

like that of the time over which the contributions ought to extend, ought to be determined according to circumstances. So far as the present case is concerned, I see no reason for differing from the views expressed by the Lord Ordinary on the subject.

The only other question requiring notice is whether the sum to be paid by the burgh in place of what it has been previously in the custom of contributing is now, once and for all, to be fixed at a certain specific sum, or is in the future to fluctuate according as the previous contributions may be held to have fluctuated in the past. This question does not appear to have been raised before the Lord Ordinary, whose views regarding it have accordingly not been given. But, for my own part, I can entertain no doubt that according to the true meaning of the statutory enactment there ought to be a precise sum fixed upon once for all. This appears to me to have been what was intended, having regard to the words of the enactment, which are expressly to the effect that in place of the customary contributions a sum shall be paid at the term of Martinmas yearly. It would be unfortunate, I think, as leading to endless disputes and controversy, were it otherwise. Accordingly the principle of a fixed sum seems to have been adopted by the Court in the *Dunbar* case, 3 *Rettie* 631.

In that case also it was held that sums paid for repairs on the school-house, as well as towards the schoolmaster's remuneration, were contributions to the school in the sense of the Act. As to those matters therefore, notwithstanding what was said at the debate on behalf of the burgh in the present case, I can entertain no reasonable doubt.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Asher—Mackintosh. Agent—John Galletly, S.S.C.

Counsel for Defenders (Reclaimers)—Scott—Crawford. Agents—J. L. Hill & Co., W.S.

* *Wednesday, October 23.*

SECOND DIVISION.

SPECIAL CASE—SCHOOL BOARD OF DUNFERMLINE *v.* MAGISTRATES AND TOWN COUNCIL OF DUNFERMLINE.

School—Education (Scotland) Act 1872, sec. 46—Burgh—Customary Contribution.

Prior to 1835 a burgh had been in the custom of contributing to the burgh school (besides the interest of small mortifications in their hands amounting to £19, 3s. 4d.) a variable sum for the usher's salary, and £9, 0s. 10d. to the rector. It also provided a house for the rector worth £25 a year. From 1835 to 1860 the burgh was under trust, and some of these payments were interrupted, the rector accepting a composition in lieu of his former allowances. In 1869 the burgh passed a resolution agreeing to pay £100 per annum in aid of the school so long as it

* Decided October 19, 1878.

“continues to be conducted to the satisfaction of the council.” This was paid till the passing of the Education Act 1872. *Held* that in the circumstances the burgh was bound to pay in perpetuity each year the sum of £100 in aid of the school (which was held to include the interest on mortifications), and a further sum per annum being the average expenditure for maintaining the buildings for ten years prior to the passing of the Act.

This was a Special Case presented by the School Board and the Magistrates and Town Council of the burgh of Dunfermline in regard to the amount to be paid by the burgh to the School Board in terms of section 46 of the Education Act. For the terms of that section and the construction put upon it by the Court reference is made to the case immediately preceding this (*School Board of Perth v. The Magistrates, ante, p. 22*). The special facts presented for the judgment of the Court in this case are sufficiently stated in the opinion of Lord Gifford (*infra*).

The burgh had been under trust from 1835 to 1860, but in consequence of mineral estate having developed, the revenue of the common good had increased from £3900 in 1869 to £8000 in 1878.

The Town Council argued that they were not bound to continue payment of the sum of £100, which in 1869 they had resolved to pay permanently on condition of their being satisfied with the conduct of the school. They were further not liable for the annual amount of repairs, this sum not being applicable to higher instruction. They could not now satisfy themselves as to the management of the school, which had been vested in the School Board; and the School Board had altered the school from a primary to a higher class public school, in which only one class of the inhabitants was interested. Payment since 1869 did not constitute custom in the sense of the section.

At advising—

LORD GIFFORD—This case depends upon the application of the same section—the 46th of the Education (Scotland) Act 1872—as that in question in the preceding case just decided relative to the School Board of Perth.

The circumstances, however, are different, and in the present case—that of the royal burgh of Dunfermline—they are somewhat peculiar, the peculiarity principally arising from the fact that from 1835 to 1860 the affairs of the burgh were embarrassed and under trust, and that it is comparatively of recent date that the burgh funds or common good, chiefly by the development of the minerals, have become exceedingly prosperous.

I assume the law and the true reading of the statute to be that followed in the case of *Perth*, just now decided (*see p. 22*), and in that of *Dunbar* (3 *Rettie* 631, 13 *Scot. Law Rep.* 391), and other previous cases. Under the Education Act of 1872 therefore the Magistrates and Town Council of Dunfermline are bound to pay to the School Board of Dunfermline “such sum as it has been the custom of” Dunfermline prior to 1872 “to contribute to the burgh school out of the common good of the burgh, or from other funds under their charge,” and the question is rather one of fact than of law, namely—What was prior to 1872 the annual customary contribution of the burgh

of Dunfermline to or for behoof of its burgh school?

