

LORD KINNEAR was absent.

The Court affirmed the interlocutor of the Sheriff, and of new dismissed the action.

Counsel for the Pursuer—M'Clure—Hunter. Agent—Henry Robertson, S.S.C.

Counsel for the Defenders—Salvesen—Guy. Agent—W. G. L. Winchester, W.S.

Friday, May 27.

SECOND DIVISION.

TOWN COUNCIL OF DUNDEE v.

MILLER.

Statute—Contract—Construction of Statutory Contract—Registrar of Births, &c.—Commutation of Fees for Fixed Salary—Registration of Births, &c. (Scotland) Act 1854 (17 and 18 Vict. cap. 80), sec. 51.

By section 51 of the Registration of Births, Deaths, and Marriages (Scotland) Act 1854, it is provided "that it shall be lawful for the parochial board, with the approbation of the Registrar-General or of the Sheriff, to place the registrar and assistant-registrar upon annual salaries, the amount of which shall be fixed by the parochial board, with the like approbation; and such salaries shall be paid by the parochial board out of the assessment to be levied as hereinbefore directed, and the fees received by the registrar, which in such case shall be accounted for by him to the parochial board."

In 1894 the office of registrar of births, &c., fell vacant in a burgh district. The town council resolved that the new registrar should be paid by an annual fixed salary of £150 as authorised by the above section, and that the fees received by him as such registrar should be accounted for and paid over to him by the town council. This was approved of by the Registrar-General, and the appointment was accepted in the above-mentioned terms by the applicant chosen.

Held (diss. Lord Young) that under this contract the registrar appointed was bound to account for and pay over to the town council all fees which he collected for all duties imposed on the registrar by statute, even although the statute might be subsequent in date to the Act of 1854 or subsequent to the date of the appointment.

By the Registration of Births, Deaths, and Marriages (Scotland) Act 1854 (17 and 18 Vict. cap. 80), the registration of births, deaths, and marriages is provided for, and by section 12 it is, *inter alia*, enacted that "when there shall be a vacancy in the office of registrar the parochial board shall . . . by a majority of the votes of the members present at a meeting specially called for the purpose, elect the registrar

of the parish or district." It is declared (section 66) that in burghs the town council shall possess all the powers thereby conferred on parochial boards. Dundee was duly divided into districts for the purposes of the Act, and registrars were appointed for each district.

By section 17 of said Act it is provided that "the registrar shall be entitled to demand, in respect of registration and the other duties required to be performed by him under the provisions of this Act, the several fees herein authorised to be taken, and shall keep a correct account of all sums received by him, in virtue of this Act, in the course of each year, and shall within ten days after the 31st day of July yearly deliver or transmit a copy of such account up to the said 31st day of July, authenticated by him, to the sheriff, to be preserved in the sheriff-clerk's office, and to be furnished by the sheriff to the Registrar-General, and if required to one of Her Majesty's principal Secretaries of State." Fees were authorised to be taken by the registrar from the public by sections 31, 32, and 47 for certain registrations, and by sections 56 and 57 for extracts from and searches in registers. Further, by section 50 the registrar is directed to make out twice in every year an account of the number of births, deaths, and marriages registered by him in the half-year preceding, and upon said account being verified, in terms of said Act (amended by 23 and 24 Vict. cap. 85, sec. 16), the parochial board are directed to pay the registrar, in respect of each of the first twenty entries of births, deaths, and marriages appearing in such verified account, a sum of 2s. each entry and 1s. for each subsequent entry. By said section 50 it was also enacted that the parochial board should pay the registrar, "in the event of such fees being deemed inadequate to his remuneration, such further sum as the parochial board shall think fit." Further, by said section the parochial board was empowered "to levy by assessment the sums required for payment to the registrar of the amount of his account so verified, and such further sum as may be necessary for his remuneration" and for other expenses.

By section 14 of said Act every registrar was empowered, with the approbation of the parochial board, to appoint an assistant to act in case of his illness or unavoidable absence, and with like approbation to dismiss such assistant. By section 51 of the said Act it was also provided as follows:—"Provided that it shall be lawful for the parochial board, with the approbation of the Registrar-General or of the sheriff, to place the registrar and assistant-registrar upon annual salaries, the amount of which shall be fixed by the parochial board with the like approbation; and such salaries shall be paid by the parochial board out of the assessment to be levied as hereinbefore directed, and the fees received by the registrar, which in such case shall be accounted for by him to the parochial board."

