

of town-clerk and burgh schoolmaster had been held by Lord Lee to be analogous in *Provost, &c. of North Berwick v. Lyle*, November 19, 1885, 23 S.L.R. 214. There was no authority in the law of Scotland that the holder of a *munus publicum* was independent of his own employers. Even if it were the law that the authority of the Court was required in order to validate the dismissal of a town-clerk, that authority was asked for in the present action.

At advising—

LORD JUSTICE-CLERK—I am of opinion that a Town Council, while it has no power to remove the town-clerk from his office at their own hand, and must have the sanction of the Court to his dismissal, is not taking an incompetent course in resolving that he ought not to hold office and that he should be dismissed, and then coming to the Court with an action such as we have here, that the facts may be ascertained and the judgment of the Court taken upon them, by which an operative action may be obtained. And this it appears to me is truly what the action is intended to effect. I am therefore in favour of adhering to the judgment of the Lord Ordinary, and remitting to him to proceed. I think it, however, right to say that I consider that in the event of the defender being removed his removal can only operate as regards his emoluments from the date of the judgment of the Court in the action, subject it may be to such expenses as may have been necessary for obtaining temporary fulfilment of the duties of the office by another person pending the final decision.

LORD YOUNG concurred.

LORD TRAYNER—I think it is quite a settled point that the pursuers could not at their own hand, or, as the authorities put it, without process at law, dismiss the defender from the office which he held. They might, however, quite competently resolve that the defender by reason of his conduct had forfeited his right to that office, and come to the court to have that resolution given full effect to. The pursuers by their minute, no doubt, in terms dismissed the defender, but they have come to the Court to have their action approved. I am therefore disposed to treat the pursuers' minute as expressing only their opinion and resolution, and in that view I think we may now in this action competently inquire whether the pursuers' resolution was justified. I observe that the pursuers conclude for declarator that the defender ceased to be town-clerk as at 21st January 1902, being the date of their minute dismissing him. Whether the defender ceased to be town-clerk at that date, or if not then at what date, is a matter on which at present I would rather not express an opinion. It has yet to be ascertained whether the defender's conduct was such as to warrant his dismissal. If it did not, then the date of his dismissal is obviously a question which will not arise. I therefore agree that the interlocutor of the Lord

Ordinary should be affirmed and the proof taken which his Lordship has allowed.

LORD MONCREIFF—In the view of at least the later decisions, and especially *Simpson v. Tod*, 3 Sh. 150, and *Farish v. Magistrates of Annan*, 15 Sh. 107, we must hold that a town-clerk cannot be arbitrarily removed from office by the magistrates and that he cannot be turned out without process of law, that is, without the authority of the Court. The pursuers have recognised the necessity of obtaining the sanction of the Court by raising the present action. It may be doubted whether, strictly speaking, the conclusions of the summons are in proper shape, because the Court is asked not to dismiss the defender but to approve of two resolutions passed by the pursuers whereby they dismissed the defender as at 21st January 1902. But I think that those resolutions may be treated as simply resolutions to dismiss the defender conditionally upon the sanction of the Court being obtained after inquiry.

I have no doubt that if the Court should after proof come to be of opinion that the defender ought to be dismissed, the Court will be able in its judgment in this process to do complete justice between the parties as to the presumed date and consequences of the dismissal.

I am therefore of opinion that the interlocutor of the Lord Ordinary allowing a proof before answer should be affirmed.

The Court adhered.

Counsel for the Pursuers and Respondents—Ure, K.C.—Hunter. Agents—Simpson & Marwick, W.S.

Counsel for the Defender and Reclaimer James Carse—Guthrie, K.C.—A. S. D. Thomson. Agents—St Clair Swanson & Manson, W.S.

Wednesday, January 28.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

ALEXANDER'S TRUSTEES v. MUIR AND OTHERS.

Superior and Vassal—Feu-Disposition—Construction—Duplicandor Triplicand—Obligation “as also to Pay the Double of the Yearly Feu-Duty every Nineteenth Year.”

