

unless the rule and principle stated by some of the Judges in the *Paisley* case in 1835 was now held to be sound law.

If nonconformists can be lawfully summoned to worship by a bell,—if the use of a bell of their own is not denied to them by law,—then I am of opinion that the magistrates of this burgh, while maintaining the uses of the bells for the parish church, and protecting against disturbance, are entitled to authorise their use for summoning to worship the congregations which met in the evening, though those congregations may be nonconformists.

The magistrates are owners,—sole owners, and municipal custodiers of the bells. They respect the rights of the complainers. They preserve to the complainers all uses customary or required, and they protect the complainers against disturbance and inconvenience. That being the case, nothing in the resolution remains to be challenged or complained of, except that nonconformists may, by the sound of the bell, receive notice of the hour for Sabbath evening worship.

The decision in the *Paisley* case, with the opinion of the Judges, was quoted and founded on by the counsel who opened this case for the complainers, and undoubtedly judicial opinions were given in that case negating the right of dissenters to use a bell,—to use any bell. This was broadly and most emphatically stated by Lord Meadowbank and Lord Medwyn.

I was satisfied that if this decision in the *Paisley* case is not here founded on and held to be an authority, then the complainers are not entitled to succeed in the present demand for interdict, for the bells in this case are, and have been for nearly a century, the sole property of the burgh, and the magistrates have authorised their use.

On the other hand, if we are called on now to recognise and enforce the law as declared in the *Paisley* case, and to proclaim now that the right to use a bell,—any bell,—summoning to worship, was limited exclusively to the established church, while the prohibition to use a bell as a call to worship is a penalty on nonconformity, I must decline to do so. I think that such a proposition is opposed to the constitutional toleration which law recognises and justice demands. The magistrates direct the using of their own bells. Their authority sustains the lawfulness of the use, unless it be altogether unlawful to use a bell to summon to worship a nonconformist congregation. I do not admit the unlawfulness of such a use of this bell, and we all know that it is not uncommon. The plea that this use of a bell belonging to the town is unlawful, the demand for the exclusive right of the established church to use such a bell, is in my view worthy only of the days when the Curfew Bell enforced the putting out of light, and proclaimed the sway of darkness.

The Lord Ordinary has, in my opinion, rightly disposed of the case by refusing the interdict.

THE LORD PRESIDENT AND LORD JERVISWOODE  
concurring with LORD DEAS.

The Court pronounced the following interdictor:—

“Repel the first objection stated in the said note; sustain the objection, and therefore disallow the charges of £23, 2s. paid to Mr M'Gibbon; with that exception, approve of the Auditor's report, and decern against the

respondents for payment to the complainers of £372, 11s. 8d., being the amount of the said account as taxed, after deducting therefrom the sum disallowed.”

Counsel for the Complainers—Watson and Glog. Agents—Gillespie & Paterson, W.S.

Counsel for the Respondents—Dean of Faculty (Clark), Q.C., and Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Thursday, July 9.

## FIRST DIVISION.

WEYTE V. SCHOOL BOARD OF HADDINGTON.

Schoolmaster—Burgh School—School Board—Education Act 1872 (35 & 36 Vict. c. 62) secs. 23, 24.

In a burgh school the dwelling-house of the teacher and the class-room formed one tenement—held that the whole building vested in the School Board under the 24th sec. of the Education Act of 1872, and that the master on being dismissed by the School Board as “inefficient, unfit, and incompetent,” lost the dwelling-house.

This was a Note of Suspension of certain decrees in the Sheriff Court of Midlothian and Haddington, brought by the Rev. William Whyte, rector or head master of the Haddington Burgh School, against the School Board of the burgh of Haddington, in the following circumstances:—

