

case in which an appeal may be presented, but it is a condition upon which alone the poor person may appeal; and therefore I think when the statute goes on to provide for the same case as before, the case of a poor person as in the preceding sub-section mentioned, and omits the special condition which was applicable to the appeal of the poor person himself, the necessary construction is that the appeal which is in the second sub-section given for the first time to the Board of Guardians is free from the condition that was attached to the appeal by the poor person himself.

LORD DUNEDIN—I concur with the opinion of the noble and learned Earl that the logical way of disposing of this appeal is to hold that the appeal given to the Board of Guardians is absolute. That view of course is destructive of the suggestion which was made by Lord Salvesen in his opinion, that it would be more reasonable if the two appeals had been alternative—a suggestion which I venture to think would never have been made if the learned Judge had been at all conscious of the grievance which this Act of Parliament was sought to remedy. But as regards the other point, which I do not think logically arises, I have nothing to add to the judgment of Lord Dundas, which is entirely satisfactory to me.

LORD ATKINSON—I concur with Lord Dundas in the construction which he has placed upon section 5, sub-section (1), and if I may I beg to adopt it. I also concur with the three noble and learned Lords who have preceded me as to the proper construction of sub-section (2) of section 5.

LORD PARKER—I also concur on both points.

LORD SUMNER—So do I.

LORD PARMOOR—I concur on both points.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Pursuers (Appellants)—The Dean of Faculty (Scott Dickson, K.C.)—Roberton Christie, K.C.—Dallas. Agents—R. Addison Smith & Company, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Defenders (Respondents)—The Solicitor-General for Scotland (Morison, K.C.)—Pitman. Macrae, Flett, & Rennie, W.S., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Thursday, January 28.

FIRST DIVISION.

WHITE v. DUNBAR MAGISTRATES AND OTHERS.

Process—Petition and Complaint—Delivery of Documents—Competency.

The chamberlain of a royal burgh, on the instructions of the town council, retained in his custody certain documents belonging to the burgh. The town clerk brought a petition and complaint against the town council and the burgh chamberlain, averring that he had the sole right to the custody of documents belonging to the burgh, and craving the Court to ordain the chamberlain to deliver the documents to the petitioner. *Held* that the petition and complaint was incompetent.

On 27th November 1914 Robert White, Town Clerk of the Royal Burgh of Dunbar, with the concurrence of the Lord Advocate, presented to the Court a petition and complaint against the Town Council and against Andrew C. Ramsay, the Burgh Chamberlain, craving for delivery of certain documents belonging to the burgh.

The petitioner *averred, inter alia*, that he attended a meeting of the Finance Committee of the Town Council on 9th February 1914, and took notes for the preparation of a minute of the meeting. Three letters were at the date of the meeting in the possession of the Chamberlain, were submitted by him to the meeting, and were thereafter retained by him. The petitioner was unable to prepare the minute of the meeting, as the said letters had been retained by the Chamberlain. The said letters were all documents of the burgh, and should have been in the charge and custody of the petitioner. The said minute ought in the usual course of business to have been laid before the Town Council at their meeting on 11th February 1914, but for the reason stated the petitioner was unable to prepare and submit a minute to the Town Council. The custody of the letters was considered at the meeting of the Town Council on 11th February 1914, when the Council resolved that the Chamberlain should allow the Town Clerk to have the use of any papers dealt with at finance meetings for the purpose of preparing a minute of such meetings, but that the documents after the purpose of the Town Clerk therewith was served should be returned to the Burgh Chamberlain. In accordance with this resolution the Town Clerk obtained from the Chamberlain and returned to him the three letters mentioned. At a meeting of the Finance Committee held on 8th December 1913 the Chamberlain, who was not a law agent, was instructed to prepare a memorial for the opinion of counsel in connection with a dispute which had arisen regarding the rating of certain properties in Dunbar, and to instruct Edinburgh

agents to obtain an opinion. The Town Council approved of this on 10th December 1914. The memorial was prepared and the opinion obtained. The memorial and opinion were submitted by the Chamberlain to a meeting of the Finance Committee on 7th September 1914, but consideration of them was postponed. They were retained by the Chamberlain, and submitted by him to a meeting of the Finance Committee on 9th November 1914. The committee dealt with the business to which the memorial related, and thereafter agreed "that the Clerk should not get access to nor have the custody of the opinion of counsel in connection with the rating of the said property, but that the same should remain in the custody of the Burgh Chamberlain." The petitioner was unable to prepare an effective minute of the meeting of the Finance Committee, and to submit the memorial and opinion to the meeting of the Town Council on 11th November 1914 as he should have done in the usual course of business, as these documents were in the custody of the Chamberlain. At the meeting of the Town Council on 11th November 1914 the petitioner asked for the custody of the said memorial and opinion, which he was entitled to in terms of the Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 78. The Town Council agreed by a majority "that the Town Clerk should not have access to nor have the custody of the said memorial until the case was settled, and that the same should remain in the custody of the Chamberlain."