It was by section 15 of said Act also

provided:—"No registrar shall acquire any vested right in or to his office by virtue of his appointment, and in case any registrar shall fail or neglect or refuse to discharge the duties of his office, or shall be unfit or incompetent to discharge such duties, it shall be lawful for the parochial board to make application to the Sheriff for his removal from his office," and the Sheriff was empowered after inquiry to remove the registrar.

Subsequent to the date of the said Registration Act of 1854 the following statutes were passed, viz., (a) The Registration of Births, &c., Amendment Act 1855 (18 Vict. cap. 29)—It proceeds upon the preamble of the Registration Act of 1854, and by section 10 it is to be deemed a part of that Act, and construed therewith as if they formed one Act. It provides for the dismissal of incompetent registrars by the sheriff, on application by the Registrar-General where the parochial board fails to apply, for examiners of registrars, for registers of corrected entries, and other small details. (b) The Marriage (Scotland) Act 1856 (19 and 20 Vict. cap. 96)—It proceeds upon the preamble "that it is expedient to amend the law touching marriages in Scotland," and declares under what circumstances irregular marriages contracted in Scotland shall be valid, and makes some other provisions. *Inter alia*, by section 2 a registrar under the Act 17 and 18 Vict. cap. 80, who has registered an irregular marriage under warrant of the sheriff, is required and empowered to give a certified copy of the entry, "charging for the same the sum of 5s." (c) The Registration of Births, &c., Amendment Act 1860 (23 and 24 Vict. cap. 85).—It proceeds upon the preamble of the said Acts 17 and 18 Vict. cap. 80, and 18 Vict. cap. 29, before mentioned, and repeals certain sections of both, and provides for the registration of neglected entries, for the correction of errors in registers, for the publication of the appointments of registrars, for the registration of births, deaths, and marriages of Scottish subjects occurring in foreign countries, for the payment (section 17) of the postages, &c., of registrars, and (section 18) for the increase of the income of registrars upon a representation by a registrar to the Registrar-General that his remuneration under the 50th section of the original Act is inadequate. Section 20 provides that this Act shall be deemed a part of the recited Acts, and shall be read and construed therewith as if the three Acts formed one Act. (d) The Vaccination (Scotland) Act 1863 (26 and 27 Vict. cap. 103).—It proceeds upon the preamble that it is expedient to extend, and in certain cases to make compulsory, the practice of vaccination in Scotland, and to make further provision for the vaccination of the poor. It enacts that parochial boards shall appoint vaccinators whose fees (section 2) are fixed, and (section 11) that on the registration of the birth of any child the registrar shall deliver to the person registering such birth a notice applicable to vaccination, and also forms of certificates, and (sections 3 and 8) that all certificates of

vaccination shall be registered in the registration district where the parties reside. This Act also provides (section 15) that the registrar of births, deaths, and marriages in every district shall enter in the duplicate register of births kept and retained by him the word "vaccinated" under the name of every child whose vaccination has been certified, and shall enter other prescribed particulars relating to vaccination, and it is declared that such books shall be open for search at all reasonable times, and that the registrar shall be obliged to give a copy, certified under his hand, of each entry therein, on payment of a fee of 1s. for each search and 6d. for each certificate. Section 16 also provides as follows, viz.—"A fee of threepence shall be paid to the registrar for each person vaccinated, in respect of whom he shall have performed the duties required in this Act, and the said fee shall be payable in the same manner as the fee now payable to such registrar for registering births is paid; and the sums required for the execution of this Act in regard to registration shall be laid on along with and form part of the assessment authorised by the Acts in force for the registration of births, deaths, and marriages in Scotland." Section 17 provides that where the registrar does not within the period fixed by the statute receive a certificate of vaccination or of postponement of vaccination, &c., he is to send a notice of the failure to the parent or guardian of the child in question; and a parent or guardian failing to exhibit the necessary certificate to the registrar within ten days from despatch of the notice "shall forfeit a sum not exceeding twenty shillings, to be applied in the manner in which penalties are directed to be applied under this Act, and the further sum of one shilling to be paid to the registrar in respect of such notice." These sums may be recovered as penalties under the Act. The Act likewise, *inter alia* (section 28), provides "that when any such parish or portion thereof is situate within burgh, the town council shall have the same powers with reference to the execution of this Act, in so far as registration is concerned, as are conferred by the Acts in force for the registration of births, marriages and deaths." (e) the Marriage Notice (Scotland) Act 1878 (41 and 42 Vict. cap. 43).—It proceeds upon the preamble that it is expedient in order to encourage the celebration of regular marriages in Scotland, that provision should be made for the celebration of such marriages after notice to registrars. It declares (section 1) that the registrar therein mentioned means 'the registrar of births, deaths, and marriages for a parish or district under the Act of the 17th and 18th years of the reign of her present Majesty, c. 80' (being the Registration Act of 1854 first mentioned in this case), and that the word 'parish' and the word 'district' shall have the same meanings attached to them as those under the said Act. By this Act notices of marriages may be published at the registrar's office in the manner prescribed, and marriages so published may be celebrated as

