

into the dock and was killed. Such being the averments made by the pursuers, I say I am somewhat surprised at the Sheriff-Substitute's observation which I have read, as to the man having been more to blame than anyone else. He was not to blame for the doors not being properly bolted.

I think the case must go to trial.

LORD MONCREIFF — I am of the same opinion. I confess that at first I was inclined to think that a case of contributory negligence is disclosed on this record. The averment of fault on the part of the defenders which the pursuers make in Condescence 7 is sufficient. What I had doubt about was whether the pursuers in their statement of what happened do not disclose a case of contributory negligence against the deceased. But on consideration I have come to the conclusion that this question cannot be satisfactorily disposed of without inquiry.

LORD TRAYNER was absent.

The Court sustained the appeal and recalled the interlocutor appealed against.

Counsel for the Pursuers and Appellants — Salvesen — T. B. Morison. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents — Dewar — A. Moncreiff. Agents — Drummond & Reid, S.S.C.

Wednesday, November 17.

FIRST DIVISION.

GOVERNORS OF GEORGE HERIOT'S TRUST, PETITIONERS.

Educational Trust—Scheme by the Educational Endowment Commissioners—Alteration of Scheme—Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. c. 59), sec. 14.

Proposed alteration of a scheme by the Educational Endowment Commissioners with a view to granting retiring allowances to teachers, *approved*.

Limits within which the Court exercises its jurisdiction under the Educational Endowments (Scotland) Act 1882 *defined per Lord President*.

The Governors of George Heriot's Trust, with the approval of the Scotch Education Department, presented a petition to the Court for alteration of the scheme of administration drawn up by the Commissioners under the Educational Endowments (Scotland) Act 1882, approved of by Her Majesty in Council on 12th August 1885.

The said scheme contained the following clause (95):—"It shall be in the power of the Court of Session to alter the provisions of this scheme upon application made to them, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything

contained in the Educational Endowments (Scotland) Act 1882."

The petitioners craved, *inter alia*, that clause 26 of the said scheme should be deleted, and the following clause substituted therefor:—"The Governors shall have power to grant retiring allowances to any headmaster or assistant teacher or other employees in George Heriot's Hospital School, to any principal, professor, or teacher, or other employees fully and exclusively employed in the Heriot-Watt College, and to any other officials or employees of the Trust, in accordance with a scheme to be approved by the Scotch Education Department."

In support of this alteration they averred—"The petitioners believe and aver that it would be a great advantage to them to possess this power, and that its occasional exercise would conduce to the efficient and economical management of the Trust. The teachers and officers of the Trust hold office at the pleasure of the petitioners (clauses 13, 44, 46). There are cases, however, in which old and faithful servants of the Trust have, on account of age or infirmity, become less efficient in the performance of their duties than in their younger and more vigorous years, and while dismissal in such circumstances would, in the view of the petitioners, be a hardship if not an act of cruelty, they are of opinion that it would be in the interests of the Trust that they should have power, to be exercised under the control of the Scotch Education Department, to pension off tried and faithful servants when circumstances justify it."

Mr James A. Fleming, advocate, to whom the Court remitted to report upon the regularity of the procedure, and upon the proposed alteration of the scheme, reported that the procedure had been in all respects regular, and further reported in the following terms on the alteration in question:—"The petitioners also ask that power should be given to them to grant retiring allowances to any of their employees in accordance with a scheme which is to be approved by the Scotch Education Department. I have some doubt as to whether this addition is within your Lordships' powers, which are limited to alterations not contrary to anything contained in the Educational Endowment (Scotland) Act 1882. The petitioners have power to apply such portion of the funds as they think fit in the maintenance and upkeep of the Hospital School (section 37) and the Heriot-Watt College (section 57), and to determine the salaries of the teaching staff and the mode of payment of these salaries (sections 48 and 68). So far as the proposal affects new appointments, and is for the purpose of getting better officers for the same salary, or as good officers for a lower salary, it would seem to be a very slight extension of the petitioners' existing powers, and one that might reasonably be given in express terms. But when the purpose, as stated in the petition, is to make a voluntary allowance so as to secure the retiral of aged and infirm servants who have presumably all along been paid a

