

In some respects these decisions go beyond what is required for the determination of this case—because (First) this was not an innocent misrepresentation in the sense that the defenders thought they had authority. It was an intentional misrepresentation made in precise terms, at least to the pursuers if not to both parties. (Secondly) Even after the charterers on 6th December declined to proceed, the defenders, although they knew that they had furnished the charterers with an absolute defence (when it came to be discovered) against a demand by the pursuers to enforce a contract upon the pursuers' terms, persisted in keeping the pursuers in the dark by maintaining that the ship had been fixed on the pursuers' terms. There was then no mention of the defenders' intention to give their guarantee. Such a proposal would have necessitated the disclosure of the misrepresentation, and the absence of all mention of a guarantee does not quite tally with the explanation now put forward.

But I have no hesitation in following the law there laid down in so far as it applies.

On the question of damages I have very little to add to the very clear statement of the Lord Ordinary in his note. The main item is the loss of anticipated profit under the contract which the defenders professed to have made for the pursuers, under deduction of the profit actually realised on a substituted voyage, the freight in which was 5s. instead of 7s. 6d. Now, from 5th December onwards freights fell rapidly. The pursuers lost their opportunity of getting equally good freight, and ultimately 5s. a ton was as much as I believe they could have obtained under a suitable charter.

As to the minor item of the expenses of the action against Ireland & Son, I should have had considerable doubt but for one consideration, viz., that when pressed by the pursuers' agents to point out their authority from the charterers, the defenders, instead of admitting that they had no authority, simply referred the pursuers' agents to the correspondence, and added, "You will see from same that we acted merely as brokers, and as such well within our authority." (Letter, 28th February 1899.) In reply to that letter the pursuers' agents on 1st March 1899 wrote that they were not satisfied from the correspondence that the defenders had authority from the charterers to bind them as the defenders professed to do by telegram No. 41, and they added, "It may well be that taking the whole circumstances into account you had such authority, and we understand from your letter of yesterday you say you had, and we shall act upon this footing subject to the terms of our letter of 27th ult. unless we hear from you to the contrary in course."

To this letter the defenders returned no answer, and in the circumstances I think the pursuers were entitled to proceed against the charterers until defences were lodged.

On the whole matter I am for affirming the interlocutor as it stands, and remitting the case to the Lord Ordinary.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD TRAYNER was absent.

Counsel for the Pursuers and Respondents—Ure, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Clyde, K.C.—C. D. Murray. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, January 27.

FIRST DIVISION.

MACKIRDY v. GLASGOW AND TRANSVAAL OPTIONS, LIMITED.

Process—Proof—Diligence and Recovery of Documents—Letter Books—Company—Application for Rectification of Register.

In an application for the rectification of the register of a company in respect of misrepresentations in a document alleged to be a "prospectus," the petitioner averred that this document had been sent to a number of members of the public. He applied for a diligence to recover the letter-books of the company, and of certain persons alleged to have been promoters thereof, that excerpts might be taken of all letters to any person enclosing a copy of said document. Diligence granted.

W. A. S. Mackirdy, Lesmahagow, presented a petition for the rectification of the register of the Glasgow and Transvaal Options, Limited, by the removal of his name from the register. He averred that he had been induced to take shares by representations contained in a document which he alleged to be a "prospectus" issued prior to the flotation of said company, and that these representations were untrue. The petitioner founded, *inter alia*, upon sections 9 and 10 of the Companies Act 1900. He averred that the prospectus was widely circulated in Glasgow and the surrounding district from the office of the person who ultimately became secretary of the company, and also by certain persons named in article 1 of the petition, who were alleged to be promoters of the company.

Answers were lodged by the company. They denied that the document referred to was a "prospectus," and that it was issued to the public as such.

On November 19th a proof was allowed.

Mackirdy then lodged a note craving for a diligence to recover documents. The first two articles in the specification were in the following terms:—"(1) The letter-books of the company, that excerpts may be taken therefrom of all letters to any person enclosing a copy of the document printed on pages 2 and 3 of the petition [i.e., the notice or prospectus] or enclosing forms of application for shares in the company, or offering to any person or proposing that he should take shares in the company,

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

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

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

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

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

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

Tuesday, January 27.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

MAGISTRATES OF ROTHESAY

v. CARSE.

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

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

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

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

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

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