regular marriages without proclamation of banns, and certificates by registrars of such publication are declared equal to certificates of proclamation of banns. By section 15, the Registrar-General is directed to provide 'to every registrar of a parish or district in Scotland' a book called 'The Marriage Notice Book,' and forms of notices and certificates, &c.; and it is declared that 'the expenses of providing and printing the same shall be defrayed in the manner provided in the Registration Act of 1854.' This Act further provides (sections 8 and 9) for specified fees being paid to registrars by members of the public presenting notices of intended marriages for entry in the marriage notice book, and also by persons desirous of inspecting said book, or of obtaining certificates of publication, &c. (f) The Friendly Societies Act 1896 (59 and 60 Vict. cap. 25)—By section 97 it is provided '(1) For the purpose of this Act a certificate of the birth or death of any member of or person insured or to be insured with a registered friendly society or branch, shall, on application being made, as in this Act provided, be given under his hand by the registrar of births or deaths for a sum not exceeding 1s. in place of all fees or payments otherwise payable in respect thereof; . . . (3) Whenever the registrar is required by the person applying for any certificate of birth or death to fill up the form of application, he may demand a sum not exceeding 3d. for so doing.

"On 23rd October 1894 the office of registrar of the First or St Peter's District of the Burgh of Dundee became vacant through the death of James Young. A special meeting of the Town Council was held on the 30th of the same month of October, at which sixteen applications for the vacant office were submitted. The Council then adopted and passed the following resolution—'(1) That the registrar to be appointed in succession to Mr Young shall devote his whole time and attention to the duties of the office, and shall not accept or take any other place or employment. (2) That such new registrar shall be paid by an annual fixed salary, as authorised by section 51 of the original Act, and that the fees received by the registrar shall be accounted for and paid over by him to the Town Council. (3) That the salary of the new registrar shall be at and after the rate of £150 per annum, the Town Council also paying the rent and taxes and cleaning of the registrar's office, and all necessary coal and gas for heating and lighting, and the registrar being reimbursed for his cash outlays for postage stamps and stationery. The Clerk was instructed to apply for the Registrar-General's approbation of the foregoing resolutions. Subject to the statutory approbation of the foregoing resolutions, the Council resolved to appoint Mr T. Y. Miller to the office of Registrar of the First or St Peter's District."

These resolutions were submitted to the Registrar-General, in terms of the statute, on 1st November, and on 3rd November the approbation of the Registrar-General

was signified by the following letter:—

"Registrar-General's Office,
 "Edinburgh, 3rd November 1894.

"Sir,—In reply to your letter of the 1st inst., I beg to intimate my approval of the salary of £150 (One hundred and fifty pounds sterling) fixed by the Town Council of Dundee for the Registrar of St Peter's District of Dundee, in terms of the 51st section of the Act 17 and 18 Vict. c. 80, on the understanding that such rate of remuneration will be subject to my reconsideration whenever a change may be deemed expedient. On referring to the 51st section of the Act above referred to, you will observe that the statutory approbation of the Registrar-General does not extend beyond fixing the amount of the salary. Under the 8th section of the Registration Amendment Act (23 and 24 Vict. c. 85) the question of the provision and maintenance of a suitable office for the registrar is left in the hands of the Town Council; but I may say generally that the arrangements proposed in your letter seem to me to be very reasonable and proper. In terms of 17th section of the last-mentioned Act, the registrar is entitled to be reimbursed his necessary outlays as there specified.—I am, Sir, your obedient servant,
 STAIR AGNEW, *Reg.-Gen.*

"Sir Thomas Thornton, LL.D.,
 "Town-Clerk of Dundee."

On 5th November the Town Clerk intimated to Mr Miller his appointment, as follows:—

"City Chambers,
 "Dundee, 5th November 1894.

