Edinbain, in the parish of Durnish, Skye, father of the deceased James Stewart, iron-turner, who resided at 136 Crookston Street, Glasgow, was pursuer; and Messrs Robert M'Laren & Co., iron-founders, Canal Street, Port Eglinton, Glasgow, were defenders.

In the revised condescendence for the pursuer, it was stated that the deceased James Stewart, eldest son of the pursuer, was about twenty-six years of age, and had been brought up in Glasgow as an iron-turner. He was of sober, industrious habits, and had been in the employment of the defenders for about three months when he met with his untimely death. His duty in the defenders' employment was that of working at a turning-lathe, which he had occasionally to oil, and to shift the belt. This lathe is fitted up against a wall, and the deceased had to stand, and pass and repass, on a plank in front of the turning-lathe. The said plank was only 18 inches broad, and immediately behind it, and at a distance of only 3 feet, there was other machinery consisting of bevelled wheels and pinions, which were in rapid motion from time to time. There was no fencing of any kind to protect the workmen and others who had occasion to pass or to work near the machinery. The flooring was also in an unsafe state, with holes in it and inequalities, which, with the proximity of the moving machinery, made it dangerous. On or about the 18th day of January 1867, the deceased, while engaged in his work, accidentally fell back among the wheels and pinions, which were in rapid motion at the time, and was instantaneously killed, having been cut in two and his head completely severed from his body.

The defenders in their statement said the deceased entered their service as a journeyman iron-turner upon the 28th September 1866. All the machines and lathes in the turning-shop which were driven by the machinery could be thrown into or out of gearing without any of the workmen moving from their places. The lathe at which the deceased worked is, and has all along been, used in what is termed "face-turning." The said lathe had been used continuously, not only since the acquisition of the works by the defenders in 1856, but for many years previously, without the slightest risk to any of the workmen on the premises. In the end of 1866, it became necessary to repair the machinery, and for this purpose it was necessary to remove the boxing, and to take down the old wheels and shafting in order to allow the new wheels, shaft, &c., to be put in and adjusted. After this was done, it was impossible at once to replace the boxing round the wheels and pinions, because in such circumstances the machinery required to be constantly watched. The deceased and his fellow-workmen in the turning-shop were well aware that the machinery was not then boxed in, and that it could not be so until it had been thoroughly tried and found to be in smooth working order. Neither the deceased nor his fellow-workmen incurred any risk from the state of the machinery; and in working the lathe at which he was employed, the deceased had no occasion or necessity to approach the said machinery. On the 18th January 1867, it was found that the deceased had met with his death in consequence of coming in contact with the new wheels and pinions; but the defenders believe and aver that his death was solely attributable to accident, or to his own rashness or want of care.

The issue for the jury was "Whether, on or about the 18th day of January 1867, the deceased James Stewart, while working in the employment of the defenders in their workshop at Glasgow, was killed by coming in contact with a portion of the moving machinery through the fault of the defenders in not having the said machinery duly fenced, to the loss, injury, and damage of the pursuer?"

Damages were laid at £500.

The jury retired at a quarter before six o'clock, and after an absence of fully an hour, returned into Court with a verdict for the pursuer—damages, £80.

Counsel for the Pursuer—Gifford and Alexander Nicholson. Agent—D. J. Macbrair, S.S.C.

Counsel for the Defenders—Watson and Asher. Agent—Jas. Webster, S.S.C.

Tuesday, March 3.

GOLDIE *v.* CHRISTIE AND PETRIE.

Reparation—Session-Clerk—Wrongous Dismissal—Appointment ad vitam aut culpam—Culpa—*Kirk-Session—Competency—Issue.* A party was elected session-clerk *ad vitam aut culpam.* He brought an action of damages for wrongous dismissal against two members of session, jointly and severally, or severally, alleging that at a meeting of session at which these two members, *inter alios*, had been present, he had been dismissed from office without any *culpa* being proved against him, by the votes of these members. Action dismissed as irrelevant (*dub.* Lord Deas). Opinion, *per* Lord President, that if, as he alleged he had not been guilty of *culpa*, his proper action was a declarator that he was still session-clerk; and that no case of delict was raised against the defenders inferring joint and several liabilities.

Opinions as to appropriate remedy of pursuer.

