COURT OF SESSION.

Saturday, February 9.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DOAK *v.* SCHOOL BOARD OF NEILSTON.

School—Education Act 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 55—*Emoluments of Schoolmaster—Resolution of School Board to Lower Scale of Fees.*

The Education Act 1872 provides (sec. 55) that teachers appointed prior to its coming into operation shall not, with respect to emoluments, "as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions" therein contained.

After the passing of the Act the school board of a parish in which the schoolmaster had been appointed prior to the Act, and had received the school fees, lowered the scale of fees payable by children attending the school. The attendance at the school and the gross amount of fees having increased, the schoolmaster raised an action against the school board to have it declared that he was entitled to have his remuneration fixed on the same footing as if all the children attending the school were paying fees at the rate fixed before the Act passed. The Court *assoilzied* the defenders, being of opinion that the schoolmaster had not been "prejudiced" in his emoluments in the sense of the statute by their action.

The Education Act 1872 provides (section 55)—"Subject to the provisions hereinafter contained regarding the removal of the teachers of public schools appointed previously to the passing of this Act, such teachers shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the school board having the management of such schools respectively."

Duncan Martin Doak was appointed to the office of schoolmaster of the parish of Neilston by the heritors and minister on 7th May 1869. At the date of the passing of the Education (Scotland) Act 1872 his emoluments consisted of a salary of £70 per annum, an annual Government grant of £30, and the school fees levied according to a scale or rate defined by the heritors, and agreed to by him. The School Board of the parish on the 2d of February 1880 resolved that the scale of fees then in use be abolished as at the term of Whitsunday 1880 and a new scale adopted. The scale of fees so fixed was lower than the scale in existence at the passing of the Act, and it was also resolved that all the children under six years of age be taught free. Mr Doak did not consent to the reduction and abolition of fees, and at the end of the financial year ending May 1882, as no arrangement of the matter had been made, he made out a statement of his claims for emoluments applicable to that year. These claims were (1) for the sum of £70 for salary, (2) £30 as Government grant, and (3) school fees £235, 11s. 4d. calculated at the rates fixed by the heritors, the whole claim amounting *in cumulo* to £335, 11s. 4d. sterling. The School Board paid him £277, 4s. 11d, leaving £58, 6s. 5d., made up of £30 of Government grant, to which as a permanent grant the defenders did not admit his right, and £28, 6s. 5d., the difference between the fees for the year calculated on the new scale, and the sum to which they would have amounted if calculated on the old.

Mr Doak then raised this action against the Board to have it declared that he was "entitled to demand and receive from the defenders and their successors, during his tenure of the office of teacher of the public (formerly parochial) school of the parish of Neilston—(1) A salary of £70 sterling per annum; (2) the value of a Government certificate, held at the date of the passing of the Education (Scotland) Act 1874, and still held by him; and (3) the whole fees paid or payable in respect of persons taught in the said school, as the same were enjoyed by him at the date of the passing of the said Act." There were also petitory conclusions for "(1) The sum of £30 sterling; and (2) the sum of £28, 6s. 5d. sterling, with interest on said respective sums at the rate of five per centum per annum from the 25th day of May 1882 until payment."

He averred that his income for the years 1871-72-73 was £248, 15s. in the first of these years, £261, 7s. 5d. in the second, and £271, 19s. 8d. in the third, and further, that the increase which had recently taken place in the attendance at the school was due to his energy and skill as a teacher.

The defenders stated that the increase in the attendance at the school was due to the reduction of fees, which they were entitled by the statute to make, and that the changes they had made were for the good of education in the parish, and had had the effect of increasing the gross fees as compared with the amount received in preceding years. They stated that they "have all along been willing to settle the pursuer's emoluments for the said year (1881-2) on the footing of paying him a slump sum equivalent to the amount of the emoluments enjoyed by him as at the passing of the said Act, with a reasonable addition thereto in respect of such prospective increase as the parties might fairly have contemplated when the Board came into operation." They tendered £305 (being the school fees actually earned for the year, with £100 in lieu of salary and Government grant), under deduction of £277 already paid, as in full, along with the house and garden, of his emolument for 1881-82.

The pursuer pleaded—"(1) The pursuer having been teacher of the parish school of Neilston at and prior to the passing of The Education (Scotland) Act 1872, is entitled to decree in terms of the declaratory conclusions of the summons. (2) The actings of the Board in abolishing fees, at least so far as to interfere with the emoluments of the pursuer, are illegal and *ultra vires*. (3) The defenders being justly due and indebted to the pursuer in the sums sued for under the petitory conclusions, the latter is entitled to decree therefor."

