

**LORD JUSTICE-CLERK**—In this case the question is whether the Sheriff-Substitute must be held to have committed an error in law in holding that the respondent was in fact dependent upon the earnings of his son, who was killed by an accident while in the appellants' employment. I am unable to hold that there is any ground for finding that such error was committed. The deceased contributed to the support of the household of his father, who suffers from rheumatism so as to be in an uncertain state as to power for regular labour. It is true that the father was doing his best to help a crippled brother, for whose support he was, of course, not liable. The whole family seem to have assisted this crippled relative. That was a fact to be taken into account in considering the case, but in no way was conclusive on the question of partial dependence on the son's earnings for his own support. I am of opinion that on the facts before him as stated in the case, it was open to the Sheriff-Substitute to find partial dependence to have existed, and that the appeal should be refused.

**LORD YOUNG**—I think that the Sheriff is right.

**LORD MONCREIFF**—The respondent in this appeal is the father of the deceased workman. He therefore is a "person entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman," and thus satisfies the first part of the definition of the word "dependent" given in the statute, section 7 (2). But he is not entitled to receive compensation unless it is proved that he was "dependent on the earnings of the workman at the time of his death." The Sheriff-Substitute, acting as arbitrator, has held that the respondent was in part dependent on the earnings of the deceased, and assessed the compensation at £75. Against that judgment the employers have appealed by a stated case, the question put to us being whether in the circumstances stated the respondent was in part dependent upon his son's earnings at the date of the latter's death.

We cannot entertain this appeal unless it raises a question of law; and assuming that it does, we cannot sustain it unless we are satisfied that there was no evidence on which the Sheriff-Substitute was entitled to decide as he did. I greatly doubt whether any question of law is raised, because assuming that the person claiming compensation possesses the requisite title in point of relationship, the question whether he was dependent, and if so, to what extent, seems to me to be a question of fact to be decided by the arbitrator.

The only way in which such a case can be represented as raising a question of law is that on the statement in the case there is no evidence to support the arbitrator's finding, and on that footing such appeals have been considered—*Simmons v. White Brothers, L.R., 1899, 1 Q.B. 1005*, and *The Main Colliery Company v. Davies, L.R. 1900, App. Ca. 358*.

If this appeal is competent to any extent, I can only say that I cannot affirm that there was no evidence to support the finding of the Sheriff-Substitute. We have nothing to do with the amount which he has awarded. That is not before us, and therefore we are not called upon to consider how much the award has been increased or diminished by the consideration that the respondent was burdened with the support of a brother and sister.

While I should have preferred to find that no question of law is properly raised, I am prepared to concur in answering the question put to us in the affirmative.

**LORD TRAYNER** was absent.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties to the stated case, answer the question of law therein stated in the affirmative: Therefore affirm the award of the arbitrator and decern: Find the respondent entitled to expenses since the date of the award of the arbitrator, and remit," &c.

Counsel for the Appellants—M'Kenzie, K.C.—Macphail. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Respondent—Crabb Watt—Sanderson. Agents—Wishart & Sanderson, W.S.

Tuesday, March 11.

#### FIRST DIVISION.

#### PROVOST, MAGISTRATES, AND COUNCILLORS OF ROTHESAY v. CARSE.

*Burgh—Town Clerk—Dismissal by Magistrates—Interim Appointment—Public Officer—Nobile Officium.*

A town clerk of a royal burgh was dismissed on the ground of incapacity by resolution of the provost, magistrates, and council. He refused to vacate office, and an action was brought to have the dismissal declared valid. While this litigation was pending the provost, magistrates, and council presented a petition in which they averred incapacity and excessive indulgence in alcohol on the part of the clerk, and also that he had been sequestered, that the depute town clerk had resigned, and that owing to the relations of the parties it was impossible to carry on the business of the burgh. The Court in these circumstances appointed an interim clerk to act pending the litigation.

This was a petition by (1) 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 (2) the Rothesay Harbour Trustees, for the appointment of an interim town clerk to act in room of James Carse, solicitor, Rothesay, who had been dismissed from the office of town clerk, and from certain other offices to which he had been appointed.

The petitioners stated as follows:—"On 26th September 1899, James Carse, solicitor, Rothesay, was appointed town clerk of the royal burgh of Rothesay, and was also appointed to the various offices and appointments connected with the duties which the Town Council perform as Commissioners and Local Authority foresaid.

