

Counsel for the Defender—Solicitor-General, Watson and Keir. Agents—Tods, Murray & Jamieson, W.S.

Tuesday January 21.

SECOND DIVISION.

[Lord Gifford, Ordinary.]

MACPHERSON v. CLERK AND OTHERS.

Schoolmaster — Dismissal — Parochial and Burgh Schoolmasters (Scotland) Act 1861—1 and 2 Vict. c. 87.

Held—The provisions of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, are not applicable to the dismissal of Parliamentary Schoolmasters.

On 10th August 1871, at an adjourned meeting of the heritors of the parish of Kilmallie, held at Fort William, a resolution was passed dismissing Duncan Macpherson from the office of Schoolmaster of the Oinich Parliamentary School; declaring the said school to be vacant; and requiring the schoolmaster to remove within fourteen days from the date of intimation, from the said school, schoolmasters house, and pertinents. The summons in this action was raised by the schoolmaster, and concluded for reduction of said resolution, and declarator that he was still schoolmaster.

The pursuer's first plea in law was that the 19th section of the Parochial and Burgh Schoolmasters (Scotland) Act 1861 has no application to schools founded under the Act 1 and 2 Vict. c. 87.

The defenders' second plea was—that they ought to be assolized, in respect their proceedings were competent and regular in terms of the Act 24 and 25 Vict. c. 107.

The Lord Ordinary pronounced the following interlocutor:—

“*Edinburgh, 25th June 1872.*—The Lord Ordinary having heard parties procurators, and having considered the closed record and whole process—Finds, reduces, decerns, and declares, in terms of the reductive conclusions of the summons, in so far as the writs called for affect the pursuer or his status and position as schoolmaster of the Parliamentary school of Oinich. Further finds, decerns, and declares, in terms of the declaratory conclusions of the summons, and interdicts and prohibits the defenders from taking any steps towards carrying the resolutions and minutes now reduced into effect, and decerns; Finds the pursuer entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report.

“*Note*—The Lord Ordinary has found the question in this case to be attended with a good deal of difficulty. The question is, whether the provisions contained in the 19th and 20th sections of ‘The Parochial Burgh Schoolmasters (Scotland) Act 1861’ apply to the case of the pursuer, who is not a parochial or burgh schoolmaster strictly so called, but who is the schoolmaster of a Parliamentary school, established under and in virtue of the Act 1 and 2 Vict., cap. 87, being the Parliamentary School Act of 1838. The Act 1696, cap. 26, ordains that there be a school established and a schoolmaster appointed in every parish in Scotland, and provision is made for providing the school and for the salary of the schoolmaster. This Act only applies to proper par-

ish schools. The Act 43 George III., cap. 54 (1803) was passed for making better ‘provision for the parochial schoolmasters, and for making further regulations for the better government of the parish schools in Scotland.’ This Statute, which was the governing Statute till the Act of 1861, contains a great variety of provisions regarding the salaries of the schoolmasters, the provision for schools and schoolmasters’ houses, and for the establishment of side schools in large and detached parishes. The whole Statute, however, refers only to parish and burgh schoolmasters, whose salaries are provided by the heritors or magistrates. The Act under which the pursuer of the present action was appointed is 1 and 2 Vict., cap. 87 (1838), entitled ‘An Act to facilitate the foundation and endowment of additional schools in Scotland.’ The Statute recites the Act of 5 Geo. IV. for building additional places of worship in the Highlands and Islands of Scotland. It narrates that churches had been provided and districts erected into *quoad sacra* parishes, and it empowers the Commissioners of Her Majesty’s Treasury to set aside from sums voted by Parliament for education in Scotland funds for providing a schoolmaster’s salary in such new *quoad sacra* districts as might be found necessary, the heritors of the parish ‘or district,’ providing the school-house and schoolmaster’s house. Schools established under this Act are known as Parliamentary schools, and the great distinction between them and parish schools, or side schools, is that the schoolmaster’s salary is not paid by the heritors, but is wholly provided from the Parliamentary fund. By special provisions, however, the Act of 1696 and the Act of 1803 are made applicable to Parliamentary schools, and are declared part of the Act of 1838, and ‘to be construed and carried into force and effect along therewith, in all respects as if the same were re-enacted and repeated therein.’ The Lord Ordinary is of opinion that, in virtue of this enactment, the provisions for the suspension or deprivation of schoolmasters by libel before the Presbytery contained in the Act of 1803, would be applicable to Parliamentary schoolmasters. But then comes the Act of 1861, which creates the present difficulty. This Act does not in its rubric or general clauses expressly apply to Parliamentary schoolmasters, although they are mentioned in several of the special provisions, and the question is whether the enactments of sections 19 and 20, which introduce a new mode of dismissing, suspending, or enforcing the resignation of certain schoolmasters, apply to the schoolmasters of Parliamentary schools.