A vassal held under a feu-di-position granted in 1807 which stipulated for a yearly feu-duty of £248, 18s. 2d., and which contained the following clause:—
“As also to pay to me (the superior) and my foresaids at the term of Whitsunday 1824 the sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the said whole subjects, and also to pay to me (the superior) and my foresaids every nineteenth year (counting from

the said term of Whitsunday 1824) the said sum of £497, 16s. 4d. sterling, being the double of the said yearly feu duty which will then be due for the whole subjects above mentioned, and so forth, doubling the said yearly feu-duty every nineteenth year counting from Whitsunday 1824, but that only for each nineteenth year as the same comes round." The feu-disposition further contained a clause under which the superior bound himself to enter heirs and singular successors of the vassal without demanding any composition whatever "in regard that the foresaid feu-duty, together with the double thereof in every nineteenth year . . . are the agreed and fixed consideration hereby accepted of in lieu of all compositions for the entries of heirs, disponees, and singular successors."

Held (rev. judgment of Lord Stormonth Darling) that the feu-disposition imposed an obligation to pay only twice the feu-duty every nineteenth year, and not twice the feu-duty over and above the feu-duty for the year.

Earl of Zetland v. Carron Company, June 30, 1841, 3 D. 1124, *distinguished*.

In March 1902 an action was raised by Eliza Lady Alexander and others, the trustees of the late Major-General Sir Claud Alexander, Bart. of Ballochmyle, in the county of Ayr, as superiors of certain lands in that county, against Sir John Muir, Bart. of Deanston House, Perthshire, as their vassal, and James Finlay & Company, merchants, Glasgow, as his tenants in a portion of the lands, for payment of two sums of £248, 18s. 2d. alleged to have been underpaid to the superiors at Whitsunday 1862 and Whitsunday 1881 by the vassals in these years respectively for the lands in question, and for poinding.

Sir John Muir held the lands in question under a feu-disposition granted in 1807 by Claud Alexander Esquire of Ballochmyle, the then superior of the lands, with entry as at Whitsunday 1805.

By the feu-disposition the vassal was taken bound to pay an annual feu-duty of £248, 18s. 2d. money feu—"As also to pay to me, the said Claud Alexander and my foresaids, at the term of Whitsunday 1824 the sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the said whole subjects, and also to pay to me, the said Claud Alexander and my foresaids, every nineteenth year (counting from the said term of Whitsunday 1824) the said sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned, and so forth, doubling the said yearly feu-duty every nineteenth year, counting from Whitsunday 1824, but that only for each nineteenth year as the same comes round."

The feu-disposition further contained a clause binding the superior to enter as vassals the heirs, disponees, or singular successors of the vassal without demanding or being entitled to exact any composition whatever "in regard that the foresaid

feu-duty, together with the double thereof every nineteenth year, . . . are the agreed and fixed consideration hereby accepted of in lieu of all compositions for the entries of heirs, disponees, and singular successors in the foresaid lands and others."

The defender Sir John Muir became vassal in the lands in question in 1884, conform to disposition and assignation in his favour by the then vassal.

At the terms of Whitsunday 1862 and 1881 a sum of £497, 16s. 4d., inclusive of the feu-duty of the year, was paid by the vassals in those years respectively.

At the term of Whitsunday 1900 a sum of £497, 16s. 4d. was paid by the defenders to the pursuers over and above the feu-duty of that year.

The sums sued for were alleged by the pursuers to be due for the years 1862 and 1881 as *debita fundi*.

The following receipts were produced by the defenders for the payments made at Whitsunday 1881 and Whitsunday 1900, viz:—

"*Ballochmyle, 15th May 1881.*

Messrs James Finlay & Coy. to Colonel Alexander.

To money feu	- - -	£306 18 9½
44 pecks teind meal at 15s. 7d.	- - -	2 2 10
Burdens	- - -	9 13 1½
Double feu	- - -	248 18 2
		<u>£567 12 11</u>

Off In. Tax - - - 14 3 9

By cash, John Wallace - £553 9 2
£553, 9s. 2d. (Stamp 1d.) 27th May 1881.