This was an action at the instance of William Goldie, parish schoolmaster of the parish of Arbirlot, in the county of Forfar, against John Christie, minister of the parish, and James Petrie, farmer, Pitcundrum, in the said parish. The pursuer alleged that the minutes of the Kirk-Session of Arbirlot bore of date 12th May 1844, that he was elected session-clerk *ad vitam aut culpam.* He further alleged that, on the 11th May 1865, he was "wrongfully, illegally, or without any true or just cause, dismissed from his office as session clerk. At the meeting of session at which this dismissal took place, there were present the two defenders, the said deceased Thomas Finlayson, and Mr James Lawrence, labourer, and residing in the village of Arbirlot, who was an elder of the said parish, and the pursuer. The motion for the pursuer's dismissal was made by the deceased Mr Finlayson, and seconded by Mr Petrie, both of them having been previously urged to act as they did by the defender Christie, who, in consequence of his acting as moderator, had no vote, but who acquiesced in the judgment. The said Mr Lawrence did not concur in the dismissal of the pursuer, but, on the contrary, dissented and complained to the presbytery. At the same meeting, on the motion of the said deceased Thomas Finlayson, the defender Christie was appointed interim session clerk."

The pursuer pleaded that having been, by the actings of the defenders, wrongfully deprived of office, he was entitled to reparation, and proposed the following issue:—

"Whether on or about the 12th day of May 1844, the pursuer was appointed session-clerk of the parish of Arbirlot, *ad vitam aut culpam*, and whether, on or about 11th May 1865, the pursuer was wrongfully dismissed from his said office, or was at and after that date wrongfully prevented from discharging the duties and drawing the emoluments of his said office by the defenders or either of them, to his loss, injury, and damage?"

Damages laid at £500.

The case was reported on the issue.

MACDONALD for pursuer.

YOUNG and DUNCAN for defenders.

At the suggestion of Lord Deas, judgment was delayed.

At advising—

LORD PRESIDENT—When we were about to dispose of this case previously a suggestion was made by Lord Deas as to how far we might not be trenching on the judgment of the Court in the case of *Graham* v. *Sime* (Macfarlane, p. 427), and accordingly judgment was deferred until we should have an opportunity of looking into that case. And now, having done so, I am satisfied that the present case differs from the case of *Sime* in those very respects in which I think it ought to be dismissed. I take for granted, though there is no distinct averment to that effect by the pursuer, that the pursuer was elected to the office of session-clerk *ad vitam aut culpam*. The pursuer avers farther that on 11th May 1865 he was wrongously dismissed from his office, and he then proceeds to show how this dismissal was brought about; and his ground of challenging this dismissal as wrongous and illegal is, that there was no *culpa* stated or proved against him sufficient to justify the dismissal of a public officer who held office *ad vitam aut culpam;* and his plea is, that having been by the actings of the defenders wrongfully deprived of the office of session-clerk, without his having committed any *culpa* to justify such dismissal, he is entitled to reparation as sued for. Now, what is that reparation? It is reparation for having been deprived of the office of session-clerk. But if his averments are true, that there was no *culpa* on which the defenders were entitled to dismiss him, the whole basis of his claim disappears. He has mistaken his remedy. His remedy would be to seek a declarator that he has not been dismissed, but that he is still *de jure* session-clerk, and if he is so, he is bound to discharge the duties of his office. And accordingly that was the form of action adopted in *Sime* v. *Graham*. The pursuer sued there for reduction of the minutes constituting the attempted dismissal from office, and concluded that he was still session-clerk and entitled to discharge the duties of the office, and concluded also for interdict against the defenders molesting him in the performance of his duties, and then wound up with a conclusion for damages in respect of an improper attempt to interfere with that discharge. That was a properly libelled summons looking to the allegations made in that case. But there are no such conclusions here. There is nothing but a conclusion for damages, and the damages are sought because of deprivation of office, *i.e.*, he seeks an equivalent for the emoluments of office to which he would have been entitled if he had not been dismissed. That is a mistaken remedy, and is not justified by the facts.