The defenders pleaded—"(1) The pursuer's statements are irrelevant and insufficient to sus-

tain the conclusions of the summons. (2) The action cannot be maintained, in respect that the actings of the defenders complained of are within their statutory powers. (3) The pursuer not having been prejudiced in respect to his emoluments by the actings of the defenders, the action should be dismissed."

The Lord Ordinary (KINNEAR) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—The pursuer complains of a resolution of the School Board by which they fixed the scale of fees at a lower rate than he had obtained before the passing of the Act of 1872, and, further, resolved that children 'below six years of age should be taught free.'

"The pursuer concedes that the Board had power to lower the scale of fees, but subject, as he maintains, to his right of compensation for diminished emoluments. It is said to be questionable whether they had power to give gratuitous education to any class of children. But that question is not raised for decision, since the pursuer does not challenge the resolution of the Board as being in itself illegal, but complains of it merely in so far as it may diminish his emoluments.

"The defenders, on the other hand, concede that the pursuer is entitled, under the 55th section of the Act of 1872, to the emoluments which he enjoyed at the passing of the Act, or to a remuneration equivalent to these emoluments.

"The pursuer's emoluments at the passing of the Act consisted of a salary of £70 per annum, an annual grant of £30, and the school fees; and it was admitted at the bar that all of these sources of emolument had been taken into account by the defenders in fixing the remuneration which they have tendered for the year 1881-82,—the sum of £305 tendered consisting of the school fees actually earned during that year, with the addition of £100 in lieu of the salary and Government grant previously enjoyed by the pursuer. But the pursuer's averment is that his income for the years 1871-72-73 was considerably less than the £305 tendered, having been £248, 15s. in the first of these years, £261, 7s. 5d. in the second, and £271, 19s. 8d. in the third. The result, therefore, of the alterations of which he complains has not been to diminish his emoluments, but to increase them. He maintains, however, that he is entitled to have his remuneration fixed on the same footing as if all the children presently attending the school were paying the fees at the rate fixed before the passing of the Act; and this is said to follow from the decision in *Fraser* v. *The School Board of Carluke*, 4 R. 892, where it was held that the value of a schoolmaster's office could not be fairly estimated without taking its prospects as well as its actual revenue into account. But the pursuer had no such secured prospect of earning fees at the old rate from so large a number of pupils as now attend the school, as to enable him to estimate the value of his emoluments upon that basis. It cannot be assumed that the increased attendance is in no degree attributable to the diminished scale of fees, although it is probable that other causes, and among others the pursuer's skill and energy, may have contributed to the result. Nor can it be assumed that the minister and heritors would have made no alteration in the scale if the attendance had increased under their administration to the same extent as under the administration of the School Board. They had power to lower the fees in the same manner and for the same reasons as the School Board, and it cannot be assumed that they would not have done so if they had found that it could be done without unduly diminishing the pursuer's income. The result is, that the action of the School Board has in no way diminished the pursuer's income, and therefore that he has no claim for compensation. It may be that his emoluments have not been increased in the same proportion as his work; but it is only a diminution of emolument which will entitle him to compensation under the statute.

"Even if a case for compensation had been established, the declaratory conclusions could not have been sustained consistently with the judgment in the case of *Carluke*."

The pursuer reclaimed, and argued—It was recognised in *Fraser* v. *The School Board of Carluke*, June 4, 1877, 4 R. 892, that a schoolmaster was a partner in the general prosperity of his school, and entitled to share as such in any increase of that prosperity. He was entitled to recover fees if there were any at the passing of the Act of 1872—*Buchanan* v. *The School Board of Tulliallan*, June 11, 1875, 2 R. 793; *Somers* v. *The School Board of Teviothead*, October 31, 1879, 7 R. 121. It was the fact that the school had increased in attendance solely through his ability and skill. The 55th section of that Act provided he was to have compensation for any diminution in his emoluments, and such had been caused by the defenders' resolution to lower the scale of fees. He was, then, entitled to be paid as if all the children presently attending the school were paying the fees at the rate fixed before the passing of the Act.

The defenders replied—In all matters of internal administration the School Board was supreme. It could alter the whole *status* of the school, and raise or lower the fees at discretion—*Hunter* v. *The School Board of Kelso*, March 5, 1875, 2 R. 520. It was admitted that the 55th section of the 1872 Act provided that the schoolmaster was not to be prejudiced in his emoluments; but the pursuer admitted that his income had been for the years 1871-72-73 considerably less than the sum which the defenders had offered him, and he had thus suffered no prejudice in his emoluments, and compared with those he enjoyed prior to the passing of the Act. A parochial schoolmaster appointed prior to 1872 was in this respect in no better position than any other, for the minister and heritors might, if they chose, have lowered the fees, and it could not be assumed that they would not have done so if the school had then been in the same flourishing condition that it was now. The improvement in its condition was the natural result of the lowering of the scale of fees.