"Dear Sir,—I beg to intimate to you that the Town Council have appointed you to the office of registrar of births, deaths, and marriages, of the First or St Peter's district, Dundee, under and subject to the following terms and conditions, which have received the approbation of the Registrar-General of Births, Deaths, and Marriages in Scotland, viz.—'1. That you devote your whole time and attention to the duties of the office, and do not accept or take any other place or employment. 2. That you shall be paid by an annual fixed salary, as authorised by section 51 of the original Act, being the Act 17 and 18 Vict. cap. 80, and that the fees received by you as such registrar shall be accounted for and paid over by you to the Town Council; and 3. That your salary shall be at and after the rate of £150 per annum, the Town Council also paying the rent and taxes and cleaning of your office, and all necessary coal and gas for heating and lighting, and you being reimbursed for your cash outlays for postage stamps and stationery.' Please let me hear from you whether or not you accept the appointment on the foregoing terms and conditions.—Yours faithfully,

"T. THORNTON, *Town-Clerk.*

"Mr T. Y. Miller,
 "3 Melville Terrace, Dundee."

On 12th November Mr Miller accepted the appointment by letter as follows:—

"3 Melville Terrace,
 "Dundee, November 12, 1894.

"Sir Thos. Thornton, Town-Clerk.

"Dear Sir,—I hereby accept appointment

as Registrar of St Peter's District of Dundee, on the terms and conditions specified in your letter to me of the 5th inst.—Yours faithfully,
T. Y. MILLER."

All these letters were submitted to a meeting of the Town Council on 12th November 1894, when "the Council accordingly now declared Mr Miller duly appointed, as in the said minute of 30th October last." Mr Miller thereupon entered upon the duties of the office of registrar in terms of the appointment, and has continued to discharge the duties. The salary agreed upon, as aforesaid, was thereafter regularly paid to him, and he regularly accounted for and paid over to the Town Council the whole fees received by him under the Acts before mentioned, including the fees received by him under and in respect of the Vaccination Act 1863 and the Marriage Notice Act 1878, but excepting the small fees payable under sub-section 3 of section 97 of the Friendly Societies Act 1896.

In December 1895 he wrote to the Town Council representing that, after a year's experience of the duties and responsibilities of his office, he found that the salary of £150 was inadequate to cover the salary which he paid to his assistant (£40) and to reasonably remunerate himself for his labours, and he submitted that he should receive, in addition to his salary, the fees under the said Vaccination Act and the Marriage Notice, Friendly Societies, and Factory Acts. The Town Council, however, replied that having regard to the terms of his appointment, and to the fact that it was made at a date long subsequent to the passing of all the said Acts, they refused the said application.

On 30th March 1897 Mr Miller applied to the Town Council to have it acknowledged that he was legally entitled to retain the fees under the Vaccination Act 1863 and the Marriage Notice Act 1878 in addition to his salary. The Town Council declined to make any such acknowledgment.

In order to decide the point a special case was presented by (1) the Town Council of Dundee, and (2) Mr Miller, the registrar.

The questions of law were—"1. Is the second party entitled, over and above his salary, to receive and to retain for his own use and behoof the fees payable to him under the following statutes mentioned in article 5 of the case, or under any and which of said statutes, viz., (1) The Act 19 and 20 Vict. cap. 96? (2) The Act 26 and 27 Vict. cap. 108? (3) The Act 41 and 42 Vict. cap. 43? (4) The Act 59 and 60 Vict. cap. 25? or 2. Is the second party bound to account for and pay over the said fees to the first parties?"

Argued for the first parties—All the fees received, in terms of any statute, by the second party as registrar including the fees received by him under the Vaccination Act 1863 and the Marriage Notice Acts 1878, were fees received by him in the sense of his appointment, and must be accounted and paid over by him to the first parties. The question was one as to the construction of a

contract. All duties pertaining to the public office of registrar came under the terms of the contract. The entire fees were to be paid over. Section 51 provided that the office of registrar might be salaried, and not merely some of the duties of the office. If the registrar was dissatisfied with his salary, he could appeal to the Registrar-General to increase his salary in terms of section 18 of the Registrar of Births Amendment Act 1860 (23 and 24 Vict. cap. 85).

