

exceeded the sum of expenses incurred to the respondent. This would have been, so far as my experience goes, an unprecedented demand, and one to which, as Lord Ordinary, I should certainly not have acceded. It would have involved a new record on a point which might be entirely unconnected with the subject-matter of the petition and thereby initiate a new litigation.

On principle, therefore, I should have been prepared to decide the question against the claimer. But I further agree with the Lord Ordinary that so far as we are concerned it is settled by authority. The only matter dealt with in the opinion of the Inner House in *Fleeming's* case does not arise here, but the exact point was dealt with by Lord Fullarton, and the ultimate decision involved an affirmation of his view as stated in the passage quoted by the Lord Ordinary. . . .

LORD GUTHRIE concurred.

The Court adhered.

Counsel for the Reclaimer—A. O. M. Mackenzie, K.C.—Morton. Agents—Norman Macpherson & Dunlop, S.S.C.

Counsel for the Respondent—M'Lennan, K.C.—W. J. Robertson. Agents—Thomas & William Liddle, W.S.

Saturday, March 11.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

CARMICHAEL v. HECTOR AND OTHERS.

School—School Board—Membership—Disqualification—“Holding Office of Profit” —Pensioner—Education (Scotland) Act 1878 (41 and 42 Vict. cap. 78), sec. 21.

The Education (Scotland) Act 1878, section 21, enacts—“No person holding an office of profit under a school board in any parish or burgh shall be eligible or shall be capable of acting as a member of such school board. . . .” *Held* that the words “holding an office of profit” in above section did not apply to a pensioner of the school board so as to render him ineligible for nomination as a candidate for election to, and for membership of, the school board.

The Education (Scotland) Act 1878 (41 and 42 Vict. cap. 78), section 21, is quoted *supra* in rubric.

John Nelson Carmichael, Margaret Place, Aberdeen, *pursuer*, brought an action against (1) Thomas Hector, clerk and treasurer of Aberdeen School Board, returning officer at the election of the School Board of the burgh of Aberdeen, alleged to have taken place on or about 16th April 1914; (2) Alfred Beaumont, Aberdeen, and others, being the persons alleged to have been elected members of the School Board at the said election; and (3) the School Board of

the Burgh of Aberdeen, *defenders*, for declarator “that the pursuer was on 1st April 1914, and presently is, eligible for nomination as a candidate for election to and for membership of the School Board of the burgh of Aberdeen, and (second) this being so found and declared, or whether this be found and declared or not, the defender the said Thomas Hector, as returning officer foresaid, ought and should be decerned and ordained by decree of the Lords of our Council and Session to exhibit and produce before our said Lords a pretended decision made and intimated on or about 1st April 1914 by the said Thomas Hector, as returning officer foresaid, whereby he declared to be invalid a nomination paper or papers lodged in his hands on or about the said 1st April 1914 nominating the pursuer as candidate at the election of the said Aberdeen School Board, and the said pretended decision ought and should be reduced by decree of our said Lords, and the pursuer reponed and restored thereagainst *in integrum*.”

Defences were lodged for Thomas Hector and the School Board of Aberdeen.

The pursuer pleaded—“(1) The pursuer having, on 1st April 1914, been and being now, eligible for election as a member of the School Board of the burgh of Aberdeen, is entitled to decree in terms of the declaratory conclusions of the summons. (2) The pretended decision of the returning officer declaring the pursuer’s nomination invalid, being illegal and improper, should be reduced as craved.”

The defenders pleaded—“(4) The pursuer being a person ‘holding an office of profit’ under the School Board, within the meaning of the Education (Scotland) Act 1878, section 21, and the Order in Council of the Scotch Education Department of 25th November 1913, section 8, was ineligible for nomination as a member of the Board, and the defenders are therefore entitled to absolver.”

The facts of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 4th December 1915 sustained the first plea-in-law for the pursuer and decerned against the comparing defenders in terms of the declaratory conclusions of the summons.

Opinion.—“The pursuer in this case, who was formerly a manual instructor under the Aberdeen School Board from December 1895 until March 1911, has brought an action to have it found and declared that he is eligible for nomination as a candidate for election to and for membership of the School Board of the burgh of Aberdeen. There is also a conclusion for reduction of a letter by the Clerk of the School Board acting as returning officer, intimating that in connection with an election for the School Board in April 1914 he held the pursuer’s nomination as a candidate for a seat on the Board to be invalid. The defenders in the action are the Clerk of the School Board and the members of the School Board.