"*Edinburgh, 15th November 1900.*

Ballochmyle Trust.

"Received by us, agents for the trustees of the late Major-General Sir Claud Alexander of Ballochmyle, Baronet, superiors of the subjects aftermentioned, from Messrs James Finlay & Co., by the hands of Messrs M'Grigor, Donald, & Co., Writers, Glasgow, the sum of Four hundred and ninety-seven pounds sixteen shillings and fourpence, in payment of casualty due at Whitsunday 1900 in respect of the subjects described in the feu-disposition granted by Claud Alexander Esq. of Ballochmyle, in favour of Kirkman Finlay and others, dated 11th April 1807.

A. & A. CAMPBELL.

"£497, 16s. 4d. stg. (1d. stamp.)"

The pursuers pleaded—" (1) The sum sued for being justly due and resting owing to the pursuers, as superiors of the lands and others described in the summons, and being *debita fundi*, the pursuers are entitled to decree of poinding and for payment as craved."

The defenders pleaded—" (1) The sums sued for not being justly due and resting owing under the said feu-disposition to the pursuers as superiors of the lands and others described in the summons, and not being *debita fundi*, the defenders are entitled to be assoilzied with expenses from both the conclusions of the summons. (2) The sums sued for not being justly due and resting owing to the pursuers as superiors of the lands and others described in the summons, in virtue of the superiors

having accepted payment from the vassals of certain sums of money in full discharge of all feu-duty and compositions due at the terms of Whitsunday 1862 and Whitsunday 1881, the defenders are entitled to be assoilzied with expenses from both conclusions of the summons. (3) The action is barred by *mora*, taciturnity, and acquiescence."

On 21st June 1902 the Lord Ordinary (STORMONTH DARLING) decreed against the defenders in terms of the conclusions of the summons.

Opinion.—"The purpose of this action is to enforce payment by the superiors of two sums of £248, 18s. 2d. each said to have been underpaid by the vassals at Whitsunday 1862 and Whitsunday 1881 respectively as the agreed-on consideration for entering heirs, disponees, or singular successors. It is admitted that at each of these terms the sum of £497, 16s. 4d. only was paid by the vassals, inclusive of the feu-duty of the year, and that at Whitsunday 1900 the like payment was made, but over and above the feu-duty of the year.

"The parties having thus acted originally on the construction of the feu-contract for which the defenders contend, and latterly on the opposite view, the first question is, which of the two views is correct? Upon that I think there can be very little doubt. If the words of the feu-contract were ambiguous it might be permissible to speculate on the analogy of relief-duty. But the words are really distinct enough to exclude all speculation as to probable intention. There is first a fixing of the feu-duty at £248, 18s. 2d. to be paid 'yearly' at the term of Whitsunday in all time coming, and then, introduced by the phrase 'as also,' there is a precise obligation to pay every nineteenth year from Whitsunday 1824 the sum of £497, 16s. 4d., 'being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned, and so forth, doubling the said yearly feu-duty every nineteenth year counting from Whitsunday 1884,' finally there is a clause binding the superior to enter and receive as vassals the heirs, disponees, and singular successors of the original disponees without demanding any composition therefor, and this clause is prefaced by the words—'And in regard that the foresaid feu-duty, together with the double thereof in every nineteenth year, . . . are the agreed and fixed consideration hereby accepted of and in lieu of all compositions for the entries of heirs, disponees, and singular successors in the foresaid lands and others.' Now, seeing that the 'double thereof' has just been defined in the deed as amounting to the sum of £497, 16s. 4d., and that it is stated as 'together with (*i.e.*, in addition to) the feu-duty, the conclusion seems inevitable that the total sum to be paid every nineteenth year is three times the feu-duty. In short, I see no substantial distinction between this deed and the deeds in *Earl of Zeland v. Carron Company*, 3 D. 1124; and *Cheyne v. Phillips*, in the Outer House, 3rd June 1897, 5 S.L.T. No. 38.