Argued for the second party—The expression "an annual fixed salary of £150 as authorised by section 51 of the original Act" means a salary for the duties of registrar as such under the Registration of Births Act 1854, and the Amending Acts of 1855 and 1860, and no other. The fees to be accounted for by him under his appointment were only the fees received by him under these three Acts as registrar. The first parties did not elect him to perform any other duties than those imposed by these three Acts. The duties imposed by other Acts devolved upon him as a public official holding a certain position, and emoluments were conferred upon him for these duties. No authorisation was given for the substitution of a fixed salary for these duties. Section 51 of the Registration of Births Act 1854 could not be construed as embracing the fees payable under these other Acts, and the Registrar-General had no statutory power to approve of a salary as a substitute for these fees. Section 51 only dealt with the fees which the parochial board in terms of section 50 were entitled to pay out of an assessment to be levied on the public. The fees to which the registrar was entitled from private parties, under section 47, were not included in section 50, and a fixed salary could not be substituted for them. The fees under the Vaccination Act 1863, the Marriage Notices Acts 1878, and similar Acts were in the same position. It was contended on the other side that if the registrar was dissatisfied with his salary he could apply to the Registrar-General for an increase under section 18 of the Registration of Births Amendment Act 1860. But section 18 only applied to the case of the remuneration of the registrar from public assessment under section 50 of the Act of 1854, and not the remuneration from private fees under the Vaccination Acts 1863 and similar Acts. On a just construction of the terms of his appointment, and of the statutory powers of the first parties with reference thereto the second party was entitled over and above his salary to receive and retain for his own use and behoof the fees payable under the Vaccination Act 1863, the Marriage Notices Act 1878, and similar Acts. [LORD YOUNG—Suppose we hold that all fees to which the registrar is entitled can be commuted into a fixed salary, are both or either of the parties willing to apply to the Registrar-General and see whether he wrote the letter approving of the salary of £150 on the understanding that this salary was to come in place of fees of every description?]

Counsel for second party intimated his willingness to apply, but counsel for the first parties stated that he had no instructions in the matter from his clients.

At advising—

LORD JUSTICE-CLERK—The party of the second part in this case was in November 1894 nominated by the Town Council of Dundee, the party of the first part, to the office of registrar of births, deaths, and marriages for one of the districts under the jurisdiction of the first party. Acting under the authority of the 51st section of the Births, Deaths, and Marriages Act, the Town Council resolved that the registrar should be paid by salary, and they fixed the salary at £150 per annum, and obtained the approval of this salary from the Registrar-General, such approval being necessary to the validity of payment by salary under that clause. The party of the second part accepted the office upon the “terms and conditions” expressed in the Town Council’s letter of appointment, these being—[*His Lordship read the conditions*].

The question now raised is, whether under that engagement the party of the second part is bound to account for all fees which he collects for all duties imposed by statute upon the registrar of births, deaths, and marriages, or whether he is only bound to account for the fees under the Acts relating directly to births, deaths, and marriages, and is entitled to retain the fees under the two Acts relating to marriage notices, the Act relating to vaccination, and the Act relating to friendly societies.

The second party contends that it was not competent for the Town Council to make an arrangement by which the fees payable to the registrar under any of the Acts other than the three Births, Deaths, and Marriages Registration Acts should be commuted and salary paid for the fulfilment of the duties. I do not think that the contention is sound. By the 51st section of the Act 23 and 24 Vict., the power given to the local authority is quite general. It is to “place the registrar” upon “salary,” and enacts that when this is done “the fees received by the registrar shall be accounted for.” I think that when the question of salary was considered, all the duties imposed upon the registrar of births, deaths, and marriages could be and had to be taken into account, and a suitable salary fixed for their performance, and that all fees were to be accounted for. In this case the appointment was that the second party was to give his whole time to the duties of the office to which he was appointed—that was to all duties which by statute that officer is bound to perform—that for doing these duties he was to receive the salary named, and was to account for the statutory fees he received for doing the duties. I cannot hold that if he did any duty as registrar that he was not to account for the fees, and he was precluded by the terms of his appointment accepted by him from doing any other work than the duties of his office of registrar. He was therefore precluded from doing anything for which he

should receive emolument, other than the salary agreed upon. The dilemma seems to be this, if any fees are received by him *qua* registrar, then he has undertaken to account for the fees, but if he does not receive any particular fees as registrar, then he is doing work other than that of his office, which is a breach of his engagement.

It is of course quite possible in the case of such an officer that new duties may be imposed upon him by statute—indeed, this has been done in the present case by the Friendly Societies Act of 1896. But it does not appear to me that this in any way affects the case with which we have to deal. The second party, if from increase of population or from new duties being put upon the office, he considers his salary to have ceased to be adequate, can apply to have it revised like that of any other official on fixed salary. Of course his salary can be considered at any time, and if the Registrar-General, *ex proprio motu*, or at the call of either of the parties to this case, sees right no longer to approve of the salary as suitable, the Town Council would be compelled either to alter it or to resolve no longer to keep the registrar on fixed salary. And the second party, if he cannot get such a revision as he thinks he can accept, need not retain the office.

Upon the question put to the Court I think we have only to consider the effect of the appointment on a fixed salary which has been approved by the Registrar-General, and my opinion is that under that appointment the salary agreed upon is all that the second party has right to, and that the first party are entitled to receive all fees collected by him. I propose therefore that the first question should be answered in the negative, and the second question in the affirmative.