The burgh schools of the Royal Burgh of Haddington, which were averred to have existed from time immemorial, were under the patronage of the magistrates and council of the burgh. The school buildings belonged to them, and they appointed the teachers. The school buildings consisted of a large tenement which, beside school-rooms &c., contained the dwelling house of the rector or head master. In September 1843 the complainer was appointed rector of the schools. He received a salary of £45, (out of which certain sums were payable to the masters), one half of the whole school fees, and a free house. One of the conditions of the appointment was that the schools should “remain as at present, united into one seminary.” On 12th April 1873 the respondents, seeing that there was accommodation for 200 pupils in the burgh school, and that for three years there had not been one pupil in attendance, felt it to be their duty to enquire whether the complainer was not “incompetent, unfit, or inefficient.” The respondents therefore obtained a report from the Inspector of Schools for the district, and a copy of this report was sent to the complainer, who, although he addressed a letter to the respondents, gave no explanation of the fact that the school was without scholars. On 30th August 1873 the respondents declared that the complainer was unfit or inefficient as a teacher, and removed him from the school-rooms, dwelling-house, and other premises. The minutes of the School Board (respondents) in regard to these transactions are to the following effect:—“14 May 1873.—The Board, as narrated, after full consideration of all the circumstances of the case, felt constrained to declare that they consider the Rev. William Whyte, the present rector of the Burgh Schools, to be ‘unfit or inefficient,’ and instructed the clerk to

write to the secretary of the Scotch Education Department and to request an inspection and report by the District Inspector." "The Clerk reported that in terms of last minute he sent Mr Whyte, the rector of the burgh schools, a copy of the report by Mr Gordon, one of Her Majesty's Inspectors of Schools, and other papers mentioned in the minute, and he received from Mr Whyte a letter in reply, which was read to the meeting. The Board think it unnecessary to take any special notice of the disrespectful terms in which they are referred to in that letter, but they must now proceed in terms of the statute to give judgment in the matter; and having carefully considered the sections of the statute bearing upon the removal of unfit or inefficient teachers, their former minute, the report of Her Majesty's Inspector, and Mr Whyte's communication, in which no explanation is given of the past and present state of the burgh schools as an educational establishment, nor reason assigned why there has been no school for the last three years, the School Board hereby unanimously confirm the former minute finding that Mr Whyte is "unfit and inefficient" as a teacher thereof; and further, and subject to the confirmation of the Board of Education, they hereby unanimously pronounce sentence of removal against him as rector or teacher of the Burgh Schools, and from the school rooms and dwelling-house, and other premises occupied by him in connection therewith. Further, the Board direct the Clerk to transmit a copy of the report of Her Majesty's Inspector and of this minute to the Board of Education, and respectfully to request that they should be pleased to confirm the judgment of this Board in the matter. The Board further direct the Clerk to send a copy of this minute to Mr Whyte, that he may, if so advised, make a representation on the subject to the Board of Education."

The complainer refused to remove from the school house, and the respondents, on 17th November 1873, presented a petition to the Sheriff of Midlothian and Haddington for warrant summarily to eject the complainer from the said dwelling house and premises. The Sheriff-Substitute (SHERIFF) granted decree as craved, and the Sheriff (DAVIDSON) in so far as the judgments of the Sheriff-Substitute were appealed against, adhered. It was in regard to these judgments that this Note of Suspension was brought.

The complainer averred that he was appointed *ad vitam aut culpam*, and that there was no fault on his part. His explanation of the fact that there were no scholars in the school was contained in the following statement:—

"In May 1844, the said town council appointed a committee in regard to the said school, to whose appointment the complainer objected, as being at variance with and in contravention of the foresaid report, the constitution of the school, and the complainer's foresaid appointment. The school became gradually unprosperous, but through no fault on the part of the complainer. Trustees, who were the leaders in the town council, and practically the patrons of the burgh schools, organised a private school, which is still in existence, and in one day in 1845, the scholars were reduced from about sixty to about seven, arising from their act. The schools were afterwards put into a much more prosperous state by the exertions of the complainer, but by the withdrawal from time to time of masters who commenced as burgh school teachers, and then

left, taking away their scholars, and other causes, the system did not thrive. The burgh schools had been reported on by the town council as being located in an unhealthy position, and the classrooms as not properly ventilated; new school buildings were on that account recommended by the town council committee to be erected, but these were never erected. Of later date, the town council had wrongfully and improperly interfered with the complainer, and found fault with the chastisement of children attending school which led to the complainer giving up that mode of discipline. The council also, without cause, found fault with the complainer as teaching erroneous Bible doctrine, and did much as private individuals, and also in their corporate capacity, to destroy the schools. Ultimately, from the various causes set forth in this article, the attendance at the burgh schools, which was small in the summer of 1870, ceased after the harvest of 1870. This, however, was not owing to any fault on the part of the complainer, who is a good and efficient and well qualified teacher. Since the end of 1870, as previously, the complainer has had full possession of his house (viz., the said westmost house), as rector of the burgh schools, as well as of the salary appertaining to that office."

