

just. The supposed interest of the heritable creditors must therefore, in my opinion, be disregarded. And there is nothing in the evidence to show that the unsecured creditors will be prejudiced. The only difference which this action can make in the sequestration proceedings is, that the subjects will be freed from the burden of an illegal security for the benefit of all the creditors according to their several interests, and the only difference which, on that being done, the pursuers' claim will make is, that they may obtain full payment of a part of their debt by the exercise of a right of retention instead of merely ranking for a dividend. If the unsecured creditors have such an interest in the rents as to make this of any importance to them, it would seem to follow that they must have a corresponding interest in the subject which produces the rents, and in that case they would gain more by the recovery of the subject itself than they would lose by the retention of the rents. But we have no such statement as to the position of the estate as would be required in order to ascertain exactly the manner in which creditors may be affected by this action. And it does not appear to me to be necessary that we should inquire further. It is sufficient that the pursuers' claim to retain, if it receives effect in the sequestration, is preferable to the claims of unsecured creditors. It follows that if they should lose anything by the claim being sustained, that is a loss to which they must submit. They cannot defeat a legal preference by setting up against it a preference which the law disallows.

For the same reason the only other ground on which the defence is maintained appears to me to be equally unfounded. It is said that the trustee has sold the whole assets of the estate, together with his title to reduce the conveyance in question, to the defender Mr Colledge, and that the sale must receive effect under the provisions of the Bankruptcy Act. It is not explained how the reduction of a security will prejudice the purchaser. But it is unnecessary to consider whether the purchaser will be prejudiced. His position is, that by virtue of his purchase he has acquired a right from the trustee to support the conveyance against the pursuers' challenge, and this position is untenable for two reasons. In the first place, assuming that the trustee might assign his own title to reduce for the benefit of the general body of creditors, it is manifest that he could not assign the preferable right of an individual creditor. In the second place, if he could have sold to the pursuers' prejudice before the litigation began, he certainly could not do so after the action had been raised. Now, the process was intimated to the trustee in obedience to an interlocutor of the 17th of December, the sale was carried through on the 22nd of January, and the trustee was sisted as a defender on the 1st of January for the purpose apparently of maintaining that he had defeated the pursuers' title by selling the right which formed the subject of litigation dur-

ing the course of the process. I remain of the opinion which I expressed in reporting the case, that the pursuers' title cannot be affected by such a transaction.

The result is that in my opinion the pursuers are entitled to decree in the action of reduction to the effect of enabling them to maintain their plea of retention in the sequestration. The reduction destroys the title of Messrs M'Callum and Bowie to maintain the action in the Sheriff Court; and the Sheriff's interlocutor must therefore be recalled, and that action must be dismissed.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The disposition was reduced, and the appeal thereafter sustained.

Counsel for the Pursuers—Jameson—Shaw. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defenders—M'Kechnie—Guy. Agent—MacAndrew, Wright, & Murray, W.S.

Tuesday, March 10, 1891.

## FIRST DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

### SCHOOL BOARD OF BARVAS AND OTHERS v. MACGREGOR.

*School—Board—Dismissal of Teacher—Public Teachers (Scotland) Act 1882 (45 and 46 Vict. cap. 18), section 3, sub-section (2).*

Section 3, sub-section (2), of the Public Teachers Act 1882 provides that a certificated teacher can only be dismissed by resolution agreed to by a majority of the whole school board.

*Held* (1) that this provision made it illegal for a school board to delegate the power of dismissing a teacher to managers appointed by it, and (2) that the resolution of a school board dismissing a teacher, which was agreed to by a majority of the whole board, was not rendered invalid by the presence of Her Majesty's Inspector of Schools for the district at the meeting at which the resolution was adopted.

On 10th June 1885 Donald Macgregor, certified teacher, was appointed by the School Board of Barvas teacher of the Lionel Public School in the parish of Barvas. The terms of his appointment were that he should have a salary of £40, school-fees, free house and garden, and one-half of the annual Government grant, and that three months' notice should be given by either party of the termination of the engagement.

On 21st December 1888 the Committee of Council on Education in Scotland resolved to give assistance to certain parishes in the Highlands on, *inter alia*, the following con-

ditions—“(1) The school board shall, in pursuance of section 22 of the Education (Scotland) Act 1872, commit the management of each school under their charge to three managers, of whom one shall be Her Majesty's Inspector in charge of the district. (2) To such managers shall be committed full powers of appointing and dismissing the teachers of the school under their management, of deciding as to the organisation of the school, the salaries of the staff, the fees to be exacted, and all items of expenditure in regard to the school, including lighting, heating, cleaning, and repairs.”

