

Thursday, May 27.

SECOND DIVISION.

SCHOOL BOARD OF MOCHRUM v. D. M.  
MACFARLANE.

Education (Scotland) Act, 1872—Contract—Implied Condition.

A school board in December 1873 by a resolution fixed the salary of the parish schoolmaster at a certain sum per annum. Two months thereafter the Board recalled that resolution as from Martinmas 1873, and ultimately they refused to pay part of his salary, on the ground that he refused to furnish a list of scholars to the Board. In an action at the instance of the master for his salary as fixed in December, and commencing from May 1874,—held (1) that the salary fixed by the Board commenced from Whitsunday 1874; (2) that the contract was for a year; (3) that there was not an implied condition that the master was to furnish a list of scholars to the Board.

The summons in this suit, at the instance of Duncan Macfarlane, schoolmaster, Gowabrae, Port-William, against the School Board of the parish of Mochrum, concluded for payment of £100, with interest at £5 per cent. on £37, from 15th May 1874, and on the sum of £62, 10s., from 11th November 1874.

The facts of the case were these:—The pursuer was teacher of the parish school of Mochrum under the Parochial and Burgh Schoolmasters Act, 1861, at a salary fixed by the heritors and minister, by minute dated 30th January 1862, of £50 per annum, and he also drew the school fees. After the passing of the Education (Scotland) Act, 1872, and on 15th December 1873, the School Board, at a full meeting, passed the following resolution:—

“Mochrum Church Vestry,  
15th December 1873.

“Board met. All the members present. Mr Maxwell in the chair.

“*Inter alia*—A letter from Mr Macfarlane, the schoolmaster, dated 9th inst., in reply to a request from the chairman relative to his returns to the Board respecting his income from school fees for the last year, were laid before the Board.

“The meeting agreed to adjourn consideration of this letter until Mr Macfarlane be present, and take up the next business before them.

“The Board, on resuming consideration of Mr Macfarlane's letter, above referred to (he being now present), fix his salary at £125 sterling per annum. This salary Mr Macfarlane accepts, as schoolmaster, in a letter dated this day (15th inst.)”

On the same date the pursuer wrote as follows accepting the salary:—

“Dear Sir,—Mr Gillespie informs me that the Mochrum School Board have agreed to give me £125 sterling per annum as salary as parish teacher. I agree to accept this amount.—I am, dear Sir, your most obedient servant,

“D. M. MACFARLANE.”

After some correspondence between the defenders and pursuer, in which they requested him to furnish them with a list of scholars and the fees

due from each, and he expressed his willingness to give a sight of his register of scholars to their clerk, on 7th February 1874 the defenders passed the following resolution:—

“Resolve—(1.) To recall their resolution, of date 15th December 1873, to give the teacher of the above school a fixed salary of £125.

“(2.) To appoint his salary for the present six months, beginning Martinmas 1873, and hereafter, to be at the same rate and on the same conditions as those fixed by the heritors and minister in the aforesaid minute of 30th January 1862, with the exception of the words ‘school board of this parish’ shall be substituted for the ‘heritors and minister.’

“(3.) To give to the teacher, in addition to the above salary, the fees actually collected and accounted for to the treasurer, it being understood that if it shall be proved that the teacher is prejudiced as to his emoluments by the lowering of the school fees, the School Board are willing to make up the deficiency if necessary.

“(4.) That the treasurer shall assist the teacher to collect the fees due up to the present time, but that hereafter the teacher shall collect them himself, and account for them to the treasurer, in accordance with the opinion of the Board of Education.

“(5.) That a copy of the above be sent to the teacher.”

On 3rd June they passed the following resolution:—

“Board met. All the members present. Mr Maxwell in the chair.

“*Inter alia*—The Board resolve that the alteration in Mr Macfarlane's salary, by minute of meeting dated 7th February 1874, to £50 per annum, and the school fees, take effect from the 15th May 1874, and authorise the clerk to pay the balance due to that date, according to the old arrangement.”

The defenders paid the pursuer £25 on 20th May 1874, and on 4th June sent him a cheque for £37, which he returned, as it had become apparent parties were at issue as to the salary.

Pursuer now claimed £100, being balance of his salary unpaid, with interest.

The pleas for the pursuer were:—(1.) Under the agreement mentioned in Article 2 of the Condescence, the defenders are bound to pay to the pursuer, as teacher of the public school of Mochrum a fixed salary at the rate of £125 per annum. (2.) In the circumstances, the pursuer is entitled to decree as concluded for, with interest and expenses.

The defenders' pleas were:—(1.) The pursuer's averments are irrelevant and insufficient. (2.) The arrangement of 15th December 1873 was terminable by the defenders—1. At their pleasure. 2. On the pursuer's failure to supply information necessary for the defenders collecting the school fees. 3. On reasonable cause, and for the better management of the school funds. 4. In any event, on the lapse of one year from Whitsunday 1873. (3.) The defenders having been ready and willing, and having offered before this action was raised, to pay the balance of £37, 10s., due at Whitsunday 1874, and the sum of £25 due at Martinmas 1874, this action was unnecessary; and the defenders, upon payment as aforesaid, are entitled to absolvitor, with expenses.

