrong in fact, inasmuch as it stated that the magistrates and council had considered the memorial. Now, they had never seen it.' But the answer to this was—'They have heard the queries. You can dissent.' Accordingly the resolution was carried by a majority of six to three without the memorial having been considered or read, and another resolution was passed immediately afterwards directing that the memorial and opinion 'should remain in the possession of the provost, subject to exhibition to the magistrates and council, but with instructions not to permit the same to be copied in the meantime,' and remitting to a committee with power to take action for carrying the resolution into effect.

"But although this may shake confidence in the resolution, I am not disposed to think that it absolves the Court from the painful duty of considering whether dismissal was justified by the defender's conduct. A proof has been allowed to the pursuers upon that point, and on the allegations it was impossible to avoid this. I must, however, say that in my opinion the pursuers of the present action in appealing to a court of justice to approve of such a resolution carried under such circumstances are bound to show clear grounds for it. It must appear that the fault of which they complain were in the words of Lord Stair (*sup. cit.*) 'not such as are light faults, but they must be atrocious, or at least of knowledge and importance.'

"It appears from the evidence that the newspaper reports of the various meetings between 8th October 1883 and 24th November 1884, as printed, are (with the exception of that relative to the meeting of police commissioners on 22d April) admitted to be substantially correct. They certainly show that throughout the whole period language was used, as well by members of the council as by the clerk, which at well conducted meetings of such a body would instantly be disallowed as unbecoming. A practice of interposing suggestions and of meeting those suggestions in a manner which almost inevitably led to the bandying of words among the members of the council, or between the members and the clerk, was to some extent tolerated, and when such interposition was checked it was frequently either done too late or done in a manner ill calculated to restore order. For example, at the meeting of 8th October 1883, which illustrates very well the commencement of the proceedings which ended in the dismissal of the town-clerk, the defender suggested that as the interests of the corporation might conflict with those of the old water company, it might be proper to employ a different engineer to the water company's engineer, to report as to taking over the works of the old water company, and the terms on which they should be taken over. Thereupon the provost stated, 'We have resolved to take over the water

company.' The clerk, 'You have not—at least not in a formal manner—and I must keep my books right.' Here the clerk was rude in manner but right in matter of fact. But what followed shows how necessary it is in judging of points of manner and taste to keep in view the customs of the place, the way in which business was there in use to be done, and the atmosphere, so to speak, of the meetings. I refrain from going over the report in detail. The defender, I think, rightly and in the honest discharge of his duty, pointed out perhaps somewhat persistently that it was necessary the commissioners should decide formally whether they were going to take over the water company's works, and also whether they were going to proceed under the Lindsay Act or the Public Health Act, which latter Act he recommended them to adopt. The way in which his suggestions were treated was in my opinion unfortunate—I cannot say that there was misconduct on the part of the provost. For the provost was supported by a majority of the commissioners in what he said and did, and he was therefore within his right, and accountable only to the ratepayers. But I am bound to say that the attitude assumed on that occasion towards the defender as clerk, and the whole course of the proceedings which ended in the provost giving notice of a motion 'that the present clerk's services be dispensed with,' amply account, without fault on the part of the defender, for no business being done at that meeting. This is how the discussion upon the defender's suggestions commenced—The provost, 'Did I not understand that we were unanimous and most anxious to take over the water scheme? I called a public meeting for that very purpose, and they endorsed our action. There is only one way in which we can go into the scheme, and that is to employ an engineer to do it. Before the public meeting we had a meeting here and Mr Lyle attended, but he never put in an appearance at the public meeting, and I was very surprised at it.' The clerk—'I attended the first meeting to give my advice.' The provost—'Give your advice when it is asked.' The clerk—'I am here to advise you against a wrong course of procedure, and in order to keep my books right I must have this matter gone about in an orderly fashion.' The provost—'I will not allow you to dictate to me, sir. If there is any more of this I shall move a motion.' The clerk—'If you say under what Act you are going to take the water company over I'll know what to do, but at present I am quite in the dark as to your intentions.'

"I am of opinion that it was not the fault of the defender that the business of the burgh on that occasion was not satisfactorily and efficiently conducted.