At advising—

LORD RUTHERFURD CLARK—This is a very important question. I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed, and as I cannot assign any better reasons than those given by him I shall add nothing.

LORD CRAIGHILL and LORD M'LAREN concurred.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court adhered.

Counsel for Reclaimer—J. P. B. Robertson—Wallace. Agents—J. & A. Hastie, S.S.C.

Counsel for Respondents—Mackintosh—Baxter. Agent—F. J. Martin, W.S.

Monday, February 18.

OUTER HOUSE.

[Lord Adam.

MARX *v.* NORTH BRITISH RAILWAY COMPANY.

Process—Reparation—Jury Trial—Amount of Damages—Expenses.

This was an action for damages for personal injury, in which the damages were laid at £5400. No tender was made by the defenders, who admitted liability, but maintained that the sum sued for was excessive. The jury awarded to the pursuer £800 as damages. On a motion by the pursuer to apply the verdict and find him entitled to expenses, the defenders maintained that the expenses should be modified, in respect the pursuer had obtained so small a sum in proportion to that sued for. The Lord Ordinary, on the ground that the jury had given a substantial sum to the pursuer, found him entitled to full expenses.

Counsel for Pursuer—J. P. B. Robertson—Darling. Agents—J. & J. Ross, W.S.

Counsel for Defenders—Sol.-Gen. Asher, Q.C.—Comrie Thomson. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, February 21.

FIRST DIVISION.

HOEY *v.* HOEY.

Process—Proof—Husband and Wife—Divorce—Recall of Witness—Evidence Act 1852 (15 *Vict. cap.* 27), *sec.* 3.

In an action of divorce on the ground of adultery, counsel for the defender at the close of the proof moved the Lord Ordinary, in terms of sec. 3 of The Evidence Act 1852, to be allowed to recal G, a witness for the pursuer, who had deponed that she was eye-witness to one of the alleged acts of adultery, on the ground that information had since her examination been received that she had given to other parties a totally different account of what she alleged she had seen. It was proposed to question G as to these different accounts, with the view of leading evidence of the parties to whom defender alleged these different statements had been made. The Lord Ordinary *refused* the motion, being of opinion, looking to the whole circumstances, that no sufficient reason had been adduced in support of it. The case came before the Inner House on a reclaiming note, when the defender renewed his motion to be allowed further to examine G in the manner and to the effect proposed to the Lord Ordinary. The Court, following *Robertson* v. *Steuart*, February 27, 1874, 1 R. 532, *granted* the motion, and pronounced this interlocutor:—"Having heard counsel on the motion of the defender to be allowed further to examine the witness" G "in the manner and to the effect proposed in the course of leading the defender's proof, allows the said witness to be recalled and examined as proposed, and also allows the defender to examine other witnesses for the purpose of and in the terms of the 3d section of the statute 15 Vict. c. 27," and appointed the evidence to be taken before Lord Shand.

Counsel for Pursuer—Party. Agents—Stewart-Gellatly, & Campbell, S.S.C.

Counsel for Defender—R. Johnstone—Ure. Agents—Ronald & Ritchie, S.S.C.

Thursday, February 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

OAKES *v.* MONKLAND IRON COMPANY.

Master and Servant—Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 8—*Employers and Workmen Act* 1875 (38 *and* 39 *Vict. c.* 90), *secs.* 10 *and* 13—*Merchant Seamen* (*Payment of Wages and Rating*) *Act* 1880 (43 *and* 44 *Vict. c.* 16), *sec.* 11—"*Workman*"—"*Seaman.*"

Held that a fireman on board a barge propelled by steam, which plied exclusively on a canal, was not a "seaman" but a "workman" in the sense of the 10th and 13th sections of the Employers and Workmen Act 1875, and therefore entitled to the benefits of the Employers Liability Act 1880.

Section 10 of the Employers Liability Act provides—"The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act 1875 applies."

Section 10 of the Employers and Workmen Act provides—"In this Act the expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Section 13 provides— . . . "This Act shall not apply to seamen or apprentices to the sea-service."

Section 11 of the Merchant Seamen (Payment of Wages and Rating) Act 1880 provides—"The thirteenth section of the Employers and Workmen Act 1875 shall be repealed in so far as it operates to exclude seamen and apprentices to the sea-service from the said Act; and the said Act shall apply to seamen and apprentices to the sea-service accordingly; but such repeal shall not, in the