“The Lord Ordinary with some hesitation has come to be of opinion that they do not, and that Parliamentary schoolmasters must be proceeded against by libel under the provisions of the Act of 1803. (1.) The title of the Act of 1861 does not apply to Parliamentary schoolmasters, excepting to relieve them from the test. The rubric is ‘An Act to alter and amend the law relating to parochial and burgh schools, and to the test required to be taken by schoolmasters in Scotland.’ The plain meaning of this title is, that while all schoolmasters in Scotland are to be relieved from the test, it is only in the case of parochial and burgh schoolmasters that the law is to be amended. (2.) This reading of the rubric is in entire accordance with the enactments of the Statute, for while section 12, in abolishing the test, expressly mentions not only parochial schoolmasters, but schoolmasters under 1 and 2 Vict. 87—that is, Parliamentary schoolmasters—most of

the other provisions only apply to parochial and burgh schoolmasters. (3.) The Interpretation Clause of the Act of 1861 defines 'parochial school' as meaning and including 'every school established or to be established, or provided for under the said recited Act.' Now, the only recited Act is the Act of 1803, and this definition of parochial school seems to exclude Parliamentary schools. It was admitted on both sides of the bar that the Parliamentary school of Oinich does fall not under the definition of a burgh school. (4.) The main ground on which the Lord Ordinary proceeds is, that when the Act of 1861 intends its provisions to apply to Parliamentary schools and schoolmasters, it expressly says so, and the Lord Ordinary cannot resist the inference that when not expressly mentioned, parochial schoolmaster, or schoolmaster of a parish, means only, in terms of the interpretation clause, schoolmasters established under the Act of 1803. It is plain that all the provisions about salary and additions thereto can have no application to Parliamentary schoolmasters, for the heritors have nothing whatever to do with their salaries, and have no power to fix, to increase, or to assess therefor.

"The pursuer at first attempted to show that the provisions about side schools, and the resignations of, and retiring allowances to schoolmasters, do not apply to Parliamentary schools. Such schools cannot be discontinued by the heritors, and the heritors cannot give retiring allowances to Parliamentary schoolmasters, or compensation for house and garden, for they have no power to assess therefor. The first time the Parliamentary School Act of 1838 is mentioned is in section 9 of the Act of 1861, sub-section 5, where Parliamentary schoolmasters, especially described as schoolmasters under 1st and 2d Vict. c. 87, are made subject to the same examination as 'parochial schoolmasters.' So in section 12, already alluded to, the enactment is expressly made applicable to Parliamentary schoolmasters—the Act 1 and 2 Vict. c. 87, being expressly cited. It may be that section 13 may be read as a pendant to section 12, and may possibly apply to Parliamentary schoolmasters, but this would not warrant an extended interpretation of the other sections of the Act.

"The next section which expressly mentions the Parliamentary Schools Act is the 17th, where the title of the Act of 1838 is quoted, and Parliamentary schoolmasters expressly brought under the provision. Now it is one of the best established canons of construction that when in special cases particular clauses of a statute are expressly made applicable to a particular person or class, the absence of such express reference exempts that person or class from the operation of other clauses. If the whole Statute, and in particular clauses 19 and 20, applied to Parliamentary schoolmasters, what was the use of expressly providing that sections 9, 12, and 17 should apply to such schoolmasters? The express enactment in these sections seems to exclude Parliamentary schoolmasters in all other sections.

"(5.) A further difficulty occurs, which seems nearly conclusive against the defenders. Sections 19 and 20 empower the heritors in some cases, and compel them in others, to provide retiring or resigning schoolmasters with a retiring salary, and with compensation for their dwelling-houses. But plainly the heritors cannot do this out of the Parliamentary fund, which is not theirs, and which is not under their control; and is equally plain that they could not assess for the retiring allowance, for

in no case can they assess for a Parliamentary school salary. Now, if section 19 does not apply to resignations compelled on account of incapacity, it is difficult to hold that it applies to resignations compelled through fault.

"On the whole, the Lord Ordinary thinks it the safe construction to limit the Act of 1861, in the case of Parliamentary schoolmasters, to those clauses in which they are expressly mentioned. To attempt to apply the other clauses would lead in many cases to difficulties almost inextricable.

"The above view makes it unnecessary to consider the objections to the procedure of the heritors and Presbytery. The Lord Ordinary may say however that, assuming the heritors to have jurisdiction or power to proceed under the Statute of 1861, he does not think there are such irregularities as would be fatal to the proceedings."

The defenders reclaimed.

The Court adhered, with additional expenses.

Counsel for Reclaimers—Asher. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Pursuers—Robertson and Mackintosh. Agents—Gifford & Simpson, W.S.

Wednesday, January 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CASSIDY v. NORTH BRITISH RAILWAY CO.

Railway Company—Damages—Negligence.

Where a party had sustained injuries by falling out of the door of a railway carriage, and it was proved that no one in the carriage had opened the door,—held the Railway Company liable in damages.

The summons in this suit, at the instance of Francis Cassidy, moulder, Kirkintilloch, against the North British Railway Company, concluded for £1000 sterling, "being damages sustained by the pursuer, and as solatium due to him by and through the culpable negligence and gross carelessness of the defenders or of their servants, for whom they are responsible, inasmuch as the pursuer having paid his fare as, and having been, a passenger to Kirkintilloch in the train which left Glasgow for Kirkintilloch on the evening of Wednesday, the 20th day of July 1870 years, at a quarter before eight o'clock; and the defenders or their servants, for whom they are responsible, in violation of the legal obligations incumbent on them as carriers of passengers for hire, as well as in violation of the rules of the said railway company, having failed to keep the door on the off-side from the Glasgow platform, in the compartment in which the pursuer had taken his seat, locked and fastened; and the pursuer, while the said train was proceeding between the Bishopbriggs and Lenzie Junction Stations of the said railway, having risen from his seat for the purpose of looking out of the open window in the said door, and when he was in the act of leaning with his elbow on the said door, it suddenly flew open, and the pursuer fell out upon the line, whereby he sustained severe bodily injuries, necessitating the amputation of his left arm, and so severely injuring his health and physical