"The next question is whether the superiors are barred from making the present claim by their predecessor having accepted too small a sum in 1862 and again in 1881. I have considered the able argument of Mr C. H. Brown for the defenders with care, and certainly with no favour for so stale a demand. He founds on the receipts granted in 1881 and 1900 (that for 1862 not being extant); but neither of these documents creates any formal obstacle so as to require a reduction to clear it away. Nor can it be said that at either of these dates there was any element of transaction, *i.e.*, a settlement of disputed claims. The receipt for 1881 acknowledges the feu-duty and a like sum which it describes as 'double feu,' but it contains no words of general discharge. The receipt for 1900 is more detailed, but then it is absolutely correct, and all that can be said about it is that it does not expressly reserve any claim for by-gones. Mr Brown ingeniously endeavoured to assimilate these receipts to the granting of a charter by progress, which undoubtedly under the old law imported a discharge of all prior casualties and duties. He of course admits that the implied entry established by the Act of 1874 can have no such effect. But a simple receipt for so much money actually paid can hardly be raised to the level of a charter which the superior was not bound to grant until all his claims were satisfied, and by which he recognised the new vassal as in full possession of the feu. I am not aware of anything short of prescription or express discharge which can cut off a liquid debt standing on a written contract. Delay in making a claim may be fatal if the claim depends on the ascertainment of facts, and the opposite party's case on the facts is prejudiced by the delay. But here there were no facts to ascertain; the claim appeared *ex facie* of the deed, and the receipt of 1881 in the vassals' possession ought to have shown them that the full debt had not been paid. The under-payment was a joint mistake for which the superior at all events suffers to the extent of losing the interest of his money, and if the vassal suffers by having to meet an unexpected demand, the unexpected nature of it was to some extent his own fault. On the whole I cannot say that there was *mora* or acquiescence of such a kind as to bar the demand. I must therefore grant decree with expenses."

The defenders reclaimed, and argued—in feu-rights in case of ambiguity the presumption was for liberty. The terms of the feu-disposition in question were open to construction, while those in question in the cases referred to by the Lord Ordinary were free from doubt. The words "as also," with which the clause here in question opened, merely introduced an additional stipulation, and the words "together with," which occurred in the taxing clause, did not support the view which the Lord Ordinary had taken. The view that two feu-duties were payable every nineteenth year instead of only one was the view on which parties had acted prior to 1900, and should be regarded as

contemporaneous with the feu-disposition itself; that was the true view on a proper construction of the deed—Ersk. ii. 5, 49. Even if that view were erroneous the action was barred by *mora*, and by the acceptance of the payments made in 1862 and 1881; formal words of discharge were not necessary in the receipts for these payments—*Niven v. Burgh of Ayr*, January 18, 1899, 1 F. 400, 36 S.L.R. 294. Standing the receipts there could be no claim for arrears—*Robertson v. Wright*, November 29, 1873, 1 R. 237, 11 S.L.R. 94. In a question with a singular successor the superiors were in the same position as if they had given a charter by progress, therefore the payments sued for, if they were ever due, had been discharged—*Incorporation of Tailors of Glasgow v. Blackie*, June 11, 1851, 13 D. 1073.

Argued for the respondents—The Lord Ordinary's construction of the feu-disposition was the only one that gave effect to all the provisions of the deed. What was to be paid every nineteenth year was something in addition to and not in lieu of the feu-duty, and what was to be paid in addition was a specified sum—*Magistrates of Dundee v. Duncan*, November 20, 1883, 11 R. 145 (Lord Young, p. 147), 21 S.L.R. 107. The theory of *contemporanea expositio* did not help the reclaimer, the first payment under the clause in question having been made nineteen years after the granting of the deed. The case of the *Earl of Zetland v. Carron Company*, June 30, 1841, 3 D. 1124, supported the view that twice the feu-duty was payable over and above the feu-duty of the year. The terms of the receipt in the case of *Niven v. Burgh of Ayr*, *cit. sup.*, distinguished that case from the present. The Lord Ordinary's was the correct view on the question of bar. The defenders were in the same position as the parties liable in 1862 and 1881.