"This opinion also applies to the meeting of 20th October, and I refer to the printed report for the grounds of this opinion. The discussion upon the terms of the minute was unnecessary, for the part of it which caused the discussion was by the provost's motion allowed to stand. It may appear to others that the clerk might have refrained from minuting the provost's statement that if he could not get a clerk to work to his hand he would make a motion. But it is proved by both of the newspaper reports, in my opinion, that a statement to that effect was made, and considering the position in which the clerk had been placed by the notice of motion for his dismissal, I think he was justified in proposing to make the minutes more full than in ordinary circumstances would have been necessary. He was entitled to ask that the circumstances in which the notice was given should be minuted in order that the motion might be properly considered when it came up. There is no ground for holding that the defender framed the minute otherwise than in good faith, and for the purpose of keeping a true record of the circumstances in which the notice of motion had been given.

As to the clerk's conduct in not sending the Public Health Act to the provost, and the discussion which followed upon that, there is no proof of any intentional discourtesy on the part of the defender, and I think that the matter was needlessly brought up. I cannot hold the defender responsible for the tone of the discussion which ensued, and even the use of the expression "tuts, stuff," which was very much founded on, I think not so censurable in the circumstances as to justify dismissal or even serious reproof. When a town-clerk is told that he has 'no right to think differently' from the provost as to the proper custody of the books and papers of the corporation, it is inevitable that the discussion should degenerate and become irregular, and he can scarcely be found fault with for saying, even in the presence of the whole magistrates and council, with the provost in the chair—'that's perfect nonsense.'

"I next consider the proceedings at the meeting of town council on 15th January, at which the first memorial and opinion as to the dismissal of the town-clerk for his conduct in regard to the custody of the Acts of Parliament came up. It appears that at the meeting of 20th October it was remitted to the magistrates 'with powers to take proceedings to compel the clerk to deliver up the Acts and send them to the council chambers.'

"Such a remit may have been justifiable, though it was scarcely necessary in order to vindicate the provost's right to see the Public Health Act that the responsibility of the clerk for the safe custody of the books and papers of the corporation should be disputed, and a right claimed to take them out of his hands. But it was not within the remit to consult counsel as to the dismissal of the town-clerk, and the memorial in so far as it related to that point was unauthorised by the magistrates and council as a body. When the memorial was read it appeared to contain a number of statements as to the clerk's conduct. As the opinion had been taken without submitting the memorial to the town council, or obtaining their approval of the statements it contained, I think that the clerk was entitled to question, and that instantly, the accuracy of any of the statements concerning himself then read for the first time, as for instance the statement that he had declined to lend the Acts when wanted, and had been guilty of offensive, insulting, and unwarrantable conduct. I think that the mode in which the defender did so question these statements was rude and ill-mannered. 'It is not true; the memorial is a one-sided and untruthful representation of the state of matters,' were unbecoming expressions in the mouth of the clerk, although they were substantially well-founded. But my

opinion is that they were the natural result of the position in which the defender had been placed by the form of the proceedings taken against him, and the unauthorised character of the statements made about him in the memorial. He found that his conduct had been submitted to a species of trial, without giving either him or the council as a body any opportunity of correcting the statements regarding it. I think it not wonderful that he should have been excited into the use of language, which in ordinary circumstances would have been grossly unbecoming. But the circumstances were extraordinary, so much so that the majority refused to leave the memorial with the clerk, the provost saying—'It belongs to me and I will keep it.' It seems not to have been been observed that if the memorial was a private document not belonging to the town council as a body, the clerk's rights of speech and action regarding it might be very different from what they would otherwise have been.

"I pass over the proceedings at the meetings of town council on 23d February and 4th March 1884. They show the manner in which the business was conducted at that time, and call for no further remark in this case.