But there is a farther and a greater difficulty in the pursuer's case. He concludes against the pursuers jointly and severally, or severally. Now, the defenders called are John Christie, the minister of the parish, and James Petrie, one of the elders of the parish. These gentlemen, no doubt, were members of the kirk-session, and were present at the meeting which, the pursuer alleges, wrongously dismissed him. But they were not the only members of the kirk-session, nor the only members of the kirk-session present at that meeting. Two other gentlemen were present, Mr Finlayson and Mr Lawrence. No doubt Lawrence did not concur in the dismissal, but dissented from it, but Finlayson concurred, and not only concurred, but was the leading member against the pursuer, for it was on his motion that the dismissal of the pursuer took place. Assuming that there was ground otherwise for joint and several liability, it might be competent for the pursuer to call any of the defenders who had taken the proceedings against him, but there must be a foundation for that conjunct and several liability. There must be delict or delinquency. If this were breach of contract, I should hold the pursuer bound to call the whole members of the kirk-session, but he represents his case as one of delict, in which he is entitled to call one or more of the delinquent parties, and make them jointly and severally liable. But the facts do not raise such a case. These gentlemen were acting within their legal competency. The meeting was duly constituted, and the question disposed of, whether there was sufficient *culpa* to justify dismissal of the session-clerk, was a question which they were entitled to consider, and to decide *prima instantia*. I do not say their judgment must be final, or that, if they dismiss him from insufficient cause, he has no remedy; but it is well settled that such a body as this, dealing with *culpa* on the part of their officer, is entitled to judge of it, and is acting within its competency in disposing of it. And therefore the first element of delict is wanting, and the only thing alleged is, that they had not sufficient ground in fact for their judgment. That cannot be viewed as delinquency. Therefore it appears to me that there is no ground on the footing of delinquency for that joint and several liability. And if there is no ground for that it is difficult to see what other liability there can be in this action. The several liability of which the summons speaks is properly this, that each is to be liable for the share he individually takes in the wrong done. It is a different liability against each defender. But that is not raised here. Supposing we hold it to embrace proper joint liability, another objection occurs, that all parties are not called. There is nothing better settled than that a joint liability transmits against the representatives of the wrongdoer, and even joint and several liability so transmits. But there is no attempt here to convene the representatives of the deceased Mr Finlayson. On the whole matter, I have come to the conclusion that the summons is irrelevant, and must be dismissed.

LORD CURRIEHILL—I am of the same opinion. I think the character of the action is such as your Lordship has described, and is open to the objections your Lordship has stated. I think another objection may be added, that, such being the nature of the action, it would be necessary to libel malice.

LORD DEAS—I look on this as a case involving matters of considerable importance, and I should have been sorry to dispose of it without time for consideration. I do not say there may not be

some technical objections to the shape of the proceedings which may authorise a dismissal of the action, but I think they are very narrow.

The pursuer was elected to the office of session-clerk *ad vitam aut culpam.* He was a public officer, having important duties to perform to the public, more important duties than such officers have now to perform, owing to recent Acts of Parliament having circumscribed these duties. He was keeper of the session records; he was bound to give out extracts, and had various duties to perform of which he could not be relieved by the kirk-session. He held a civil office, with civil emoluments, and he was entitled to come to the civil Court for protection in the performance of his duties, just as he was responsible to them for the due performance of his duties. Although he was a public officer, I do not say that the same law would not have applied if he had not been so, for whenever an individual is elected to an office *ad vitam aut culpam* he is entitled to hold it unless sufficient fault is found against him to authorise his dismissal. If sufficient fault is not proved against him he is entitled to the protection of this Court whether his office is public or not. And accordingly, that protection has often been given to parties who held offices which were not public as well as to public officers. Take the case of *Abercromby* v. *Goldsmiths of Edinburgh* (M. 13,154). The Goldsmiths appointed their clerk for life. He fell into bad health, and became unable to perform his duties. They elected another clerk, but that was found not to be competent for them to do. That could not be called a public office, and the ground of that judgment was that there was a contract between the corporation and the clerk that he was to hold office for life unless fault was established against him. In the case of the kirk-session, the question of duration turns equally on contract. The contract with the clerk might have been that he was to hold office during pleasure, but instead of that it is *ad vitam aut culpam.* It is not less a violation of contract to dismiss a public officer elected for life than one not elected for life; if in either case he is dismissed without fault proved against him, he is entitled to redress in two ways—(1) to be restored to office; and (2) as against those who voted him out he is entitled to damages for loss of his emoluments, so long as he is not restored. That law has been applied in the case of many officers elected for life, and also in the case of those elected during pleasure. It has been held again and again that a party elected merely during pleasure cannot be suddenly dismissed on a mere pretence of fault, but that some reasonable ground must be established. And it is not difficult to find a principle for that, for all contracting parties are bound to act in good faith, and if a man is elected to the office of clerk to a corporation, and still more to the office of session-clerk, the law holds that you must act in good faith, and not turn him off suddenly from his employment. Still less can you do so when he has public duties to perform which are interrupted by his dismissal. In the case of the *Magistrates of Montrose* in 1710 (M. 13,118), the Magistrates elected a burgh schoolmaster, not *ad vitam aut culpam,* and they dismissed him. He suspended, and pleaded that he was elected for life. That plea was not sustained, but the Court held "that the Magistrates could not arbitrarily at their pleasure remove their schoolmaster, but that for any just and reasonable cause they might; and ordained the Magistrates to condescend before the Ordinary upon a just and reasonable cause for removing the suspender." There reference is made to the case of *Massie.* There is also the case of *Hog* v. *Sir William Ker* (M. 13,106), and the more important case of *Harvie* v. *Bogle and Kirk-session of Glasgow* (M. 13,126). I am aware that in some recent cases the Court have manifested less willingness to interfere with the discretion of parties electing an officer where he is not elected for life, but I am not aware of any case which would entitle us to say that those cases in which the Court interfered when the office was not for life were not *a fortiori* of those cases where the appointment was for life. In neither case will the law allow a dismissal without just cause. So far, I have no doubt of the relevancy of the pursuers' statements for enquiry. [*Reads pursuer's statements.*]