LORD YOUNG — The question does not regard the construction of a contract of employment. The second party is the holder of a public office to which he was elected by the first parties as the statutory patrons thereof. The holder of the office is, on the one hand, bound to perform the duties specified in the statutes referred to in the case, and on the other hand has right to receive and retain the fees also specified in these statutes except in so far as a salary has been lawfully substituted therefor by the first party with the approbation of the Registrar-General or of the Sheriff.

Seven statutes are referred to. The first is 17 and 18 Vict. cap. 80. By it the office of registrar now held by the second party was first constituted with the duties thereof and the fees payable therefor to the holder distinctly specified. By section 51 power is given to the patron—(the parochial board, whose place is here taken by the Town Council, the first parties)—“with the approbation of the Registrar-General or of the Sheriff,” to place the registrar on a salary, he accounting for and paying over to them the fees received by him.

Of the six subsequent statutes there are two of which for the purposes of this case

no account need be taken, because they create or impose no new duties with statutory fees or charges therefor, but only amend the first Act in matters immaterial to the question before us. These are the Acts 18 Vict. cap. 29, and 23 and 24 Vict. cap. 85.

The parties are agreed that the office of registrar held by the second party has under the provision of section 51 of the Act 17 and 18 Vict. cap. 80 (1854) been lawfully placed upon salary with respect to the duties imposed by that Act, and the amending Acts of 18 Vict. and 23 and 24 Vict. just referred to, and that the second party must accordingly account for and pay over to the first parties the fees received by him therefor.

The dispute regards only the duties imposed by the four Acts specially referred to in the question, and is twofold, viz., *first*, whether under section 51 of the Act of 1854 a registrar may lawfully be placed on salary for the duties imposed by these four Acts, and *second*, whether or not we are in a position to decide that the second party has been so—assuming that he lawfully might be.

First. I have already pointed out that the fees of this office are like the duties statutory, and that the patrons have no power to bargain with an appointee that he shall, as upon a term or condition of his appointment, hand all or any of them over to the patrons in exchange for a salary. It is only under the power conferred by section 51 of the Act of 1854 that such a thing as the appropriation to the patrons of the registrar's statutory fees can lawfully be made, for nowhere else is there even an allusion to such a thing as the substitution of a salary for fees, or the handing over by a registrar to another of the fees which are ordered to be paid to himself. The language of this clause indicates that the legislation in 1854 (and no other has dealt with the subject) regarded as a serious matter any interference with a registrar's right to retain the fees appointed to be paid to him. Under it each case is to be judged of on its individual merits, and that by two public authorities acting together on these terms, that unless they agree (*first*) as to the propriety in the particular case of substituting salary for fees, and (*second*) as to the amount of the salary to be substituted, the registrar shall retain the fees. It is, I think, reasonable to assume that the Legislature contemplated an inquiry and estimating consideration by each of these public authorities, of the duties to be performed and the statutory fees therefor for which a salary was proposed to be substituted as suitable remuneration. The power thus given seems to be exceptional. There may be instances of a similar power although we were referred to none, and I incline to the opinion that it ought to be construed strictly.

Prima facie, the power applied only to the duties and the fees therefor under the Act of 1854, for the authorities to whom it is given could (anterior to subsequent legislation) exercise an intelligent judgment

with respect to them only. They could take account of no others. And when Parliament subsequently created and imposed additional and distinctly new duties such as were not thought of in 1854, and directed certain fees therefor to be paid to the officer performing them, I am not prepared to extend the power in question to these in the absence of any expression in the statutes indicating such an intention. I may put a case differing in its facts from the present but having, I think, some bearing as an illustrative argument. Suppose a salary fixed and given under the Act of 1854 before the creation of new duties with fees therefor—could it be held that the salary covered these new duties and that the registrar was bound to hand over the fees therefor to the patrons? I should think not. It was suggested that in such case the remedy would be to increase the salary. But this means that whenever new duties are imposed, with specified fees for performing them, the whole question of fees or salary and amount of salary is to be re-opened. The patrons cannot on the one hand increase the salary without the approbation of the Registrar-General, and on the other are not bound to assent to the amount of which he approves. The result, of course, is, that if they do not agree that under the changed circumstances salary of a considered and specified amount is in the public interest and that of the registrar (fair account being taken of both) preferable to the retention of the fees by the registrar, the registrar must retain the fees. This would obviously be inconvenient, and I am of opinion that it is more desirable in itself and more in accord with the language of the statutes to hold that the duties and the fees therefor specified in the statutes referred to in the question are outside the power given by section 51 of the Act of 1854.