"The result so far is, that at least down to 28th March 1884, when the defender's salary as town-clerk was reduced to £8, and he was dismissed from his office as clerk to the police commissioners on three months' notice, he had been guilty of no fault justifying dismissal from his office of town-clerk. This was practically conceded, and it is implied in the form of the proceedings then adopted against him. But it is important to note the fact in considering what followed, because it is evident that in what followed the defender was smarting under the treatment which he had received, and which he thought to be harsh and unjust. If this feeling was in any degree well-founded, and if the subsequent proceedings against him were the result of a preconceived determination to get quit of him as far as possible, I think that it may afford some exculpation for conduct that might otherwise have been inexcusable. I confess that when I first read some of the subsequent proceedings my impression was decidedly adverse to the continuance of the defender in office. But the evidence has revealed some very peculiar and mitigating features in the case. At the meeting on 28th March the defender asked to be heard before the resolution to reduce his salary as town-clerk was passed. This was refused, and the refusal seems to me to make it impossible for the town council to found upon the terms in which the clerk protested against what had been done. Their resolution must stand or fall upon its own merits, and I think it falls.

"Then, again, the resolution to dismiss him from the office of clerk to the police commissioners was accompanied by a similar refusal to allow the clerk to make a statement. In the circumstances I think that the magistrates and town council cannot be allowed to use the statement made by the defender in explanation of his dismissal from the clerkship of the police commissioners as evidence against him in the question of fitness for the town-clerkship. I refrain from considering whether that statement was well founded and justifiable or not, and I do so for this reason, that as the police commissioners, the pursuers, refused to hear or consider that statement, and having refused to hear or consider it, I do not think they can now found on it. With regard to the proceedings at the meeting of police commissioners on 22d April (the poker and tongs meeting) the only complaint of any weight against the clerk is as to the publication of a report of them. Had the defender been responsible for that publication I should have been disposed to hold that the more discreditable to the provost these proceedings were the more inexcusable was it for the clerk to the commissioners to publish them. But it is not proved that the defender was responsible for that publication. He was not bound, nor was he in my opinion entitled, at his own hand to apply for interdict against the publication of the report. It may be said that he ought to have reported to the provost the proposal of the newspaper editor to insert the report which he had made up from hearsay evidence. But considering the position in which the defender stood at the time, I think that his not mentioning the matter and asking instructions on the subject was excusable.

"The next matter arises upon the proceedings at the police commissioners' meeting on 3d June. The defender is said to have submitted to that meeting a minute of the meeting of 22d April so grossly inaccurate and offensive as to show him altogether unfit for the office of town-clerk. It is also alleged that at the same meeting the defender insisted on reading and making public a scurrilous and offensive letter which he said had been received by him concerning the previous meeting, but which it is said was truly written by himself, or at least got up in a manner to which he was privy. Now, as to the proposed minute, in so far as it bears that the discreditable scene on 22d April commenced with the provost reflecting on the clerk, I think it substantiated by the evidence. I further hold it proved that there was no intentional or material exaggeration in the statement as to the chairman having threatened the clerk with personal violence. As to the propriety of minuting such matters, there can be no doubt that in ordinary circumstances it would be grossly improper, because entirely unnecessary. But in the present case something had to be entered in the minute to explain how the meeting broke up without any business being done. It was not the clerk's fault that it so broke up. What he said about sticking to facts was caused by the reflection that had been cast upon him, and which in my opinion was not warranted by the facts, and on the whole, although it would have been more dignified and correct to have omitted all disagreeable details as unnecessary, I think that the defender's conduct in proposing such a minute was not in the circumstances such as can be founded on by the pursuers in support of their resolution of 24th November.

"As to the letter professing to be from Madame Tussaud & Sons, it is not proved that the defender was in any way responsible for the writing or sending of it. But I think his conduct was most improper and reprehensible, not only in reading a portion of it against the remonstrances of the chairman, but also in allowing it to get into the hands of the newspaper reporters. Even his bringing it before the meeting at all without authority was an offence. He knew it was a

hoax of a most offensive kind directed against the provost. Yet according to his own admission he saw nothing but fun in it. I think that his conduct on this occasion was such as would have warranted instant dismissal by the police commissioners in ordinary circumstances. The question is, whether it warranted dismissal by the town council from the office of town-clerk on the 24th November? I have found this question to be attended with difficulty. For even if the town council were an entirely distinct and different body of persons they would be entitled to take notice of such conduct in public on the part of their clerk. But there are some considerations which induce me to hesitate in finding this matter sufficient as a ground of dismissal in the present instance from the town-clerkship.