Appeals were taken to the presbytery, and were rightly dismissed, for the presbytery had no jurisdiction in such a matter, and it is not the part of the presbytery but of the Court to interfere in such cases. A minute was prepared and adopted, and after all they go back on the matter, and, in respect that he did not prepare it at the time, they remove him. I say no more than that that was a fair question for the Court or for a jury, whether that was or was not a reasonable cause of removal of a public officer appointed *ad vitam aut culpam* That is relevant for inquiry, whether it is sufficient or not.

As to the parties on whom the liability rests if wrong was done, I think the pursuer calls the right parties, for he calls those who voted for the resolution of dismissal. I do not think any one else could be held liable in damages. There may be a question as to calling the representatives of Mr Finlayson, but in the view I take of the case it is not necessary to go into that. I think he was right in calling those he did. He had nothing to do, so far as damages are concerned, with those who did not vote for dismissal. If he had asked to be restored to office, either with or without reduction, the case might have been different, but I doubt if reduction is necessary, for the kirk-session do not remove him, and the only ground for saying that he was removed is in his own statement. If he claims the office still, which I think he must do, it may be necessary to call the whole kirk-session, but if he had brought them all into the field, and then concluded for damages, his action would have been quite right. The case of *Sime* v. *Graham* was the same as this, except as to the form of procedure. Sime was a session-clerk, elected for life, and, according to his statement, was removed just as in this case. As to the damages in that case, the parties against whom damages were claimed were only those who voted for the motion—there is an exception in the claim for damages of those who did not vote for it. That was a well-considered case, and was fought keenly on both sides, the zeal of the parties communicating itself to the counsel in the cause. The senior on the one side was Mr Hope, and on the other, Mr Duncan M'Neill. I say nothing of the juniors, except that they were not wanting in zeal. The result of the discussion was that the Court approved of this issue:—"Whether, on or about the 24th day of March 1822, the defender was appointed session-clerk of the parish of North Berwick during his life and good behaviour? And whether, on or about the 3d day of March, or the 20th day of November 1824, the pursuers, or any of them, wrongfully dismissed him from his said office or wrongfully prevented him from discharging the duties, and drawing the emoluments of the same,

to his loss, injury, and damage?" The case was set down for trial, but was compromised on the day of trial. This issue settles that the party being appointed *ad vitam aut culpam*, it was enough if he could establish that he was wrongously dismissed. The notice of malice being necessary is new to me. No law, I think, would hold malice to be necessary to give redress against such a breach of contract. There is no trace of malice in the issue in *Sime's* case, or in the other cases. It is whether the session wrongfully dismissed him from his said office, or wrongfully prevented him from discharging his duties. If he is prevented from discharging his duties, that is a substantive claim according to this issue. And so in the matter of damages, which were claimed, not against the whole kirk-session, who were quite rightly called in the reduction, but only against those who did the wrong. There is no doubt as to the law applicable here. I think there is no flaw but in procedure, and that of the narrowest possible description. If it were not for your Lordships' opinions, I should not have held that there was any flaw at all. For although in *Sime, ob majorem cautelam*, all the parties were called in the reduction, it does not follow that an action of damages may not lie against those who did the wrong, without calling the whole kirk-session. It may be the most expedient form of process to embody both claims. The proper action would have been to reduce or declare void that resolution, and to claim to be allowed to exercise his office in public, and to claim damages against those doing the wrong for breach of contract. I am not prepared to dissent from the judgment to be pronounced, but I come to take that view entirely on the ground of the form of procedure, and accordingly I thought it necessary to state my view of the general law.