It is admitted that from time immemorial the Magistrates and Town Council of Dunfermline have contributed towards the support of the burgh school and its teachers. Prior to 1833 the customary contributions appear to have been—First, The providing and maintenance of the school buildings, including the rebuilding of the schools when required, and all repairs and annual charges; Second, the provision of a free house for the rector and the maintenance thereof; Third, the payment of an annual sum of £8, 6s. 8d. sterling to each of the rector and the teacher of music, being the interest, apparently at 10 per cent. of the sum of £2000 mortified by Queen Anne in 1610; Fourth, an extra annual payment to the rector of £3, 0s. 10d. sterling out of the common good of the burgh; and Fifth, Prior to 1835 the Council made an annual donation towards the salary of an usher out of the common good in addition to the annual interest of 1000 merks Scots mortified in the hands of the Town Council by the Kirk-Session of Dunfermline.

In 1835 the affairs of the burgh became embarrassed and were placed under trust, and this trust subsisted till the year 1860, when the Magistrates and Council were reinstated in the burgh property. During the subsistence of this trust the payments by the Town Council for behoof of the burgh school were necessarily interrupted, at least to some extent. The school buildings and the rector's house, however, seem to have been maintained as before, and the rector for the time accepted a composition in lieu of his former allowances.

In 1860 the trust for the creditors of the burgh was brought to an end and the Magistrates and Council were reinvested, and since that date, chiefly from the workings of minerals in the property, the burgh revenue has very greatly increased. It now exceeds the sum of £8000 per annum.

In 1869 the rectorship became vacant, and the Town Council on 26th July 1869, adopting the recommendations of a school committee which they had appointed, passed a series of resolutions regulating the constitution of the school and fixing the payments which were to be made for behoof of the school from the burgh funds. These resolutions are embodied in the Special Case. Their substance, in so far as payments from the burgh funds are concerned, seems to be the following:—

First—The separate house for the rector is abolished, and the whole buildings, including the rector's house, are to be made available for teaching purposes and put into proper order and repair.

Second—That an annual grant of £100 be given from the corporation funds, but "this grant, although intended to be a permanent endowment so long as the school continues to be conducted to the satisfaction of the Council, may be withdrawn at any time if that condition is not fulfilled." This grant of £100 per annum is afterwards allocated—£70 to the rector, and £30 to the English master.

Third—That the rector shall also receive £8, 6s. 8d. per annum, being the interest of Queen Anne's mortification.

Fourth—The Town Council also guaranteed

that the emoluments of the rector and English master should reach a certain minimum, but, as this was only for the first year after their appointment, it does not materially affect the points now in dispute.

The question really is—Are the resolutions of the Magistrates and Town Council on 26th July 1869 to be taken as the measure of the customary payments now to be made by the Town Council to the School Board in terms of the Education Act, or in estimating the customary payment must the resolutions of 26th July 1869 be laid out of view and regard be had solely to the state of matters existing prior to the town's embarrassment in 1835, and thereafter on its reinvestment in 1860.

Now, the words of the statute are that the constant sum to be paid to the School Board shall be the sum which it has been the custom of the burgh to pay for the burgh school prior to 1872, the date of the passing of the Education Act, and it could scarcely be maintained that what followed upon the resolutions of 1869, which only subsisted at most for three years, would constitute in law a permanent custom. The resolutions themselves, although of course binding in a question with any teachers who may have been appointed under them, might have been reconsidered and altered at any time by the Town Council itself. In short, as the measure of the School Board's right under the Education Act is custom and nothing else, I should have great difficulty in holding that the resolutions of 1869, which were entirely pendent upon the will of the Town Council, and which only subsisted for three years, constituted *per se* a "custom" in the sense of the Education Act.

It does not follow, however, that the resolutions of the Town Council of 1869 are to be entirely disregarded and laid out of view. They do not of themselves, followed by only three years' usage, constitute a "custom," but they may be, and I think they are, very important as expressing or exhibiting the interpretation given by the Town Council itself of what they held themselves bound to do for behoof of the burgh school; and if there is no unreasonable disproportion in substance and effect between the resolutions of 26th July 1869 and the previous custom of the burgh, going back necessarily before its embarrassment in 1835, and, in such case, having regard to the whole circumstances, I should be disposed to attach very great weight to the resolutions of 1869, and I would not lightly disturb what the Town Council then after the fullest consideration and deliberation resolved to do.