It was contended for the pursuer that defenders were found by their contract of 15th December to pay him a fixed salary at the rate of £125 a year.

The defenders contended that, under section 53 of the Education (Scotland) Act, they had absolute discretion as to the manner of paying the teacher's salary, and that so long as they did not prejudice the pursuer they could alter their mode of payment at pleasure or on reasonable cause; at all events, that the contract of 15th December was terminable on the lapse of one year from Whitsunday 1873.

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

“28th January 1875.—The Lord Ordinary having heard counsel for the parties, and considered the record and process, repels the defences, and decerns against the defenders in terms of the conclusions of the summons: finds the defenders liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and report.”

The defenders reclaimed.

At advising—

LORD JUSTICE-CLERK—This is a most unfortunate dispute about very little. I am clear the pursuer is right in his contention. It appears that the School Board of Mochrum during 1873 considered the emoluments to be given to the schoolmaster. An arrangement was proposed in November to give the pursuer £110 a year, the treasurer to collect the fees. Ultimately, on 15th December 1873, at a meeting where the pursuer was present, his salary was fixed at £125 per annum, which he accepted by letter. It is contended for the defenders that this meant the salary for the past year.

I am clear that what was meant was salary for the future and for the next year at least. Then there was a dispute about the collection of fees, and on the 3d of June the Board resolved to revert to the old arrangement previous to the passing of the Education Act, from May 1874. I am clear they had no right to innovate in such a manner on the agreement of 15th December. The schoolmaster offered the defenders a sight of the registry, but refused to make a list for the defenders.

LORD NEAVES—I concur. I am clearly of opinion that the agreement of 15th December was to subsist for at least a twelvemonth.

LORD ORMDALE—I concur. The contract is quite explicit. The words are, “fix his salary at £125 per annum,” and is not at the rate of so much, which might imply some doubt as to the endurance of the contract. It is said the contract was to commence at Whitsunday 1873. That is not stated in the contract, and is not to be assumed, looking at the date of the contract. Then there was a quarrel about the collection of fees, and the meetings in February and June already referred to. I am clear it was *ultra vires* of the Board to alter the agreement of December as they attempted to do.

LORD GIFFORD—I concur. I view this contract as one for stipend or salary, and surely it must last or a year at least. The Board agree to give so much per annum. The Board endeavour to terminate their arrangement in two months, as from Martinmas preceding, and in June they try to terminate it as from the 15th of May 1874. There

was no breach of contract. It is said there was an implied bargain that the pursuer was to do what was asked in this matter. I am not sure if the Board, even in case of such a breach, have power to retain salary, but I am clear that here there is no relevant ground for breach of contract and no failure, seeing that the schoolmaster offered to hand the register to the Board.

Counsel for Pursuer—Dean of Faculty (Clark) and Jameson. Agent—G. Cotton, S.S.C.

Counsel for Defenders—Solicitor-General (Watson) and R. V. Campbell. Agents—Maitland & Lyon, W.S.

Friday, May 28.

## SECOND DIVISION.

[Sheriff of Stirling and Dumbarton.

GOW'S TRUSTEES v. MEALLS.

*Servitude by Implied Grant—Access—Intention.*

Circumstances in which held that a right of access over a neighbouring property was not implied in a grant, as the access claimed was not necessary for the enjoyment of the subject claiming it.

This was a petition by the proprietors of a village subject against the owner of a contiguous subject, craving an order for removal of obstruction in a passage over the respondent's ground, and for interdict against the respondent interfering with the free use of the said passage by petitioners. The defence was that any use the petitioners or their predecessors or tenants might have had had not continued for forty years, was not founded on any written title, had been granted only during pleasure, and could not constitute a servitude or entitle the petitioners to a possessory judgment.

It appeared that the two conterminous subjects had separate histories. The subject belonging to the pursuers was acquired by one Andrew Adam in 1806 as the original vassal under a feu-contract. The subject belonging to the respondent was feued out in 1801 to one Thomson. In the same year Thomson sold these subjects to one Fleming, and in the year 1814 Fleming disposed the same to Andrew Adam, who then became proprietor of both the subjects. Adam continued proprietor of both subjects until his death in 1841. In 1842 William Forsyth, a creditor of Adam under a bond over the pursuers' subject alone, sold them, and these subjects came by progress in 1863 to be the property of John Gow, whose trustees were the pursuers. The other subjects were disposed by Adam by a *mortis causa* deed to his wife in life and two of his children *nominatim* in fee, and they sold the subjects to the respondent in 1873. The pursuers claimed a right of access to the back portion of their premises by a close or passage on the respondent's property. There was at one time two accesses to the back court—an arched pend which was built up in 1863, and the open passage on the respondent's property.

The Sheriff-Substitute (SCONCE) pronounced the following interlocutor:—

“Stirling, 19th May 1874.—Having considered the record closed on minute of defence, proofs, productions, and whole cause, and having inspected the premises, and heard parties' procurators, and advised the cause,—Finds (1) that the parties