"In a very short time after Mr Carse's appointment it was found that the duties of the office of town clerk of said burgh, and of the said offices, appointments, and employments, were performed by him in an exceedingly unsatisfactory manner. He neglected entirely to perform the chief duties belonging to the various offices held by him, and in the conduct of such business as he did undertake he was so negligent and careless that no reliance could be placed upon him. Nor could any reliance be placed upon his word, as his statements were frequently found to be untrue. He became excessively addicted to alcohol, and he frequently appeared at meetings of Council, in the Police and Dean of Guild Courts, and at Public Inquiries in a condition which showed that he was suffering from the effects of this indulgence.

"Towards the end of the year 1901 the petitioners became convinced that in the interests of the burgh Mr Carse could not be permitted to continue to conduct himself as he had been doing. Meetings of Council were held to consider what course should be followed, and Mr Carse having refused, when remonstrated with, to amend, it was finally resolved to take the opinion of counsel. A memorial was accordingly prepared and submitted to counsel, and counsel were of opinion that, upon the facts disclosed in the memorial, the petitioners were entitled and called upon, and that it was their duty, to dismiss Mr Carse from the office of town clerk and from the said offices, appointments and employments.

"Accordingly, on 21st January 1902, the petitioners, the Provost, Magistrates and Councillors of the said burgh, passed a resolution dismissing Mr Carse from the office of town clerk of the said burgh, and on said date the petitioners, the Provost, Magistrates and Councillors of the said burgh, acting as such and as Commissioners and local authority foresaid, and the Rothesay Harbour Trustees, passed a resolution dismissing him from the offices, appointments and employments held by him.

"The said resolutions were communicated to Mr Carse, but he has declined to recognise the right of the petitioners to dismiss him from the said office of town clerk and from the said offices, appointments, and employments. An action of declarator,

interdict, and delivery has accordingly been raised against him at the instance of the petitioners, in which it is sought to have it found and declared *inter alia* that he has been duly and legally dismissed from the office of town clerk and from the said offices, appointments, and employments as from 21st January 1902. The summons in said action was signetted on 20th February 1902, and a copy is produced herewith and referred to.

"In the meantime, and pending the decision of the said action, great difficulty and inconvenience will be experienced in the conduct of the affairs of the burgh through the want of a properly appointed clerk. If the petitioners succeed in said action, and it is found and declared by your Lordships that Mr Carse has been duly and legally dismissed from the office of town clerk, and from the said offices, appointments, and employments, as from 21st January 1902, all acts done by him in connection with the office of town clerk, or with the said offices, appointments, and employments subsequent to said date will be null and void; and further, the petitioners having dismissed him from the various offices held by him will be unable to accept his advice in reference to the affairs of the burgh, and particularly in reference to the litigation which will follow upon the said summons of declarator, interdict, and delivery.

"Already meetings have been held at which the relations between the town clerk and the petitioners have seriously interfered with the business of the burgh. Mr Carse has been sequestrated under the Bankruptcy Acts, and William Alexander Stewart, writer, Rothesay, has been appointed trustee on his sequestrated estates. Disputes and litigations have arisen as to salary and other matters between the trustee and various members of the staff of the town clerk's office. The depute town clerk and the whole staff of the office are in the employment of Mr Carse. The depute has resigned, and the circumstances threaten to paralyse the whole work of the office. Not only in consequence of the present litigation, but in consequence of the town clerk's bankruptcy, his interests have become hostile to those of the corporation. In particular, it has been found necessary to retain part of his salary in consequence of a claim at the instance of the corporation for licences and fees collected by the town clerk, and disputes have arisen in regard to said matters with the bankrupt, and also with the trustee on his sequestrated estates.

"It is therefore necessary that some person should be appointed to perform the duties *ad interim* of the town clerk of the said burgh and of the said offices, appointments, and employments. The petitioners have appointed Robert Duncan Whyte, writer, Rothesay, to act *ad interim* in execution of the duties of town clerk, and of the said offices, appointments, and employments. It is necessary, however, that the authority of your Lordships should be obtained for such an appointment, and the petitioners respectfully suggest the name

of the said Robert Duncan Whyte as a fit and proper person to fill the said offices *ad interim*."