The petitioner craved the Court "to ordain the said Andrew C. Ramsay forthwith to deliver over to the petitioner the whole of the documents belonging to the burgh dealt with by the meetings of the said Finance Committee of 9th February 1914 and 9th November 1914, and of the said Town Council on 11th February 1914 and 11th November 1914 referred to, the custody of which has been wrongfully withheld from the petitioner, and which are now in the possession of the said Andrew C. Ramsay."

The respondents, *inter alia*, stated that the three letters referred to were submitted by the Chamberlain to the meeting of the Finance Committee on 9th February 1914, and were thereafter retained by him. One of the letters was addressed to the Chamberlain by the Scottish Office after they had thrice requested certain information from the petitioner, who entirely ignored their letters. All three letters related to matters which fell to the Chamberlain to deal with in the course of his official duties, and were properly in his hands at the dates mentioned. The respondents had all along been quite willing that the petitioner should have the custody in ordinary course of these and any other burgh papers whenever they were not required for any temporary and legitimate purpose by any other official of the Council. The said memorial was not prepared by the Burgh Chamberlain. The Chamberlain was instructed to collect the information to lay before Edinburgh agents with a view to their preparing a memorial. The memorial and opinion were retained by the Chamberlain, and as they were required by him in

connection with his duties at the Burgh Valuation Court to be held on 9th December 1914 he had meantime refused to hand them over to the petitioner. Immediately after the Burgh Chamberlain's necessary purpose with the said memorial and opinion was served these papers would be handed over to the petitioner to remain in his custody as Town Clerk.

The respondents craved the Court to dismiss the petition and complaint in respect that it was incompetent, irrelevant, and unnecessary.

The respondents argued—This petition and complaint craved merely for delivery of documents, not for punishment for malversation of office. It was therefore incompetent, for a petition and complaint was of a criminal character—Mackay, *Manual of Practice*, p. 587; *Practice*, i, p. 242, ii, p. 438; *Bell v. Gow*, November 28, 1862, 1 Macph. 84. A petition and complaint with a similar crave had been dismissed as incompetent—*Bell & Moncrieff v. Jameson*, June 24, 1848, 10 D. 1413. *Spence v. Cunningham*, July 6, 1830, 8 S. 1015; and *Finnie v. Magistrates of Fortrose*, July 15, 1868, 6 Macph. 1066, 5 S.L.R. 658, were not authorities supporting the present application. In *Spence v. Cunningham* the petition and complaint dealt with matters relating to elections, and was considered competent under A.S., 11th July 1828, sec. 88. In *Finnie v. Magistrates of Fortrose (cit.)* the competency of the procedure had not been challenged. Even if competent the procedure here was inexpedient. An action for delivery of the documents in the sheriff court or the Outer House was more appropriate—*Macnabs v. Macnab*, 1912 S.C. 421, 49 S.L.R. 339. The petition was irrelevant. The crave did not specify the particular documents called for, and proof would be necessary to discover what the documents referred to in the petition were. Section 78 of the Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49) referred to such documents as the title-deeds belonging to the burgh, and did not justify a demand by the Town Clerk for the custody of documents required by another official of the burgh in performing his official duties.

The petitioner argued—The prayer of the petition was sufficiently specific. Four meetings were referred to, and the documents called for were the documents dealt with at these meetings. The petition and complaint was competent. It was based on the Town Clerk's position of privilege as keeper of all burgh documents, and fell within the limitation of the judgment in *Bell v. Gow (cit.)* expressed by Lord Cowan at p. 86. The petition and complaint was based on *Spence v. Cunningham (cit.)* and *Finnie v. Magistrates of Fortrose (cit.)*. *Finnie v. Magistrates of Fortrose (cit.)*, in particular, was indistinguishable from the present case. The answers were irrelevant. Section 78 of the Town Councils (Scotland) Act 1900 (*cit.*) gave the Town Clerk the custody of all documents belonging to the burgh, and the documents referred to in the petition admittedly belonged to the burgh.