This arrangement was adopted by the School Board of Barvas, and Mr Maclellan and Mr Helm, members of the board, were appointed to act along with Mr Robertson, Her Majesty's Inspector of Schools for the district, as managers of Lionel School. It was intimated to Donald Macgregor that in future he should take his instructions only from these managers.

On 2nd May notice was sent to the members of the board and Mr Robertson, that at a meeting of the board to be held on 26th May a motion for Macgregor's dismissal would be under consideration. Notice of this motion was sent on the same day to Donald Macgregor.

At the meeting of the board on 26th May a motion for Macgregor's dismissal at the expiry of three months was moved and seconded by members of the board, and was carried by a majority of the whole board. Mr Robertson, Her Majesty's Inspector, was present at the meeting, and he and Mr Maclellan in their capacity as managers of Lionel School concurred and agreed in the dismissal, Mr Helm the other manager dissenting.

On the same day notice of his dismissal was sent to Donald Macgregor.

Macgregor having disputed the legality of his dismissal, the School Board, Mr Robertson, and Mr Maclellan, as managers of the Lionel School, raised an action against him in the Sheriff Court at Stornoway praying the Court to ordain him to remove from the dwelling-house attached to the school at 26th August 1890 under pain of ejection, and to grant warrant to officers of Court summarily to eject him after that date.

The defender pleaded—“(4) The defender not having been validly or legally dismissed from the office of teacher of Lionel Public School, is not bound to remove from the dwelling-house attached thereto.”

By the 22nd section of the Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), power was given to school boards to delegate any of their powers to managers of schools appointed by them, except the power of raising money.

The Public School (Scotland) Teachers Act 1882 (45 and 46 Vict. c. 18), provides section 3, sub-section (2) that “no resolution of a school board for the dismissal of a certificated teacher shall be valid unless agreed to by a majority of the full number of members of such school board.”

On 15th November 1890 the Sheriff-Sub-

stitute (DAVIDSON) pronounced this interlocutor:—“Finds that the defender was appointed on 10th June 1885 by the School Board of the parish of Barvas to be teacher of Lionel Public School, with right, *inter alia*, to the ‘free house and garden’ which attach to the school there, it being conditioned that the engagement might be terminated on three months' notice by either party: Finds that at a meeting of the School Board held on 26th May 1890, after due intimation and notice to the members of the board and to the defender in terms of the Public Schools (Scotland) Teachers Act 1882, a resolution was adopted by a majority of the full members of the board, and concurred in by a majority of the managers of the school, to the effect that the defender ‘be dismissed from the office of head master of the school at the expiry of three months’ from the date of the meeting; that by letter dated said 26th May the clerk to the School Board intimated said resolution to the defender, and with the letter sent him an extract from the minutes of said meeting which set forth the terms of the resolution; and that the letter and extract were posted at Stornoway on the 27th and were received by the defender on the 28th May: Finds in law that said resolution was valid in terms of the ‘Public Schools (Scotland) Teachers Act 1882,’ and the notice thereof given to the defender was sufficient compliance with the terms of the agreement between the School Board and the defender; that the defender's right to occupy said dwelling-house was terminable equally with his office as teacher, and was terminated by said resolution and notice thereof; and that the defender was bound to remove from the said dwelling-house on the expiry of three months after 26th May 1890: Therefore repels the defences so far as not already disposed of, grants warrant to officers of Court summarily to eject the defender and his family and servants, with their goods, gear, and whole belongings, furth and from the dwelling-house and pertinents attached to Lionel Public School, in the parish of Barvas, and allows an extract of this warrant to go out and be extracted on the expiry of seven days from the date hereof, and decerns,” &c.

The defender appealed, and on 26th December the Sheriff (JAMESON) adhered to the Sheriff-Substitute's interlocutor.