At advising—

LORD JUSTICE-CLERK—The obligation to which this case relates is that the vassal whose yearly feu-duty is £248, 18s. 2d. shall pay the sum of £497, 16s. 4d., being the double of the said yearly feu-duty in the year 1824, and every nineteenth year thereafter, the sum being described thus—"The said sum of £497, 16s. 4d., being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned, and so forth doubling the said yearly feu-duty every nineteenth year." . . . The pursuer in this case maintains that the expressions so used in the feu-disposition granted by their author mean and must be read as meaning that in each nineteenth year the vassal was to pay the feu-duty, and in addition to the feu-duty a further sum equal to twice the amount of the feu-duty. I do not so read the words of the deed. It appears to me to be quite a natural reading that the feu-duty was to be paid, and that every nineteenth year it was to be paid twice over. And I do not read the words "as also" as meaning "in addition." These words are, as I read them, merely the commencement of an additional stipulation, as if it had been said "and it is further

stipulated." I do not agree with the Lord Ordinary that the words in the latter part of the clause, "the said feu-duty, together with the double in every nineteenth year," must be read as inevitably leading to the conclusion that the total sum in each nineteenth year must be three times the feu-duty. In that clause the deed is enumerating the things which the vassal was to perform on his side, and the word "together" is, I think, used in no sense as making the double feu-duty in the exceptional year an addition to the feu-duty in that same year, but as expressing that besides paying the feu-duty in ordinary years, every nineteenth year the sum to be paid was to be double that amount.

It is in consistence with this view that the stipulation was so read in the past by the superior, who on four separate occasions received payment of and accepted a sum of twice the feu-duty on the occurrence of the year when the double became due.

If there were any consistent series of decisions relating to such a clause, which indicated that a clause in the terms that are found here must be read as the pursuer contends, I should certainly bow to them. But there is no such series, and the cases referred to by the Lord Ordinary do not in my opinion bear out his view, the wording having been different to that in the deed in question. There is only one case referred to by him that is a decision of the Court, viz., the *Zetland* case. But there the words were very different. They were "a duplicand of the feu-duty over and above the feu-duty of the year." It is difficult to see how in that case the words could have been read otherwise than as meaning a triple payment. For if a duplicand was to be paid that meant necessarily a double sum, and if that was to be "over and above" an ordinary feu-duty, that must have meant three in all. But here, as I have said, the words by no means lead to such a conclusion.

I am therefore of opinion that the judgment of the Lord Ordinary was erroneous and ought to be recalled, and the defenders assolizied.

LORD YOUNG concurred.

LORD TRAYNER—I entertain no doubt that where a feu-charter merely stipulates that a double or a duplicand of the feu-duty shall be paid to the superior every nineteenth year, such a stipulation entitles the superior to an additional feu-duty in that year, and nothing more. Of course the charter may contain words which indicate clearly that the superior is to receive more, and of this there is an example in the case of the *Earl of Zetland*. There the charter stipulated for a duplicand "over and above the feu-duty of the year in which it fell due," plainly giving the superior the year's feu-duty and a duplicand thereof over and above. The Lord Ordinary thinks that this case stands practically in the same position, because the clause in which the duplicand is stipulated for commences with the words "as also"—words which in the judgment of the Lord Ordinary amount to this—that

every nineteenth year the vassal shall "also" pay, over and above the year's feu-duty, a sum equal to twice the annual feu-duty. I cannot so read the charter. The words "as also" indicate nothing more than the commencement of a new clause, and are in effect the same as if the clause had commenced with "further" or "and it is further provided." This new clause introduces a new obligation, the obligation namely for a periodical duplicand; and reading both clauses together I take them to mean this—the vassal is to pay for the lands a certain sum annually, but that is not all, he shall also pay every nineteenth year a duplicand or double of that sum. It is not material that the second clause states in precise figures the amount of the double feu-duty. But there are no words to indicate that the double to be paid every nineteenth year shall be over and above or in addition to the feu-duty for that year. The Lord Ordinary thinks he finds such words in a later part of the charter, where in consideration of "the foresaid feu-duty, together with the double thereof in every nineteenth year," the entry of heirs and singular successors is taxed. But again I venture to think the Lord Ordinary has given these words a meaning which they do not bear. It seems to me that the consideration in respect of which the entry of subsequent vassals is taxed is the payment of the annual feu-duty, with, or *together with*, a double thereof every nineteenth year. These two things—the annual feu-duty and a double thereof every nineteenth year—are the consideration, and the words in this clause, which are merely narrative, do not add to the obligation as expressed in the *reddendo*.