At advising—

LORD PRESIDENT—I am satisfied that this petition and complaint is quite incompetent. A petition and complaint of course is a well-known and well-defined form of process. It is a form of process by which a civil Court is asked to inflict punishment. But when I have said so much I have said enough to show that a petition and complaint is a wholly inappropriate remedy where one man who thinks he has a superior right to the custody of documents to another man brings an application before the Court for delivery of these documents. I am not going to lay down what the correct form of process to be adopted is, but I am satisfied that it is not by a petition and complaint.

No Act of Sederunt, no statute, and no settled practice of this Court, has been pointed to in support of the competency of this application. When authority is sought it is to be found we are told in the two cases of *Spence v. Cunningham*, 8 S. 1015, and *Finnie v. Mackintosh*, 6 Macph. 1066. Now it is quite true that in *Spence v. Cunningham* a petition and complaint was presented at the instance of the Town Clerk for the custody of certain burgh documents, but I observe that the Lord Ordinary (Moncreiff), in reporting the case to the Court, suggested, having no doubt some hesitation in entertaining the petition and complaint, that it might be justified and that it might be supported on the ground that it had a relation to a matter connected with an election, and therefore might be considered as falling within the 88th section of the Act of Sederunt of 11th July 1828, which both parties here are agreed has no sort of application to this petition and complaint. In the case of *Finnie v. Mackintosh* it will be observed that the competency was not challenged. It was taken for granted that the petition was competent. I therefore do not regard that as an authority in support of an application which otherwise appears to me to be a wholly inappropriate remedy for the delivery of a document.

I should have imagined myself, though expressing no fixed opinion on the subject, that a petition to the Judge Ordinary of the bounds was the appropriate method of securing a document to which you thought you had the right from a wrongful possessor.

Even if I thought this petition competent I should have considered it entirely irrelevant. It is out of the question to say that you can present a petition for documents or any other article described in such a way as they are described in this petition—as documents dealt with by certain meetings referred to by date. And when one turns to the minutes of these meetings no specification whatever is given of the documents and papers which are therein referred to. Once more we are asked to sustain what I consider is a wholly irrelevant application on the authority of *Finnie v. Mackintosh*, but when that case is examined it will be found that the burgh documents which are described in general terms in the prayer of the petition were set out in an inventory signed by the provost of the burgh, and a

copy of the inventory was appended to the petition, so that fuller specification of the documents recovery of which was sought could by no means be given.

I am therefore for refusing the petition on the ground that it is incompetent, and on the ground also that it is irrelevant.

LORD JOHNSTON—I agree with your Lordship that the petition as laid before us is incompetent. I accept your Lordship's explanation of the two cases upon which apparently it has been modelled. In the first case it appears quite clearly from the report that the Court thought that they were proceeding under a certain Act of Sederunt. The terms of that Act of Sederunt, even if it were still in force, certainly would not cover the present case, and there may be some doubt as to its applicability in the case of *Spence*, 8 S. 1015. The second of these cases I feel more difficulty in explaining, except upon the footing that the question of competency never was raised.

Now there is as part of the procedure of the sheriff court a method of procedure by summary application, and I can quite conceive that the present application might, and probably should, have been so presented to the sheriff court. But in this Court there is no such practice of summary petition unless there be statutory provision for it, or unless it be made to the *nobile officium* of the Court. The present application falls under neither of these categories, and accordingly there has been an attempt to bring it *pro forma*—because it is *pro forma* only—within the peculiar class of cases which are termed petitions and complaints. These petitions have a definite end, which is either to enforce the jurisdiction of the Court, or to take steps of a similar nature. They are *quasi* criminal, and they cannot be proceeded with without the sanction of the Lord Advocate. It is a misuse of terms to attempt to make a thing a petition and complaint which is in no sense a petition and complaint, by obtaining *pro forma* the sanction of the Lord Advocate. It is nothing but an attempt to introduce into this Court a method of summary application similar to that of the sheriff court, which never has been in use in this Court, and there being no practice in support of it we are bound to hold it an incompetent procedure.

LORD SKERRINGTON—I concur.

LORD MACKENZIE was not present.

The Court dismissed the petition and complaint.

Counsel for the Petitioner—Chisholm, K.C.—W. H. Stevenson. Agent—R. F. Calder, Solicitor.

Counsel for the Respondents—Murray, K.C.—MacRobert Agent—A. C. D. Vert, S.S.C.