

executors manifestly were given no concern with it. The sum of £200 he is to have over and above his share of the residue, as in lieu of wages which he had previously earned. It would be out of the question to hold that this sum vested in any one but himself, and on the whole matter I entertain no doubt that the conclusion at which the Lord Ordinary has arrived is right.

LOEDS ORMDALE and GIFFORD concurred.

LORD NEAVES was absent.

The Court adhered.

Counsel for Pursuers—Gloag—M'Laren.  
Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders—Asher—Keir. Agent  
—David Milne, S.S.C.

Saturday, March 18.

## SECOND DIVISION.

[Lord Shand.

SCHOOL BOARD OF DUNBAR *v.* THE  
PROVOST, MAGISTRATES, & TOWN COUNCIL.

*School — School Board — Burgh — The Education  
(Scotland) Act 1872, section 62.*

*Held* that the amount which the town council of a burgh must pay yearly to the School Board in terms of the provisions of the 62d section of the Education Act 1872, is the fair average of what the school has, prior to the passing of the Act, cost the burgh, and that in computing this average retiring allowances and expenditure upon the maintenance of school buildings must be taken into account.

This was an action at the instance of the School Board of the royal burgh of Dunbar against the Provost, Town Council, and Magistrates, of the burgh. The summons concluded for declarator "that the Provost, Magistrates, and Town Council of the royal burgh of Dunbar were, at and prior to the passing of 'The Education (Scotland) Act 1872,' in the custom of contributing to the burgh school of Dunbar out of the common good of the burgh, or from other funds under their charge, the sum of £102 sterling annually, or such other sum, more or less, as our said Lords shall ascertain and determine, and that the defenders and their predecessors and successors in the offices of Provost, Magistrates, and Town Council of the said burgh of Dunbar have been, since the passing of the said 'Education (Scotland) Act 1872,' are now, and in all time coming be, bound to pay to the pursuers, the School Board of the said burgh of Dunbar, at the term of Martinmas yearly, the said sum of £102, or such sum as our said Lords shall ascertain and determine that the Provost, Magistrates, and Town Council of the said burgh were, at and prior to the passing of the said 'Education (Scotland) Act 1872,' in the custom of contributing to the said burgh school out of the common good of the burgh, or from other funds under their charge: . . . And in the event of its being found and declared by our said Lords that the defenders the, Provost, Magistrates, and

Town Council of the burgh of Dunbar are not bound to pay to the pursuers the sum of £102, or at all events the sum of £92 annually, it ought and should be found and declared, by decree of our said Lords that the pursuers have not been, are not, and will not be bound, and that the defenders have been, are, and will be bound, to pay to Lyon, sometime schoolmaster in Dunbar, the retiring allowance of £42 annually, agreed to be paid to him by the Provost, Magistrates, and Town Council of Dunbar in or about the year 1851."

It appeared that for upwards of two hundred years there had been a burgh school in Dunbar supported by the Provost, Magistrates, and Town Council, out of the common good of the burgh, aided since 1852 by grants from Government. Between 1730 and 1823 the school was divided into three departments, the English, the Latin or grammar, and the mathematical, taught by separate masters, and practically separate schools. In 1823 the Latin and English schools or departments were conjoined, and in 1851 the mathematical school or department was abolished, and from that year until the passing of the Education Act there was only one teacher in the school. From 1819 until 1872, with the exception of the years between 1839 and 1851, the burgh funds had always been burdened with the payments of one or more retiring allowances. Thus, from 1819 to 1824 there were three teachers receiving salaries to the amount of £69, and there was a retiring allowance then paid of £19. Between 1824 and 1839 there were two teachers, receiving salaries to the amount of £78, and the same retiring allowance of £19 still continued to be paid. In 1839 the recipient of the retiring allowance of £19 died, and from that year until 1851 the burgh was only burdened with the payment of the two salaries, amounting to £78. In 1851 both the teachers then in office resigned, Mr Lyon with a retiring allowance of £42, and Mr Morton with a retiring allowance of £12, while Mr Dick was appointed sole teacher, with a salary of £30.—these retiring allowances and salary amounting in all to £84. In 1862 Mr Morton died, and Mr Dick's salary was then raised to £50, and a sewing mistress was appointed with a salary of £8, which in 1865 was increased to £10. Thus, from 1862 to 1865 the salaries and retiring allowance amounted to £100, and from 1865 to 1872 to £102. The pursuers further averred that considerable sums had been yearly expended upon the maintenance of the school buildings, and they claimed that these sums should yearly be paid to them.

The defenders averred that in 1851 a complete change had been made in the character of the school. It had previously been a school in which the higher branches of education had been taught, but owing to the number of other schools which were established in the burgh it was found necessary to limit the teaching in the burgh school to elementary education. About 1851 a sum of nearly £600 had been expended on school buildings, for which the burgh had granted a bill, which they had since paid. The defenders, both judicially and extrajudicially, made a tender of £60 a-year in full of the pursuer's claims.