It is something in favour of the view which I hold that it is the view which the parties to the charter have acted upon from its date (so far as we can learn) down to the time when the present question was raised.

LORD MONCREIFF—It must be conceded that the clause in the feu-disposition of 1807 admits of the construction which the Lord Ordinary has adopted. I may add that at the date of the feu-disposition it was by no means unusual in taxing casualties for the superior to stipulate for, and the vassal to agree to pay at fixed intervals of from eighteen to twenty-five years, a double feu-duty in name of casualty in addition to the feu-duty for the year in which the casualty became due. At the same time, in my opinion, the clause also admits of the construction contended for by the defenders, viz., that it only imposes upon the vassal every nineteenth year payment of a year's feu-duty as a casualty over and above the ordinary feu-duty of the year.

In deciding between the two interpretations, both of which I think are open, I have been influenced in favour of the latter by two considerations. The first is, that in most, if not in all the cases of which I am aware, where it has been intended that the vassal should pay every nineteenth year a

double feu-duty in addition to the feu-duty for the year, the words "over and above the feu-duty for the year," or equivalent words, invariably occur. The case of the *Earl of Zetland v. Carron Company*, 3 D. 1124, is most instructive, because an inquiry was made as to the practice in such cases, the result of which was to show that in a very large number of cases reported, in which three years' feu-duty had been paid, the words "over and above the feu-duty for the year," or equivalent words occurred. In that case the words were, "for yearly payment of £95 of feu-duty . . . and paying a duplicand of said feu-duty at the end of every twenty-five years."

So far that is practically what we have here. The word "and" in that deed may be taken as equivalent to the words "as also" and "together with" which occur in the feu-disposition in this case. But in Lord Zetland's case there followed the words (which do not occur here), "upon payment of which duplicand over and above the feu-duty of the year for which it falls due," the superior should be obliged to enter, &c.

The first sentences of the Lord Ordinary's (Lord Jeffrey's) opinion in that case explain the grounds of his judgment in terms which have a distinct bearing on the present case. He says "The defender's construction would be clear enough if the words of the charter had been merely 'paying a duplicand of the said feu-duty at the end of every twenty-five years.' But then there follow the important words, 'over and above the feu-duty of the year in which it falls due,' to which emphatic words that construction would give no effect whatever, but confessedly hold them *pro non scriptis*. The Lord Ordinary cannot think that he is at liberty, or rather that he is constrained so to deal with them; and giving them their plain and obvious meaning, he sees no difficulty in the case. For it is plainly of no consequence whatever, in a question as to their construction, to observe or to cite authority to show that where there is nothing more in a charter than a simple and unqualified stipulation for a duplicand or double of the feu-duty on the entry of an heir, it is only one of those yearly duties that should be considered as the relief. There cannot well be any doubt, it is supposed, or dispute as to this. But surely it is not the less true that the duplicand or double that is to be actually paid is not one but two years' such duties, and if there is an express and additional stipulation that the duplicand or double amount is to be over and above the current feu-duty for the year, there really seems no reason for doubt that the total sum to be paid must be the amount not of two but of three years' feu-duties." Thus the judgment proceeded entirely on the words "over and above the feu-duty for the year." There was no doubt of the meaning of the word "duplicand," it meant double the feu-duty. The only question was whether used in the connection in which it appeared it did or did not include the feu-duty for the year.

The other consideration is that as far as we can judge from the settlements which took place prior to the last settlement on 15th May 1900 the understanding of parties was in accordance with the construction maintained by the defenders, that is, that at every nineteenth year a double feu-duty was paid and accepted as in full of all that was then due including the feu-duty for the year.