The complainer pleaded:—(1) The action of removing, in which were pronounced the interlocutors complained of, was not a competent proceeding for the enforcement of the respondent's alleged rights; separately, the said action was not competent in the Sheriff-court. (2) The respondents had and have no title to sue said action. (4) The Haddington Burgh School, being declared to be a higher class school by the statute, does not fall within the provisions of the sixtieth section thereof. (5) Assuming that the Haddington Burgh School does fall within the provisions of the sixtieth section, these provisions are, so far as regards the complainer, controlled by the fifty-fifth section, and the interlocutors complained of are therefore erroneous. (6) The proceedings in connection with the complainer's alleged dismissal from the rectorship of the school having been contrary to law and to the provisions of the statute, the complainer is entitled to suspension as prayed for. (7) The respondents' averments in the said action being irrelevant, and in all material respects unfounded in fact, and there being no lawful ground for the removal of the complainer from his said office, the interlocutors complained of should be suspended. (8) The interlocutors complained of being erroneous, and not well founded in fact or in law, they should be suspended, and the present respondent found liable in expenses."

The respondents pleaded:—(1) No relevant and sufficient ground of suspension having been alleged, the reasons ought to be repelled. (2) In respect that the complainer had ceased to hold the situation in respect of which alone he occupied or was entitled to occupy the premises, he was and is liable to be summarily ejected therefrom. (3) The warrants and decrees complained of not being liable to objection on any of the grounds stated, the reasons of suspension ought to be repelled. (4) Generally, the whole grounds of suspension being ill founded in fact and law, the suspension ought to be repelled with expenses."

The Lord Ordinary pronounced this interlocutor:—

"9th June 1874.—The Lord Ordinary having

heard counsel for the parties,—Repels the reasons of suspension: Finds the warrants and decreets complained of orderly proceeded, and decerns: Finds the suspender liable in expenses, and remits the account when lodged to the Auditor to tax and report.”

The complainer reclaimed.

Argued for him—The house of the teacher in a burgh school was not vested in the School Board at all, but the word school, as applied to burgh school, meant only the fabric where the children were actually taught. It did not matter that the teacher's house and the school proper were here in the same tenement, the School Board had no right to the dwelling-house part of that tenement, and had no title to deprive Mr Whyte thereof.

Again, the master of a burgh school holds *munus publicum*, and the office is held *ad vitam aut culpam*. In this case, although there were no children at the school, no such *culpa* was proved against Mr Whyte as to warrant his deposition.

Argued for the respondents—The fair reading of the Statute was that the whole scholastic establishment was vested in the School Board, and it would be absurd to draw any such distinction as that attempted to be drawn by the appellant.

As to the dismissal of the appellant, the School Board had acted regularly in every respect. The fact that there were no scholars at the school afforded a strong presumption of fault on the part of the schoolmaster, and he never made any other explanation of the fact. Besides, in order to warrant their dismissing him, malversation need not be condended on, but only reasonable cause shown.

Authorities—*Magistrates of Montrose v. Strachan*, Jan. 18, 1710, M. 13, 118; *Hastie v. Campbell*, June 29, 1769, M. 13, 132; *Kempt v. Magistrates of Irvine*, M. 13, 136; *Gibson v. Directors of Tain Academy*, March 11, 1836, 14 S. 710; Bell's Principles, sec. 2189.