“*Note.*—While I had not much doubt as to the substantial soundness of the pursuers' case, I have felt the case not to be free from difficulty on the point of the formalities of the defender's dismissal. By the 22nd section of the Education (Scotland) Act 1872 power is given to school boards to delegate any of their powers to managers, except the power of raising money. But it appears to me that the provisions of the Public Schools (Scotland) Teachers Act 1882 have the effect of making the dismissal of teachers another exception from the power of delegation on the part of school boards. This, however, has evidently not occurred to the Scotch Education Department or its advisers. For by their minute of 21st December 1888 they expressly direct that to the managers there-

in referred to, 'shall be committed full power of appointing and dismissing the teachers of the schools under their management,' and the provisions of that minute have been adopted and acted on by the School Board of Barvas in relation to Lionel Public School since the commencement of 1889, as is admitted by the pursuers in their reclaiming petition. I am of opinion that such delegation was illegal as regards the dismissal of teachers, but the result is that I must ignore it altogether as inept. But this does not assist the defender much, for he was not dismissed by the managers, but by the School Board, with all the requirements provided for the protection of teachers by the Public Schools (Scotland) Teachers Act 1882. It is in my opinion merely a trivial objection that one of Her Majesty's Inspectors of Schools, who was not a member of the board, was present at the meeting. He took no part in it according to the minute, except to add his concurrence to the dismissal after it had been resolved on. I see no harm in one of Her Majesty's Inspectors being present at a meeting of any school board in the country, and certainly will not give any effect to the objection that Mr Robertson was present at the meeting in question. The School Board accordingly on the occasion of their meeting of 26th May 1890 ignored their inept delegation of powers, and performed their proper functions under the Public Schools (Scotland) Teachers Act 1882. What my Lords of the Education Department (who ought to be informed of this case) may say to this I cannot predict, but the defender having got all the protection he was entitled to under the last-mentioned statute, it is in my opinion *ius tertii* for him to plead any arrangement between the School Board and the Education Department.

"As I consider this case not to have been free from difficulty, I see no reason for expediting the defender's ejection."

The defender appealed, and argued—The defender had not been validly dismissed. If it were held that his dismissal had been at the instance of the managers, it was invalidated by the presence of the other members of the board, and by the fact that the motion for his dismissal was moved and seconded by members of the board who were not managers, and that only a majority of the managers concurred therein, though no power was given them of acting by a majority. If the board were held to have dismissed him, the dismissal was contrary to an agreement impliedly made with the defender, that he should only be subject to dismissal at the hands of the managers, and was also invalidated by the presence of the managers and Her Majesty's Inspector at the meeting—*Queen v. Justices of Hertfordshire*, 1845, 6 Q.B. Ad. & E. 753.

The pursuers were not called upon.

At advising—

LORD ADAM—[After reviewing the facts with regard to the defender's dismissal] The question is, whether the defender's dismissal was a good or a bad dismissal?

The grounds on which it is maintained to have been bad are, that the power of dismissal was devolved on the managers, and that they alone had power to dismiss the defender, and that the combined meeting of the School Board and the managers made the defender's dismissal incompetent. If the School Board are held to have dismissed him, it is said that they had no right to do so in consequence of the presence of Mr Robertson, H. M. Inspector of Schools for the district. If the managers are held to have dismissed him, it is said they had no right to do so, other members of the School Board being present. In this way a question arises as to the powers of these two bodies to dismiss a teacher.

It is clear from the terms of section 22 of the Education (Scotland) Act 1872 that the only power which a school board could not delegate under that Act was the power of raising money, but by section 3, sub-section (2), of the Public School Teachers Act 1882 it is provided that "no resolution of a school board for the dismissal of a certificated teacher shall be valid unless agreed to by a majority of the full number of members of such school board." It would rather appear from the terms of that section that a resolution by a majority of the whole school board is necessary to the proper dismissal of a teacher, and it seems to follow, as the Sheriff says, that that section makes it impossible to delegate the power of dismissal to managers. It appears, however, that by a minute of 21st June 1888 the Scotch Education Board agreed to assist the schools of certain counties on certain conditions, two of the conditions being expressed in these terms:—"1. The school board shall, in pursuance of section 22 of the Education (Scotland) Act 1872, commit the management of each school under their charge to three managers, of whom one shall be Her Majesty's Inspector in charge of the district. 2. To such managers shall be committed full powers of appointing and dismissing the teachers of the school under their management."... It appears also that the School Board of Barvas agreed to accept the assistance given, and appointed three managers upon the conditions mentioned. I am disposed to agree with the Sheriff that the delegation of a power to dismiss teachers to these managers was illegal under the Act of 1882.