These considerations seem to me to be sufficient to turn the scale in favour of the defenders and to entitle them to absolvitor. It is therefore not necessary to consider whether the present action is barred by the terms of the receipts which the pursuer gave in 1862 and 1881. But my impression is that the receipt given at Whitsunday 1881 is a complete settlement of all sums then due, including the casualty due at that term, and therefore has all the force and effect of a discharge. I do not, however, proceed on that ground.

The result therefore will be that the defenders will be assolized.

The Court recalled the interlocutor reclaimed against and assolized the defenders from the conclusions of the summons.

Counsel for the Pursuers and Respondents—C. N. Johnston, K.C.—Grainger Stewart. Agents—A. & A. Campbell, W.S.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—C. H. Brown. Agents Forrester & Davidson, W.S.

Friday, January 23.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow.

FOWLER v. HUGHES.

Reparation—Master and Servant—Bar to Action—Election to take Compensation—Proof of Election—One Receipt Only—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), secs. 1, sub-sec. 2 (b).

A workman sustained personal injury through an accident happening in the course of his employment. While he was in hospital, and shortly after the accident, his employer sent a clerk to him with 12s. 6d. and a form of receipt for money "received under the Workmen's Compensation Act 1897 from" the employer, "being compensation due" for the accident. The injured man signed the receipt, and filled in his name, address, and occupation, the date and the sum paid, and he received the 12s. 6d. Nothing was said as to the footing on which the receipt was granted, and it was not proved that the workman read it. Thereafter the workman raised an action against his employer for damages at common law or under the Employers Liability Act 1880. The defender, relying on the receipt, maintained that the action was incompetent, the

pursuer having elected to take compensation under the Workmen's Compensation Act.

Held that election to take compensation under the Workmen's Compensation Act had not been sufficiently proved.

Little v. P. & W. MacLellan, Limited, January 16, 1900, 2 F. 387, 37 S.L.R. 287, distinguished.

William Fowler, residing at 435 St Vincent Street, Glasgow, raised an action in the Sheriff Court at Glasgow against John Hughes, wholesale rag and paper stock merchant, 81 to 89 Henrietta Street, Glasgow, concluding for damages at common law or under the Employers Liability Act 1880 for personal injury caused through the fault of the defender, his employer. The action was brought on 15th May 1902.

In defence the defender pleaded—" (1) The pursuer having elected to take compensation under the Workmen's Compensation Act 1897 the present action is incompetent."

In support of this defence the defender produced a receipt in the following terms:—"Received under the Workmen's Compensation Act 1897 from Mr John Hughes the under-mentioned sums, being compensation due me for accident which occurred to me on or about the 14th day of November 1901.

"Name, WM. FOWLER.
Address, 435 St Vincent Street,
Occupation, Flock Machinist.

DATE OF PAYMENT.	SUM PAID.	SIGNATURE.
7th December	£0 12 6	Wm. Fowler."

With regard to this receipt the pursuer averred that it was prepared beforehand on behalf of the defender, and that the pursuer was not made aware of its terms, which were not explained to him.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1, sub-sec. 2 (b), enacts that where injury is caused by the negligence of an employer the workman "may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act," but that the employer shall not be liable both under and independently of the Act.

Proof was allowed and led with regard to the granting of the receipt founded on. From the proof it appeared that on 14th November 1901 the pursuer sustained an injury to one of his eyes while in the defender's employment and engaged in feeding a rag-tearing machine. He was detained in hospital until 11th January 1902, and after eight weeks the injured eye was removed. On 7th December David Johnston, a clerk in the employment of the defender, was sent to see the pursuer in hospital, and he handed him the receipt founded on by the defender. The pursuer looked at it, and filled in his name, address, and occupation, the date of payment, the sum paid, and his signature, and Johnston then gave him 12s. 6d. It was not proved that the pursuer read the receipt, and nothing was said as to the footing on which it was signed.

On 6th November 1902 the Sheriff-Substitute (BOYD) found that the pursuer had