Lord Ardmillan—In many of the observations made by Lord Deas I entirely concur, and I rest my opinion on the ground that the pursuer has not taken his appropriate remedy. This action is directed against the minister and kirk-session. It is settled law that a session-clerk is an officer of the kirk-session appointed by them, and that his office is not *ad vitam aut culpam* unless it is so stipulated. But the pursuer alleges that he was appointed *ad vitam aut culpam*, and it is probable that he was so appointed. If he had brought an action here alleging that he was dismissed from an office which he held *ad vitam aut culpam*, and concluded for reduction of the sentence of dismissal, that would have been an appropriate form of action, and he might have made a claim in that action for damages during the time he was unlawfully kept out of office. Or he might have brought an action of declarator, with declaratory conclusions to the effect that the defenders had irregularly, or at least without proof of *culpa*, dismissed, and that it should be declared that he was still session-clerk. Or he might have brought a action on the alternative ground that he never was dismissed, and that the defenders had filled a vacancy which they had not created, and he might have applied for an interdict on the footing that he was still session-clerk. To such conclusions he might have added a conclusion for damages in respect of loss of office during the time that another man had been put into his place. These remedies were open to him, and I say nothing against his right to obtain them. But my difficulty is, that he comes into Court in this action saying—either I have been dismissed by a judgment which I don't seek to reduce, or I have not been dismissed, but I claim damages. The pursuer, who does not know whether he is in office or out of it, claims damages against these two gentlemen. I think this action cannot be maintained as his only, or as his appropriate remedy. I think that, for the sake of preserving regularity of procedure, the action ought to be dismissed, leaving the pursuer to seek the appropriate remedy which the law provides.

Agents for Pursuer—Ferguson & Junner, W.S.
Agent for Defenders—Wm. Mitchell, S.S.C.

Tuesday, March 3.

SECOND DIVISION.

BENN & CO. *v.* PORRET & SEALY.

Ship—Charter-Party—Charterer's Agent—Advances for Necessaries—Power of Master. A charterer of a ship having bound himself that his agents abroad would advance a sum to pay the ship's disbursements to account of freight, and the agents, who had no funds belonging to the charterer, having declined to make advances except on receiving an obligation from the master that they would be repaid out of the freight earned, which obligation the master granted, *held*, that the agents were entitled to take the obligation and the master was entitled to grant it; that the agents were not bound by the conditions of the charter-party to which they were not parties, and that they were entitled to recover their advances from the owner, who had received payment of the freight.

Process—Advocation—Competency. Decree of absolvitor with expenses was pronounced by a Sheriff, and an advocation presented by the pursuers of the action, which they failed to proceed with, in consequence of which the defenders obtained decree of protestation, and the pursuers thereafter paid the inferior court expenses found due. They then presented a second advocation. *Held* that it was competent, as it could not be inferred from what had taken place that the pursuers acquiesced in the judgment on the merits.

This was an advocation from Renfrewshire. The pursuers were Benn & Co., merchants in Bahia, and the defenders were owner and master respectively of a ship named the Cereal. The action was raised for payment of £258, 0s. 3d., being cash advanced by the pursuers to or on the order of the master for necessaries to the vessel when she lay at Bahia in 1865. The defence was that the pursuers were not entitled to recover, because, by the terms of the charter-party under which the ship had been chartered, they were bound, as charterers' agents, to make the advances which they made, as a payment to account of freight.

It appeared that in March 1865, the Cereal, which was then in Liverpool, and about to proceed to Bahia with a cargo for her owner's benefit, was chartered by a Mr Power, of Liverpool, for the homeward voyage, with a cargo of sugar. Freight was to be paid by the charterer at the rate of 40s. per ton, and the charterer had the option of shipping any other produce than sugar, he paying the ship a lump sum of £920; but the master was to sign bills of lading at any rate of freight the char-