Taking the case as to amounts roughly and generally, the sums paid prior to the town's embarrassment in 1835 seem to have been the following:—

Rector's dwelling-house, say,	£25	0	0
Two sums of £8, 6s. 8d. for rector and music teacher,	16	13	4
Additional annual payment,	9	0	10
Maintenance and renewal of school buildings, say,	30	0	"
Contribution towards Usher's salary, including interest of 1000 merks, say,	10	0	0

£90 14 2

While by the resolutions of 1869 the Council agreed to pay—

(1) Annual grant,	£100 0 0
(2) Interest on Queen Anne's mortification,	8 6 8
(3) Maintenance of school buildings, say as before,	30 0 0
	£138 6 8

Now, although the resolutions of 1869 seem to commit the town to a considerably larger annual sum than was paid prior to the town's embarrassment in 1835, still, keeping in view the whole circumstances, the suspension of the town's management from 1835 to 1860, and the present condition of the town's affairs, I do not think that the resolutions of 1869 were an unreasonable reading of the town's customary obligation in reference to the burgh schools, and I think that the Town Council themselves then fairly measured and fixed what the customary obligation was. They dealt liberally with the burgh school, but they were quite entitled if not really bound to do so.

I am therefore of opinion that the sum now to be paid from the common good of the burgh of Dumfermline to the School Board in terms of the 46th section of the Education Act ought to be in conformity with the resolutions of the Town Council of 20th July 1869, and I propose to answer the special questions put accordingly as follows:—

Answer 1st—I think the Magistrates and Town Council are bound to pay to the School Board as from Martinmas 1875, and in perpetuity at the term of Martinmas yearly, the sum of £100, and also the sum of £8, 6s. 8d., being the interest on Queen Anne's mortification, and that from the corporation funds or common good of the burgh.

Answer 2d—I think the Magistrates and Town Council are also bound to pay to the said School Board as from Martinmas 1872, and in perpetuity at Martinmas yearly, the sum of £22, 10s. stg., as arranged by the parties as the average expenditure for maintaining the school buildings.

Answer 3d—But I think the Magistrates and Town Council are not bound to pay the School Board any farther sum, and in particular are not bound to pay any interest on the mortification of 1000 merks, that interest being held to be included in the sum of £100 stg. mentioned in the first answer.

LORD ORMDALE and the LORD JUSTICE-CLERK concurred.

Counsel for School Board—Vary Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Town Council—Moncreiff. Agents—Morton, Neilson, & Smart, W.S.

Friday, October 25.

FIRST DIVISION.

ABERDEEN COMMERCIAL COMPANY AND
ABERDEEN LIME COMPANY v. GREAT
NORTH OF SCOTLAND RAILWAY COM-
PANY.

*Railway—Jurisdiction—Railway Commissioners—
Railway and Canal Traffic Regulation Act 1854
(17 and 18 Vict. c. 31), sec. 2—Unreasonable Pre-
judice—Regulation of Railways Act 1873, sec. 26.*

Held that under the 26th section of the Regulation of Railways Act 1873 (36 and 37 Vict. c. 48) the Railway Commissioners have jurisdiction to determine that a railway company by making illegal or excessive charges for the conveyance of traffic infringes the provisions of the 2d section of the Railway and Canal Traffic Regulation Act 1854 (17 and 18 Vict. c. 31).

Railway—Tolls—Carrier—Railways Clauses Act 1845 (8 and 9 Vict. c. 33), sec. 79.

Held that a railway company which had power to charge certain limited rates as carriers of goods, and certain other and higher rates for the use of their line (*i.e.*, where parties carried their own goods either by means of their own waggons and locomotives or by hiring those belonging to the company) could not require a particular class of traders to pay the higher rates by declining to act as carriers of their traffic, and by forcing them to hire waggons and locomotives and thus to "carry" their own goods, but that the railway company in carrying these goods in ordinary goods trains under the care of their own servants were still acting as carriers, and entitled to charge no more than the limited rates.

The Aberdeen Commercial Company and the Aberdeen Lime Company traded in lime, coal, grain, manure, chemical and other merchandise chiefly connected with agriculture. Their manure traffic was conveyed from Aberdeen to its various destinations chiefly by means of the railways of the Great North of Scotland Railway Company. This traffic had up to February 1878 been conveyed in the ordinary way by the Railway Company as carriers, and charged for according to the provisions of the 55th section of the Great North of Scotland Railway Consolidation Act 1859, which was as follows:—"It shall not be lawful for the Company to charge in respect of the several articles, matters, and things, and of the several descriptions of animals hereinafter mentioned, conveyed on the railway or any part thereof, any greater sum, including the charges for use of carriages, waggons, or trucks, and for locomotive power, and all other charges incidental to such conveyance, than the several sums hereinafter mentioned—that is to say, for dung, compost, and all sorts of manure, lime, and limestone, and undressed materials for the repair of public roads or highways, twopence per ton per mile."

On 4th February 1878 the Company issued to these traders, among others, a notice in the fol-