The Lord Ordinary pronounced the following interlocutor:—

"Edinburgh, 16th November 1875.—Having con-

sidered the cause, Finds that the defenders are not bound to make payment to the pursuers at each term of Martinmas annually of more than £60 per annum, being the sum which they offer to pay in all time coming in the defences; and in respect of that offer, and of the defenders' admission of liability for that amount, assoilzies them from the conclusions of the action, and decerns: Finds the defenders entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax and to report.

"*Note.*—By section 46 of the Education (Scotland) Act of 1872, 35 & 36 Victoria, cap. 62, it is enacted that 'the town council of every burgh shall, at the term of Martinmas yearly, pay to the School Board thereof such sum as it has been the custom of such burgh, prior to the passing of this Act, to contribute to the burgh school out of the common good of the burgh, or from other funds under their charge, and the same shall be applied and administered by the said School Board for the purpose of promoting higher instruction.'

"The question between the parties is, what has been the sum which it has been the custom of the defenders, the Magistrates and Town Council of the burgh, prior to the passing of the statute, to contribute to the burgh school? The pursuers allege that the sum which it was the custom of the burgh to contribute was £102. The defenders state the amount at £60, and admit their obligation to continue to pay that sum. The difference between these sums, being £42, is made up of an allowance which the burgh in 1851 agreed to pay to Mr Lyon, a former schoolmaster, on his retiring from office, and which they have continued to pay annually ever since. Mr Lyon is now about seventy-five years of age.

"The dispute between the parties turns upon the question whether Mr Lyon's retiring allowance is, within the meaning of the statute, a sum which it was the custom of the defenders prior to the passing of the Education Act to contribute to the burgh school. I am of opinion that it cannot be properly so regarded.

"There may be many cases in which a retiring allowance paid to a schoolmaster may properly be represented to be a part of the general annual contribution by the burgh to the burgh school. A burgh may have been in use for a period of time to pay a fixed annual sum, or a sum of nearly a fixed amount, partly in salaries, partly in prizes, partly in retiring allowances, or otherwise for behoof of the burgh school, following the system or practice that where any retiring allowance shall cease by the death of the annuitant, the sum thus set free shall continue to be applied either to increase the existing salaries of other teachers, or for some other school purpose. In such cases the retiring allowance may properly be represented as part of the sum which it has been the custom of the burgh to contribute annually to the school, and under the provisions of the statute the burgh is put under the obligation of continuing to recognise that permanent obligation in all time coming. If, however, the payment be not of this character, but is given to the retiring schoolmaster to cease at his death, and in the view that on that event occurring no such payment shall thereafter continue to be made to the burgh school, or for any purpose connected with the school, it appears to me that the pro-

visions of the statute do not impose liability on the burgh to continue the payment. The Education Act transferred the burgh schools to the School Boards to be elected under the statute, subject to the burden, also transferred from the burgh, of upholding and maintaining the schools thereafter in a proper state of efficiency; and section 46 of the statute appears to be mainly directed to the object of securing for the benefit of such schools the means of promoting higher education than might otherwise be given, where such means have previously existed, either in the form of income from funds intrusted to the magistrates or other persons as trustees for behoof of the burgh school, or of a payment which the magistrates have recognised as a permanent obligation on them, by having expended a certain amount annually, over a period of time, to or for behoof of the school; the annual payment which the magistrates have been in use to make for this purpose is made a burden on the burgh funds in all time coming.

"In this view of the statute, it would be unjust to convert a payment of a temporary nature, such as a retiring allowance to a schoolmaster, which would cease entirely to be a burden on the burgh funds at the annuitant's death, into a permanent charge. Thus, in the present case it may be anticipated that in a short time the annuity will come to an end, and the defenders reasonably object to the statute being so interpreted as to convert a temporary burden of £42 a year into an obligation on them for all future time. There is nothing in the facts disclosed in the minutes of the council, or appearing either from the arrangements made when Mr Lyon retired, or when Mr Dick, the present master, received his appointment, to lead to the inference that when Mr Lyon's annuity should cease any part of the sum paid to him should thereafter be paid to a school fund, or in any way for behoof of the school. If Mr Lyon had died a year or two before the Education Act passed it would, I think, have been clear that the sum of £60 only, which in that case the burgh would have continued to pay as the salaries of the master and mistress of the school, was the amount which the burgh had been in the custom of contributing to the school prior to the passing of the Act. At the time of Mr Dick's appointment in August 1851, sometime after Mr Lyon had resigned, it appears that the school was put in some respects on a different footing from that which had previously existed, probably for the reasons stated by the defenders in their statement 4th, viz., that a number of other schools had sprung up in the town; and the subsequent minutes of the Town Council show that it was not contemplated to make any substantial change, or to devote any part of Mr Lyon's retiring allowance after it should cease to increasing the other salaries, or for any other school purpose.