Second. If the opinion which I have just expressed be sound, the first alternative of the question must be affirmed and the second negated. If unsound; we have then to consider whether or not we can affirm that the second party has in fact been put upon salary with respect to the duties imposed by the four Acts I have been referring to, and must pay over the fees received by him therefor. It is, I understand, admitted, and certainly, in my opinion, too manifest to be disputed, that this could not be done without the approbation of the Registrar-General. In the course of the argument before us, when attention was called to the terms of the Registrar-General's letter expressing the approbation which he gave, I thought it proper to ask whether in approving of the salary proposed to him he was of opinion that he lawfully might and in fact did take account of the duties and fees specified in the four statutes referred to in the question now before us. The counsel for the parties did not agree in their answers to this inquiry—the counsel for the second party answering that the Registrar-General did not take account of these duties and fees, while the counsel for the first parties

answered that his clients had heard nothing which inclined them to believe that he did not. It thus appeared that the parties were at issue on a matter of fact—not the less a matter of fact because it was manifestly capable of being simply, speedily, inexpensively, and quite certainly ascertained by the parties themselves. I accordingly put the further question whether the parties were willing to ask the Registrar-General how the fact stood and state it to us accordingly. The counsel for the second party at once assented to this course being taken, while the counsel for the first parties desired time to receive instructions on the subject.

Should the case be allowed to stand as it does without the fact now in dispute between the parties being ascertained and stated to us, I think it is impossible for us to answer the question which is put to us. We have ascertained two things—(first) that there is a difference of judicial opinion on this legal question which is involved and in dispute, viz., whether or not the patrons and the Registrar-General may in determining the question of salary and the amount of it take account of the duties and fees, and (second) that the parties are not agreed on the fact whether or not the Registrar-General was of opinion that he lawfully might take account of them and did so. I am quite unable to say that I think it immaterial whether he did or not.

LORD TRAYNER—In disposing of the question of law here submitted to us I take no cognisance of any fact stated at the bar in the course of the discussion which does not appear in the special case. If it appears in the course of the discussion that any material fact has been omitted, the parties may, if agreed as to the fact, add it to the case by way of amendment. If they differ as to the omitted fact, then it must either be disregarded or the case withdrawn. To allow any inquiry into a disputed fact either by way of proof, remit, report, or otherwise, would be, in my opinion, irregular, seeing that this form of bringing a disputed question of law before the Court is by statute confined to the case where the parties interested “shall be agreed upon the facts, and shall dispute only on the law applicable thereto.” Dealing with the case in this view, I am of opinion that the contention maintained by the first parties is right and should be given effect to.

The second party accepted the office of registrar on the terms set forth in the letter of 5th November 1894. At that time all the Acts of Parliament (except one), which imposed duties on the registrar or conferred on him the right to exact certain fees were in existence. He therefore knew what the law required of him, as well as what rights it conferred on him. In place of the fees he accepted a fixed salary (fixed in accordance with the statutory provisions), and obliged himself that he would account for and pay over to the first party the fees received by him as such registrar. That arrangement was not illegal, and if

not illegal he must abide by it. All the fees receivable by the second party are receivable by him as registrar, and in no other character, and the duties for which these fees are the return or payment are not only imposed on him as registrar (and no one but the registrar could perform them), but are evidently and clearly duties connected with the registrar of births, deaths, and marriages, which it is his primary duty to keep. The duties and rights imposed and conferred by the statute passed after his appointment are of the same character. It was said on behalf of the registrar that while he might commute for a salary the fees exigible by him under the Act 17 and 18 Vict. c. 80, he was not entitled to commute for a salary the fees exigible under the subsequent Acts. In answer to one of your Lordships, the counsel for the second party, who maintained the distinction, said he could suggest no good reason for it. I have not found any reason to support the distinction myself. Whether the registrar could refuse to give up his fees for a fixed salary, I do not consider; but to say that he could not competently do so is a view which I cannot adopt. If he could lawfully do it, he has done it.

I am therefore of opinion that the first question should be negatived, and the second affirmed.

LORD MONCREIFF—I am of opinion that the first question should be answered in the negative, that the second question should be answered in the affirmative, and that both questions should be answered now. As I read the case, which parties have submitted to us, the question which we are asked to answer is one of general importance and application. Neither party seeks to reduce or reform the contract between them. They both appeal to it though they differ as to its interpretation and effect. It appears from the letters printed in the case that the first parties offered to the second party, and that he accepted, the office of Registrar of Births, Deaths, and Marriages, of the First or St Peter's District, Dundee, on certain conditions—in particular, on condition that he should be paid by an annual fixed salary, and that the fees received by him “as such registrar” should be accounted for and paid over by him to the first parties; and that the salary should be at the rate of £150 per annum, the first parties paying certain other expenses and cash outlays.