The defender, however, seems to me to be on the horns of a dilemma. If the delegation of a power to dismiss teachers to the managers was illegal, the power was left in the School Board, and the defender was dismissed by them. If, on the other hand, the delegation to the managers was valid, then the defender was validly dismissed by them, as they were entitled, it seems to me, to act by a majority as much as any other body.

It was argued, on the authority of the well-known case of *The Queen v. Justices of Hertfordshire*, that the decision of the School Board was invalidated by the presence of the managers. That was quite

a different case from the present. Two of the managers were members of the School Board, and it was necessary for them to be present at a meeting of the board, and I do not think that the presence of Her Majesty's Inspector invalidated the resolution of the board.

**LORD M'LAREN**—The question is, whether the employment of the defender as teacher was terminated in respect of a lawful dismissal from office? because, of course, if he has been lawfully dismissed the School Board are entitled to evict him from the dwelling-house attached to the school, and the question of dismissal resolves itself into this further question, what body in Barvas is entitled to dismiss a teacher—the School Board or the managers—one of whom is not a member of the board? That question seems to depend on the clauses of two successive Acts of Parliament. In the Act of 1872 power was given to school boards to delegate all their powers except the power of raising ready-money, but by the Act of 1882 a restriction was placed upon the power of delegation, and it was provided that no teacher should be liable to dismissal except on certain premonition, and by an absolute majority of the whole school board. I see no reason why the Act of 1882 should not apply to Barvas, but apparently that question has caused a good deal of difficulty, because it was argued before the Sheriff that there was a contract made by Macgregor that the managers alone should have power to dismiss him. That argument was, I think, successfully displaced by the Sheriff.

It was argued here, however, that the board alone had the power of dismissal, and the objection stated to their decision was that Her Majesty's Inspector was present and concurred in it. I agree with Lord Adam that this case is quite distinct from *The Queen v. Justices of Hertfordshire*, because all Justices act in a judicial capacity with regard to matters coming before them, and the invariable rule is that no outside influence shall be admitted in judicial proceedings, and magistrates are not entitled to take assistance except from procurators entitled to plead before them. The case of a school board is so far different that it is quite proper for a board of the kind to take advice from any quarter they please. A board is liable to extraneous influence. The members have to consult their constituents, and merely to say that they may take advice from any person in the parish except Her Majesty's Inspector shows the unsoundness of the proposition maintained by the defender.

I certainly agree with the Sheriff that since the Act of 1882 no authority except an absolute majority of the school board has power to dismiss a teacher.

I accordingly concur in the decision at which your Lordship has arrived.

**LORD KINNEAR**—I am of the same opinion.

By the terms of the defender's appointment three months' notice was to be given

by either party of the termination of the engagement; therefore he was liable by the terms of his appointment to be dismissed, or to have his appointment brought to an end at any time on three months' notice. But then he is entitled to the protection of the Act of 1882. That Act did not restrict the title of the School Board to terminate the defender's appointment according to its conditions, but did provide that they should not do so without due notice and deliberation, and that he could only be dismissed by the decision of an absolute majority of the board. He was therefore liable to dismissal on three months' notice by an absolute majority of the board.

Now, a majority of the board have resolved upon his dismissal, and I agree with the observations made by both your Lordships, and am unable to see how any arrangement by the Scotch Education Department can deprive the defender of the protection of the Act of 1882 unless he consented to it. It was put in argument as if a new contract had been made by which the defender agreed to accept dismissal at the hands of the managers. There is no evidence of that, and it is impossible to accept that view, because there is no evidence that the defender knew of the arrangement between the Scotch Education Department and the School Board. I am quite unable to see any indication that the conditions of the defender's appointment was altered by that arrangement, and am therefore of opinion that the board were not in a position to dismiss the defender save by the vote of a majority of the whole board.

But although I have thought it right to express my opinion upon that point, I think it is of very little importance to the defender, because it is not disputed that he was dismissed by a majority of the full board, and that the procedure required by the Act was duly followed out.

I agree with both your Lordships that the case of the *Justices of Hertfordshire* has no bearing on this question, and I think that a school board would be very far from conforming with the directions of the statute if when there was a question of dismissing the teacher of a school, they failed to consult those of their body who happened to be managers of the school, and also Her Majesty's Inspector if they were able to get his advice.

I think, therefore, the defender's dismissal was quite competent.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Pursuers—M'Kechnie—Maclennan. Agents—Stuart & Stuart, W.S.

Counsel for the Defender—Strachan—Wilson. Agent—John Elder, S.S.C.