"The pursuers do not ask that the defenders should be ordained either to continue to pay the retiring allowance to Mr Lyon so long as he lives, or to pay the amount to them until that event, to enable them to discharge Mr Lyon's claim. It occurred to me that an arrangement to that effect would be a reasonable one to be adopted by the parties, who are both representatives of public interests, and I still entertain that opinion, believing that this would be carrying out the

spirit of the provisions of the Act. The defenders, however, found upon the 55th section of the statute, which provides that the retiring allowances to schoolmasters 'shall be paid and provided by the School Board having the management of such schools respectively,' as now imposed on the pursuers the obligation to pay Mr Lyon's annuity; they maintain that while, on the one hand, they are bound by the Act to give up the schools, and to continue to pay to the School Board the amount of their permanent annual contributions to the school, they are relieved from all future burdens connected with the school, and are expressly relieved from the future payment of schoolmasters' retiring allowances. It might be naturally expected that the statute would have provided that a payment of a temporary nature, such as has been here made to Mr Lyon under an obligation granted by the burgh, and which cannot, I think, be regarded as in any sense permanent, should continue to be made by the burgh for the lifetime of the annuitant; but it may be that such cases are not common, and were thus not under the notice of the Legislature. However this may be, I am of opinion that the provisions of section 46, being the only section which imposes future obligations on burghs in reference to their burgh schools, does not impose on the defenders the obligation to continue to pay such an allowance as that given to Mr Lyon. The only payments there referred to are to be continued in all time coming, and for the reasons already stated I do not think the language used includes such a retiring allowance as that which is here the subject of dispute."

The pursuers reclaimed.

Argued for them—The 62d section of the Education Act of 1872 provided that the School Board were to receive from the burgh such a sum as the burgh had been in use to contribute to the school, and what was to be looked to were, all payments made in respect of the school at the date of the passing of the Act. In this case such payment was moderately stated at £102. The retiring allowances were payments to the school within the meaning of the Act, and the burgh had, with a very small exception, been in use to pay retiring allowances from time immemorial. If it should be found that the whole retiring allowance of £42 could not be charged against the burgh, an average of the retiring allowances which the burgh had been in use to pay should be taken, and that, along with the sums expended upon the maintenance of the school buildings (which clearly fell within the meaning of the Act) would bring the sum due by the burgh up to the sum concluded for in the summons.

Argued for the defenders—The meaning of the 62d section of the Education Act was that the School Board should be entitled to receive from the burgh such a sum as the magistrates had been in use to pay to the burgh school, looking to its normal establishment, and apart from extraordinary or temporary expenditure. In this case it was not competent to go further back than 1851, because then the school had been changed from a higher class school to an elementary school—from a school with several teachers to a school with one teacher—and the school which existed before 1851 was not the school which had been vested in the School Board by virtue of the Act of 1872.

Thus, the retiring allowance to Mr Lyon could not be taken as a payment which the burgh was in use to make to the school, because it was an extraordinary and temporary payment arising out of the fact that the school had formerly been of a different kind. Although, however, the burgh could not be ordained to hand over the amount of the retiring allowance to the School Board, the School Board would be bound to pay that allowance to Mr Lyon so long as he lived, in terms of the provisions of the 55th section, and of the last clause of the 62d section of the Act. In regard to the expenditure for the maintenance of the buildings, that was clearly a co-relative to the proprietary right in the buildings; and when the School Board, by virtue of the Act, became vested in the buildings, they had also imposed upon them the duty of maintaining these buildings. Here the School Board got the buildings unburdened, whereas, if the burgh had made the £600 expended in 1851 a burden on the buildings, the School Board would have got them with that burden.

At advising—

LORD JUSTICE-CLERK—We do not think that it is necessary to have any further inquiry in this case, but that we have enough before us to enable us to decide the question here raised. There is no doubt that the meaning of the statute is that what the burgh must pay yearly in all time coming to the School Board is the fair average of what, prior to the passing of the Act, the school cost the burgh. So, without entering upon details, I am of opinion that the defenders should be ordained to make an annual payment to the pursuers of £80.

The other Judges concurred.

Counsel for Pursuers—Balfour—Jamieson.  
Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders—Burnet—Low. Agents—J. & J. Milligan, W.S.

Saturday, March 18.

## SECOND DIVISION.

APPEAL—HENDERSON *v.* M'KENZIE.

*Dogs Act 1871 (34 and 35 Vict. c. 56, sec. 2)—Summary Prosecutions Appeals (Scotland) Act 1875—Relevancy of Libel.*

By the second section of the Dogs Act 1871, power is given to Courts of Summary Jurisdiction to take cognisance of any complaint that a dog is dangerous and not kept under proper control.—*Held* that this section is not limited in its operation to dogs which are dangerous to human beings; and a libel held relevant in regard to dogs dangerous to sheep.

This was an appeal to the Court of Session under the Summary Prosecutions Appeals (Scotland) Act 1875. It arose out of a complaint brought by the appellant William Horn Henderson, Procurator-fiscal for the county of Linlithgow, against the respondent Alexander M'Kenzie,