In the case we are not asked to express any opinion, and we are not furnished with any information as to the basis on which the salary of £150 was arrived at. What we are asked to decide is whether, having regard to the contract between the parties, the powers under which the first parties placed the registrar upon salary, viz., section 51 of the Registration Act of 1854, and the terms of the subsequent statutes which are enumerated in the questions of law, the second party is or is not bound to account for and pay over to the first parties the fees received by him under the

later statutes. It seems to me that there is nothing to prevent us answering that question now. It may be that in consequence of our judgment the second party may apply to the Registrar-General to have the question of his salary reconsidered; but with that I think we have nothing to do.

On the merits of the questions put to us, I am of opinion (1) that the fees paid to the second party under the statutes enumerated in the first question of law are, in the sense of his contract with the first parties, fees received by him as registrar of births, deaths, and marriages; he so understood and acted on the contract for a year; and (2) that under section 51 of the Act of 1854 the first parties were entitled to place the second party upon an annual salary upon the condition, *inter alia*, that those fees, in addition to others, should be accounted for by him to them. The duties which the registrar discharges under the statutes in question are all duties imposed upon him by the Legislature as registrar; and he is bound in virtue of his office to discharge them. They are all cognate to the duties imposed upon the registrar under the original Act of 1854, and they were all, except one, incumbent upon the registrar at the date of the second party's appointment.

The argument for the second party seems to me to be grounded upon a false analogy. Public officials, if the conditions of their appointment permit it, are often selected and remunerated for work done, not in their official capacity or in connection with their official duties, but entrusted to them because from their official experience they are considered best qualified to do the work or give the advice desired. Fees received in return for such services do not form part of their official remuneration, and therefore are in quite a different position from fees paid in return for the discharge of duties laid upon an existing official by statute.

The primary mode of remunerating the registrar under all the statutes referred to in the case is by fees. By the original statute of 1854 the parochial board was empowered to substitute a salary for all the fees then exigible. In my opinion this power extends to all the fees authorised to be paid to the registrar in respect of the duties discharged by him as registrar under the subsequent statutes mentioned in the case.

I am therefore prepared to answer the questions in the manner above mentioned.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for First Parties—Balfour, Q.C.—Salvesen. Agents—J. & D. Smith Clark, W.S.

Counsel for Second Party—The Solicitor-General—M'Lennan. Agent—D. Hill Murray, S.S.C.

Saturday, May 28.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GILLESPIE v. HUNTER.

Reparation—Master and Servant—Liability for Act of Servant to Strangers—Scope of Servant's Employment.

In an action of damages against the landlord of a public-house for injuries sustained by the pursuer through being forcibly ejected from the premises by the defender's servant, the pursuer averred that the assault had been committed in consequence of an altercation on the subject of religion and politics, as to which he and the defender's servant differed. He averred generally that in ejecting him the defender's servant had acted within the scope of his employment as manager of the public-house.

Held that such a general averment was not sufficient, and that the specific statements of the pursuer disclosed that the quarrel in which the assault originated was a private quarrel between the pursuer and the defender's servant. Action accordingly dismissed as irrelevant.

This was an action brought in the Sheriff Court at Glasgow by James Gillespie, quay labourer, Glasgow, against Robert Hunter, spirit merchant, carrying on business at 1 Dumbarton Road there, in which the pursuer craved decree for £100 as damages sustained by him through being ejected from the public-house occupied by the defender.

The pursuer averred—“(Cond. 2) The pursuer has frequented said shop for several years, having an odd refreshment therein, and the defender knows the pursuer. The defender's said shop is under the control and management of Hector M'Kechnie, who is and has been a servant of defender for about three years, and the said Hector M'Kechnie also knows the pursuer by frequenting the said shop, as above mentioned. (Cond. 3) On the afternoon of Saturday 10th July 1897 the pursuer, along with men named Robert Allan and Mr Coleman, was in the defender's said shop having a refreshment, which was served to the pursuer and the said Robert Allan and Coleman by the said Hector M'Kechnie. While the pursuer was standing at the counter of said shop in the act of partaking of said refreshment, pursuer, in the course of conversation with Allan and Coleman, remarked that he, the pursuer, although a Roman Catholic, was a good Conservative, when the said Hector M'Kechnie, for whom defender is responsible, stated that he objected to such conversation in the defender's shop, and that if the pursuer repeated the remark, he, the said Hector M'Kechnie, would pitch him out of the shop. The pursuer simply replied that he had been