"In the first place, apart from the fact that the proceedings at the previous meeting had got into the newspapers (for which the defender was not responsible), the letter was a very stupid and comparatively stingless joke aimed at the provost. The defender should no doubt have seen that, in the circumstances known to him, the letter would not if published be regarded as all fun. I think that he ought to have handed it over to one of the provost's friends in the police commission to put in the fire or do what he liked with. But it does not necessarily follow that his indiscretion in treating the letter as he did and allowing it to obtain publicity, though grave, was so grossly culpable as to justify his being treated as unfit for any office of public trust.

"In the second place, the defender at this time had been already condemned, and I think irregularly and unwarrantably condemned. I do not presume to express any opinion upon the spirit evinced by the provost and the majority of the town council in their proceedings against the defender. For I hold myself bound to assume that they acted in good faith throughout. But I say that, possibly owing to their not adverting sufficiently to the delicacy of the duty they undertook in dealing with the town-clerk as they did, their proceedings had been irregular and unwarrantable. They were not entitled to reduce the town-clerk's salary at their pleasure, and they acted most irregularly in doing so without hearing him. For the salary was either a pertinent of his office or was due to him by an agreement which is not said to have been terminable by them at pleasure. This circumstance and his dismissal from the clerkship to the police commissioners created a peculiarity in the relations between the defender and the provost which makes it difficult to judge the conduct of the defender at this time as that of a town-clerk whose status and privileges were recognised, and upon whom rested all the responsibilities of office.

"In the third place, I think that the defender's conduct in this matter, though culpable, must be considered as a part of and arising from the long series of altercations into which he had been led.

"Reviewing these proceedings as a whole, I think that the opinion of Treasurer Bell, who took very little part in the squabbles himself, and only interposed, as far as I can see, as a peacemaker, is entitled to much weight and respect. I was greatly struck by his manner and appearance in the witness-box, and though his suggestions in the interests of peace and order may appear to have been somewhat quaint, I was satisfied from his examination that his evidence was that of a fair and exceptionally reliable man.

"My verdict therefore is on the whole for the defender.

"I consider it unnecessary to notice the other matters which have been brought into the case."

The pursuers reclaimed, but before the case was put out for hearing a new council had been elected, and the new council decided not to insist in the reclaiming-note.

Counsel for Pursuers—D.-F. Balfour, Q.C.—Strachan. Agent—William Officer, S.S.C.

Counsel for Defender—Mackintosh—Guthrie. Agents—Paterson, Cameron, & Company, S.S.C.

Tuesday, December 15.

FIRST DIVISION.

POLICE COMMISSIONERS OF OBAN *v.* CALLANDER AND OBAN RAILWAY COMPANY.

Valuation—Railway Refreshment Rooms—Police Assessment—Water-Rate—Oban Burgh Act 1881 (44 *and* 45 *Vict., cap.* 178), *sec.* 51.

Section 51 of the Oban Burgh Act 1881 provides that "The annual value of the railways and sidings. . . . stations, depôts, and buildings, ... belonging to the Callander and Oban Railway Company within the burgh shall, as regards the public water-rate and the police assessment, so far as it is applicable to water, be held to be the nearest aggregate sum of pounds sterling to one-fourth of the annual value thereof entered in the valuation roll."

The railway company had within the burgh a railway station, part of which consisted of refreshment rooms, which were let to a tenant at a fixed rent. *Held* that the refreshment rooms were part of the stations and buildings belonging to the railway company, and therefore fell to be assessed for water-rate, in terms of the section above quoted, at one-fourth of the annual value as entered in the valuation roll.

The Callander and Oban Railway Company were the owners of a railway station situated within the burgh of Oban. Part of the station consisted of refreshment rooms, which were let to a tenant at a fixed rent. These refreshment rooms were open to the public, as well as to passengers upon the railway, and there was an entrance from the railway platform, and also from the approach leading from the street to the station. The railway and stations belonging to the company were valued by the Assessor of Railways and Canals, but the refreshment rooms were valued by the assessor for the burgh of Oban, and entered in the valuation roll for the burgh.

By the Oban Burgh Act 1881 (44 and 45 Vict. cap. 178) the police commissioners of the burgh were authorised to provide an improved supply of water for the burgh, and powers of assessment were given them for that purpose. Section