The petitioners craved the Court to interpose authority to the appointment by the petitioners of the said Robert Duncan Whyte to act *ad interim* in execution of the duties of the office of town clerk of the said burgh and of said offices, appointments, and employments; or otherwise to appoint the said Robert Duncan Whyte, or such other person as their Lordships might deem fit, to be interim town clerk of the said burgh, and to act *ad interim* in execution of the said offices, appointments, and employments for such period and subject to such conditions as to their Lordships might seem proper.

Carse lodged answers in which he denied the charges made against him by the petitioners, and stated as follows:—"With regard to alleged difficulty in conducting the burgh affairs, there need be no difficulty whatever, as the respondent is able and willing to co-operate with the petitioners in carrying on the business of the burgh provided the petitioners will do their part. The various clerks are acquainted with the routine duties of their departments, and the respondent is willing to act notwithstanding the action taken by the petitioners."

Argued for the petitioners—While it was true that the Court would not interfere where no incapacity was averred (*Magistrates of Annan v. Parish*, December 6, 1835, 14 S. 111), it would interfere where there were such averments (*Adam v. Magistrates of Forfar*, March 7, 1823, 2 S. 281; *Magistrates of Newburgh*, November 29, 1864, 3 Macph. 127). Here there were the strongest averments possible, and the defender was not in a position to appoint a depute to do the work.

Argued for the respondent—The office of town clerk was a *munus publicum* held on the strongest tenure known to the law, and there was no authority for the Court interfering so long at least as the work could be done, which was the case here—*Simpson v. Tod*, June 17, 1824, 3 S. 150; *Magistrates of North Berwick v. Lyle*, November 19, 1885, 23 S.L.R. 214.

LORD ADAM—This is an application at the instance of the Provost, Magistrates, and Councillors of Rothesay to have an interim town clerk appointed, and the parties are agreed that if such an appointment is made, the person appointed should also fill the other offices mentioned in the petition. The grounds on which this application is made are that the present town clerk, who was only appointed in 1899, has so conducted himself as to show that he is incapable of performing the duties. We are also told that while there are certain fees and dues which the town clerk has to collect and pay over to the Magistrates, he has been sequestered, and the deputy who used to transact the business for him has resigned because his salary is not paid. Finally, we are told that in consequence the position of the

town clerk and the Magistrates is such that the interests of the burgh are suffering. Are we in these circumstances to appoint an interim town clerk? The Provost and Magistrates have passed a resolution dismissing the town clerk, but some doubt seems to have arisen as to the validity of that resolution, and they have thought it right to bring an action of declarator in the Court of Session to the effect that such resolution was valid, and that the town clerk has ceased to occupy that office since its date. The appointment which we are asked to make will be interim until the case of declarator shall be settled. The question is whether in that position of matters the Court should make the appointment? I have no doubt that it is competent for the Court to entertain such an application. There is clearly authority for such a course being adopted. Whether or not we are to treat the case as if the town clerk were still town clerk or as if he were out of office, is not really a question in this case. The question is, what are we to do for the benefit of the community in the circumstances, and I think a consideration of the whole state of matters shows that it would be a reasonable and wise exercise of our discretion if we were to appoint an interim town clerk pending the litigation. I think therefore that we should—while not interposing authority to an appointment made by the Magistrates as asked in the first part of the prayer—appoint an interim town clerk of our own accord.

LORD KINNEAR—I agree with your Lordship. I have no doubt about the competency of the Court to deal with the application, and I agree that in disposing of it we have to consider primarily the interests of the community of the burgh. It is clear enough that if the petitioners' averments are true the respondent is not a fit and proper person to continue in office. If they are not true—and we cannot assume that they are—still the administration of the affairs of the burgh has in consequence of the controversy between the town clerk and the Magistrates been brought to an absolute deadlock. Therefore I agree that we should make an interim appointment, which will come to an end when the question between the parties has been decided. I need hardly add that what we are now doing in no way prejudices any plea that we have been told will be taken by the respondent, or that may be taken by him in the course of the litigation.