At advising—

LORD PRESIDENT—The complainer in this case has been dismissed from the office of schoolmaster of the burgh school at Haddington, under sub-section 2 of section 60 of the Education Act of 1872. It is there provided that “if the School Board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's Inspector charged with the duty of inspecting such school, and on receiving such report the School Board may, if they see cause, remove such teacher from office; provided that before proceeding to give judgment on the matter they shall furnish to the teacher a copy of such report, and that a judgment removing a teacher shall not have effect until confirmed by the Board of Education.”

Now the proceedings of the School Board at Haddington seem to have been in entire conformity with this section. In the first place, they gave their opinion that this gentleman was unfit for the office which he held, and they called upon the Inspector of Schools for the district to report. He did so, and the School Board sent a copy of the report to the complainer. Then, upon 30th August 1873, the School Board met, and the minute is in the following terms:—“the clerk reported that in terms of last minute he sent Mr Whyte, the rector of the burgh schools, a copy of the

report by Mr Gordon, one of Her Majesty's Inspectors of Schools, and other papers mentioned in the minute, and he received from Mr Whyte a letter in reply, which was read to the meeting.” I will not read that letter, but it is right to state that while the School Board gave Mr Whyte an opportunity of making an explanation, this letter contains nothing of the sort, but is simply a deliberate insult to the School Board. The minute then proceeds—“The Board think it unnecessary to take any special notice of the disrespectful terms in which they are referred to in that letter, but they must now proceed in terms of the Statute to give judgment in the matter, and having carefully considered the sections of the Statute bearing upon the removal of unfit or inefficient teachers, their former minute, the report of Her Majesty's Inspector, and Mr Whyte's communication, in which no explanation is given of the past and present state of the burgh schools as an educational establishment, nor reason assigned why there has been no school for the last three years, the School Board hereby unanimously confirm the former minute finding that Mr Whyte is ‘unfit or inefficient’ as a teacher thereof; and further, and subject to the confirmation of the Board of Education, they hereby unanimously pronounce sentence of removal against him as rector or teacher of the burgh schools, and from the school rooms and dwelling-house, and other premises occupied by him in connection therewith. Further, the Board direct the clerk to transmit a copy of the report of Her Majesty's Inspector and of this minute to the Board of Education, and respectfully to request that they should be pleased to confirm the judgment of this Board in the matter. The Board further direct the clerk to send a copy of the minute to Mr Whyte, that he may, if so advised, make a representation on the subject to the Board of Education.” The School Board also sent a copy of their minute to Mr Whyte, and gave him another opportunity of making an explanation.

The sentence of ‘the School Board was confirmed by the Board of Education on 24th September. Now that sentence has not been challenged in any competent form of process. What happened was this. Mr Whyte refused to leave his dwelling-house, and the School Board proceeded to apply to the Sheriff for warrant of ejectment. When that warrant was obtained Mr Whyte suspended the decree, but he did not challenge the sentence of the School Board. Now one would suppose that if Mr Whyte was properly deposed, ejectment would follow as a matter of course. I think that the School Board acted quite rightly towards Mr Whyte, and had good cause to pronounce the sentence which they did. It is admitted that notwithstanding the excellent provisions which there are in Haddington for this school, there have been no scholars for the last three years. Mr Whyte never gave any explanation of that state of matters until warrant of ejectment was applied for in the Sheriff Court, and then he made this explanation:—

“Of later date the town council had wrongfully and improperly interfered with the complainer, and found fault with the chastisement of children attending school, which led to the complainer giving up that mode of discipline. The council also, without cause, found fault with the complainer as teaching erroneous Bible doctrine, and did much as private individuals, and also in

their corporate capacity, to destroy the schools. Ultimately, from the various causes set forth in this article, the attendance at the burgh schools, which was small in the summer of 1870, ceased after the harvest of 1870. This, however, was not owing to any fault on the part of the complainer, who is a good and efficient and well qualified teacher. Since the end of 1870, as previously, the complainer has had full possession of his house (viz., the said westmost house), as rector of the burgh schools, as well as of the salary appertaining to that office."

All that I can say of that explanation is, that it is altogether worthless and inadequate, and that the School Board were, in the circumstances, quite justified in pronouncing the sentence which they did.