sufficient salary, an objection might be taken to such an application of the Trust funds as inconsistent with the objects of the Trust and with the provisions of the Act. As regards pensions, the Act provides (section 13) that compensation shall be made for the vested interests of any individual holding any pension at the date of the Act, but (section 14) that any such interest acquired after the passing of the Act should be subject to the provisions of the scheme framed under the Act. Section 18, which deals with the tenure of office of officers in the employment of the governing body, gives no power to permit retiring allowances, and there is no case, so far as I have been able to learn, of a scheme framed under the Act containing such a power. Further, the Act provides (section 15) that the Trust funds shall continue to be applied for the educational benefit of the class favoured by the founder. Should, however, your Lordships be of opinion that this addition is not contrary to anything contained in the Act, I would humbly report that I think it would be for the advantage of the Trust, and would tend to its more efficient, and possibly more economical, management were such a power to be granted. At the same time, I would respectfully suggest that the section should be limited so that the pensions should be on no higher scale than those provided for permanent civil servants by the Superannuation Acts 1834 to 1892."

The Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59), sec. 14, enacts—"Every interest, right, privilege, or preference which any person may acquire after the passing of this Act, in or relative to any educational endowment . . . or in or relative to any office, place, employment, pension, compensation allowance, bursary, or emolument in the gift of any such governing body, shall be subject to the provisions of any scheme made under this Act."

The petitioners argued that the proposed alteration was not contrary to anything contained in the Act of 1882, and that the application of the *Governors of Dollar Institution*, November 28, 1890, 18 R. 174, had been refused because the proposal there was, not to institute a general pension scheme, but to make payments to certain named persons.

At advising—

The LORD PRESIDENT delivered the judgment of the Court:—In exercising its jurisdiction under this Act, the Court has not to consider for itself what are the best proposals which might be made for increasing the usefulness of the foundation, but whether the proposals actually made by the governing body, in the petition before it, may be sanctioned with or without modification. The initiative necessarily rests with the governing body, and the Court can only deal with proposals submitted to it with the consent of the Education Department.

Dealing *seriatim* with the points to which attention has been called by the

reporter and the petitioners' counsel, our decision is as follows:—*Proposed rule 26 as to retiring allowances.*—We think this may be approved as it stands.

The scheme can go back to Mr Fleming for adjustment.

The Court approved of rule 26 proposed in the petition as to retiring allowances, as in substitution for rule 26 in the scheme, and remitted to Mr Fleming to adjust the scheme.

Counsel for the Petitioners—Dundas, Q.C.—Cook. Agent—Peter Macnaughton, S.S.C.

Counsel for the Respondents—(The Merchant Company Endowments Board)—R. V. Campbell. Agent—Alexander Heron, S.S.C.

Thursday, November 4.

SECOND DIVISION.

[Sheriff-Substitute of
Inverness, &c.]

GUILD v. M'LEAN.

Lease—Condition—Public House—Power to Terminate in Event of Tenant Endangering Licence.

By sub-tack between the lessee of a public house and his sub-tenant, it was provided that in the event of the sub-tenant misconducting himself or neglecting the business, or in the opinion of the lessee so misconducting himself or neglecting the business as to endanger the licence, the lessee should have power to terminate the sub-lease on giving one month's notice. The lessee gave the sub-tenant notice in terms of the clause above quoted, and as the sub-tenant refused to quit the premises, he brought the present action of removing against him, averring that in his opinion the sub-tenant was neglecting the business so as to endanger the licence. The sub-tenant denied that this was the pursuer's opinion, and averred that the pursuer's real reason for desiring to get rid of him as his tenant was that the pursuer, who was a brewer, had taken offence at the defender getting beer from another brewer.

Held that there was no relevant averment of *mala fides* on the part of the pursuer, that apart from this his opinion was final, and that accordingly the pursuer was entitled to decree of removing.

This was an action brought in the Sheriff Court at Inverness by James Lyon Guild, brewer, Inverness, against Donald M'Lean, innkeeper there.

The pursuer craved warrant to summarily eject and remove the defender from certain premises occupied by him under a sub-tack from the pursuer, and