LORD PEARSON—I agree with your Lordships. The difficulty which I have felt about this case is, that I rather think we have to deal with it as one in which the respondent is still in office. It is suggested that in such a case it is contrary to the practice of the Court to interfere by way of interim appointment. Now, as regards applications for the appointment of an interim factor pending litigation, the rule of the Court is not to make an appointment when one of the disputants is vested with a legal title. But here another in-

terest altogether comes in, namely, the interest of the public; and that gives the case a different aspect. It is because the office in question is a *munus publicum* that it is held on the strongest tenure known to the law. But the public interest requires not merely security of tenure but also proper performance of the duties of the office; and having regard to the strong averments made here as to persistent dereliction of duty, and to the absence of any counter averments of malice or personal motive, I agree that an interim appointment should be made. I have no doubt as to the general competency of the application; and while it is not every averment of *culpa* that will suffice, yet the averments here touch so nearly the interests of the burgh and of the public within the burgh that I think that this application should be granted.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court pronounced this interlocutor:—

“Nominate and appoint Robert Duncan Whyte, writer, Rothesay, to be interim town clerk of the burgh of Rothesay and to act *ad interim* in the execution of the duties of said office and of the various offices and appointments connected with the duties which the Town Council of said burgh perform under the Acts mentioned in the petition, and that until the action of declarator and interdict between the petitioners and the respondent referred to in the petition is concluded or otherwise disposed of: Find no expenses due to or by either party, and decern.”

Counsel for the Petitioners—Ure, K.C.  
—J. D. Robertson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Jameson, K.C.—A. S. D. Thomson. Agents—Scott & Glover, W.S.

Tuesday, March 18.

## SECOND DIVISION.

[Sheriff-Substitute  
at Dundee.

GOURLAY BROTHERS & COMPANY  
v. FERRIER.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule, secs. 11 and 12, Second Schedule, sec. 13 — Review of Weekly Payments — Remit by Sheriff to Official Medical Practitioner — Certificate of Medical Practitioner Conclusive Evidence of Workman's Condition — Reduction of Weekly Payment to Nominal Amount so as to Preserve Right to Apply for Review.*

By section 13 of the Second Schedule of the Workmen's Compensation Act it is provided that an arbitrator may re-

mit to a medical practitioner appointed for the purposes of the Act to report on any matter which seems material to any question arising in the arbitration.

Section 11 of the First Schedule provides that a workman receiving weekly payments under the Act may be required by his employer to submit himself for medical examination, and may submit himself to a medical practitioner appointed for the purposes of the Act, whose certificate as to the condition of the workman is declared to be “conclusive evidence of that condition.”

In an application by an employer for review of weekly payments made to a workman who had received injuries to his eyesight, the Sheriff-Substitute, in terms of section 13 of the Second Schedule, remitted to a medical practitioner appointed for the purposes of the Act to examine the workman's condition. The report bore that the power of vision of the right eye was reduced by one-half, which condition would be permanent; that the workman would never be able for any work for which unimpaired vision was essential, but was quite able to undertake his ordinary work as a labourer.

The Court (*diss.* Lord Young) *found* that the certificate was conclusive evidence that the workman's incapacity arising from his injuries had ceased, to the effect of disentitling him to further compensation in the meantime; but that it was proper in view of the terms of the report to preserve the right of the parties to apply for review, and with that object, instead of ending the weekly payments, to reduce them to a nominal amount; and *remitted* to the Sheriff-Substitute to reduce the weekly payments to 1d. per week.

John Ferrier, labourer, having been injured in the employment of Gourlay Brothers & Company, shipbuilders, Dundee, was awarded by the Sheriff-Substitute at Dundee (CAMPBELL SMITH) compensation under the Workmen's Compensation Act 1897, at the rate of 6s. 3d. per week, beginning on 3rd January 1901, until the further orders of the Court.

On 10th September 1901 Gourlay Brothers & Company lodged a minute, in which they craved the Court to review the weekly payments and bring the same to an end as at 11th April 1901.

They averred that on that date Ferrier had completely recovered from the effects of the injuries in respect of which compensation had been awarded, and had since been earning wages at other employments; that in consequence the minuters had stopped the weekly payments on said date, and that Ferrier was threatening to charge them on the decree.

On 16th October 1901 the Sheriff-Substitute pronounced the following interlocutor:—“Having seen the medical referee's report, and heard parties, reduces the compensation payable to the pursuer to 5s. a-week as from this date until the further