“The only question that was raised in the case is whether, as put by the Clerk in his letter, in respect that as a former manual instructor in the Board’s service he draws a

pension from the Board, the pursuer is disqualified as a candidate.

“There is a section of the General Order of the Education Department dealing with the matter of disqualification, but so far as I am concerned the question is whether the receipt of this pension by the pursuer is a statutory disqualification. Under the Education Acts there are apparently two disqualifications. By section 12 of the Education (Scotland) Act 1872 it is provided ‘that no teacher of a public or State-aided school in any parish shall be eligible as a member of a school board under this Act.’ In 1878 the disqualification was extended, and by section 21 of the Act of that year it is provided that ‘no person holding an office of profit under a school board in any parish or burgh shall be eligible or shall be capable of acting as a member of such school board, or as a manager under section 22 of the principal Act.’ The defenders’ contention is to the effect that the pursuer holds an office of profit in respect that he draws a pension. The pursuer maintains that this is an unnatural construction to put upon the words of the section imposing a disqualification. I do not think I can consider whether it is advisable or inadvisable that a person in the position of the pursuer ought to be a member of the School Board. All I can consider is whether or not the statute has deprived him of the right, if he so desires, to become a candidate for election to the School Board. For my own part I should not have thought it doubtful that ‘office of profit’ meant an office where a duty fell to be performed. That appears to be the view taken with reference to the meaning of ‘office’ by the Lord Chief-Justice in the case of *Hartley*, 5 Common Bench (New Series), p. 40, at p. 55, and in the definition of ‘office’ in Bell’s Dictionary the matter is put thus—‘An office is a right to exercise a public or private employment and to take the fees and emoluments belonging thereto.’ I was also informed that in the English and Irish Local Government Acts ‘office’ is defined in the former as ‘a place, situation, or employment,’ and in the latter as a ‘situation or employment.’ There is no such definition, I understand, in the Scottish Local Government Act; but these matters I merely refer to as confirming the view which I hold as to the meaning of ‘office’ of profit. Taking the view which I do, I am bound to hold that the pursuer was not disqualified to act on the School Board of Aberdeen, and I therefore give effect to the declaratory conclusion. I suppose it is not necessary that the reductive conclusion should be dealt with.”

The defenders reclaimed, and argued—The pursuer was an officer of the School Board in respect that he drew a pension. The intention of the Act—Education (Scotland) Act 1878 (35 and 36 Vict. cap. 62), sec. 21—was to disqualify those drawing emoluments from the Board. The policy of granting pensions might come before the Board, and it would be undesirable that members of the Board drawing such pensions should determine such questions. For the etymological

meaning of “office” reference was made to Smith’s Latin Dictionary, s.v. *officium*.

Counsel for the pursuer were not called on.

LORD JUSTICE-CLERK—I have no doubt that the Lord Ordinary has arrived at a correct result. There are two statutory disqualifications as to membership of a school board. One is that no teacher shall be eligible as a member. That was introduced by the original Education Act of 1872. A further disqualification was added by the Act of 1878 in these words—“No person holding an office of profit under a school board in any parish or burgh shall be eligible or shall be capable of acting as a member of such school board.” It is noticeable that this disqualification is confined to persons holding “an office of profit,” and is not so widely expressed as are the terms of disqualification for membership of other public boards, such as the disqualification of persons “sharing directly or indirectly in the profits of any contract or employment under the Board.” But even that disqualification would not in my opinion strike at a pensioner.

Accordingly it would not be a fair construction, in my opinion, to extend the meaning of the words “an office of profit,” as Mr Lippe in his argument asked us to do. I am of opinion that a pensioner is in no sense of the term a person holding an office of profit. The pursuer is not therefore excluded from being nominated as or becoming a member of a parish school board, and accordingly the Lord Ordinary’s judgment on that matter is right. As a matter of form we shall insert in the interlocutor a statement that the other conclusions being unnecessary they ought to be dismissed, so as in that way to dispose of the whole of the action.

LORD DUNDAS, LORD SALVESEN, and LORD GUTHRIE delivered opinions to the same effect.

The Court pronounced this interlocutor—

“Refuse the reclaiming note and adhere to the interlocutor reclaimed against: Find it unnecessary to dispose of the remaining and reductive conclusion of the action: Dismiss the same accordingly, and decern.”

Counsel for the Pursuer and Respondent—G. Watt, K.C.—Carmont. Agent—W. Marshall Henderson, S.S.C.

Counsel for the Defenders and Reclaimers—Horne, K.C.—Lippe. Agents—Alex. Morison & Company, W.S.