But there is another point in this case, which involves the construction of certain clauses in the Education Act of 1872. The complainer says that he could not be ejected from his dwelling-house because the School Board have no title to that house. Now I doubt the competency of that objection, this being merely a petition for warrant to eject and remove, and not an action of removing. But without taking up that ground, I am of opinion that the objection is bad on its merits. No doubt the wording of the statute varies in the 23d and 24th sections. The 23d section provides:—"The parish and other schools which have been established and now exist in any parish under the recited acts, or any of them, together with teachers' houses and land attached thereto, shall be vested in and be under the management of the School Board of such parish, or, if situated in a burgh, then of the School Board of such burgh." Then in the 24th section it is provided:—"Every burgh school shall be vested in and be under the management of the School Board of the burgh in which the same is situated, from and after the election of such School Board," &c. Now, in the first of these sections the teacher's house is mentioned, and in the second it is not; but in both cases the term school undoubtedly means among other things the school buildings. In regard to parish schools, which depend upon a series of statutes, it is a statutory requirement that there shall be a teacher's house, and it is therefore natural that the 23d clause should distinctly say that the teacher's house as well as the school shall be vested in the School Board. In regard to burgh schools, however, the position of the teacher's house is different, for there is no statutory enactment that in the case of burgh schools a teacher's house should be provided at all. It is thus not surprising that there should be no express mention of the teacher's house in the 24th section.

But coming to the facts of the case which we are now considering, I observe that the school-house and the teacher's house are embraced in the same tenement. Now, from the nature of the case I think it obvious that they cannot be separated. The whole tenement is one which has been dedicated to one purpose from time immemorial. Taking a fair construction of the 24th section of the Act, I think that it does include a tenement of this description, and that the fact that part of the tenement is a teacher's house does not prevent the whole tenement falling under the description of 'school.'

If there had been a separate and distinct school-master's house, that would have been a different,

and might have been a delicate question. But where the schoolhouse and the teacher's house are one tenement and are not separable, I cannot but hold that the whole falls under the term school.

The other Judges concurred.

The Court adhered.

Counsel for the Complainers—Watson and Rhind. Agents—Ferguson & Junner, W.S.

Counsel for the Respondents—Dean of Faculty (Clark), and Lee. Agents—H. & H. Tod, W.S.

Thursday, July 9.

## FIRST DIVISION.

[Lord Mure, Ordinary

LORD CLINTON v. GEORGE BROWN.

*Feu-Contract—Property—Lease.*

A feuair held under a feu-charter which proceeded on a feu-contract, in which the superior bound himself to give to each of the feuairs in the village "patches of moor ground from time to time, to improve, rent free for the first nineteen years, and thereafter for nineteen years, or the lifetime of the feuair, as each feuair may incline, at such rent as the same may be valued at by two men mutually chosen;" and also, to give "patches of arable or improved land at an adequate rent, with access thereto."—*Held* that on the feuair's refusing to comply with the conditions of the superior, the latter was entitled to remove him from the arable ground, his right therein being not a right of property, but a mere leasehold right from year to year.

In 1796 the late Sir William Forbes, in order to form the village of New Pitsligo, held out certain inducements to intending feuairs, and embodied them in a general feu-contract. *Inter alia*, he undertook—(1) to give each feuair in the village at the time he acquired his feu, patches of moor ground to improve, rent free for the first nineteen years, and thereafter for nineteen years or the lifetime of the feuair, at a rent to be fixed by valuator; and (2) to give each feuair "patches of arable or improved land at an adequate rent, with access thereto." This general feu-contract was referred to and embodied in a particular feu-charter, acquired in 1812 by Andrew Brown, who accordingly obtained lots of moorland and arable ground, and held them down to the date of his death in 1858. George Brown, his son, succeeded him, and entered to all that his father had held, in possession of which the landlord, Lord Clinton, as administrator-at-law of his son, offered to allow him to remain on certain terms and conditions, which Brown refused. Lord Clinton raised a process of removing in the Sheriff-Court, and obtained decree, which Brown sought to suspend, but the suspension was sisted in order to allow Lord Clinton to bring this action of declarator of his right.

The Lord Ordinary pronounced the following interlocutor:—

"12th May 1874.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process—