In the event the Court found it unnecessary to decide that point, as will be seen from the subjoined opinions.

At advising—

Lord Justice-Clerk—I am of opinion that the advance which the factor undertook to make, and did make, was made and accepted under the conditions in the letter of the 2d March, and that letter clearly reserved power to sell even under 42s. after consulting the Glasgow firm. The Glasgow firm by accepting the advance did so on the conditions expressed in that letter. The pursuer did consult the defenders repeatedly before selling; and therefore I think they were entitled to sell as they did. Moreover, it being proved that the advance was on London terms, *i.e.*, two months and a certain amount of discount, it became a debt thereafter, and bore interest from the expiration of that date.

Lord Ormidale—In this case a question might be raised as to whether the law of England or that of Scotland applied, supposing that there be a difference between them. But we are relieved of any difficulty of that nature by the fact that there is no averment on record with regard to that, and accordingly the *lex fori* will apply. Assuming that law to be the law of Scotland, and that it is the law embodied in *Broughton* v. *Stewart*, December 17, 1814, F.C., the English house had an interest in this cargo sufficient to give them control over it.

But I agree with the Lord Justice-Clerk that this case must be taken on its own special lines, and must be decided according to the views which emerge on a careful consideration of the correspondence between the pursuers and defenders. Throughout I have been unable to adopt any other opinion of the case than that it turned upon the nature of this contract. Was the contract or was it not such as to entitle Adams & Company to sell the wheat at the time at which they did so, and in the way in which they did?

I do not think that it by any means follows that a case involving the construction of many written documents, the meaning of which is to be made clear, necessarily is a case for a jury, but here there is no suggestion of any technical matter, and the whole point turns upon the correspondence. It seems to me that a jury would have been the best tribunal to decide upon its import. Now, looking at the correspondence, what did Adams & Company mean by the words "without consulting you?" No doubt the words are ambiguous, but still we must answer the question by making an inference drawn from the facts. The words are very different from "without your authority." Nothing can be fairer in tone and manner than the whole correspondence on the part of Adams & Company. I think that they were only obliged to hold this wheat for a reasonable time, and that they amply fulfilled that obligation.

Lord Gifford—I am of the same opinion, and much upon the same grounds. Very difficult questions of law were raised as to the rights of the consignee to sell, he having made advances to the consigner, but I feel very much relieved, along with your Lordships, that we are saved from having to go into those legal questions.

The action is one by a factor (who has made advances on security of a consignment) for the unpaid balance of his advance. Is this, then, a debt, or is it not? I think that the very meaning of the word "advance" is that it is a loan to be repaid. It is made usually upon double security, for, in the first place, there is the personal security of the debtor, and secondly, there is the additional security of the goods consigned. The next question we have to consider is, When is this advance, being a loan, to be repaid? I think that in the present case the advance was to be repaid out of the price brought by the goods themselves, or else within two months, for "London terms" means sixty days. The realisation would, it was thought, be effected within sixty days, and I am of opinion that after those sixty days had expired there would be good ground of action.

What, then, is the defence? Practically that there is no loan, and no obligation to repay. The defenders here have failed to establish any premature or unwarrantable sale of the wheat; even the words "without your consent" would have only borne the meaning that so long as the transaction was running they would not sell; but those are not the words used, and still less could a meaning such as contended for by the defenders be attached to the words "without consulting you." We find letter after letter from Adams & Company pressing Athya & Company to sell at a slight loss. I concur entirely in your Lordship's views.

The Court dismissed the appeal, with expenses.

Counsel for Pursuers (Respondents)—Balfour—Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders (Appellants)—Trayner—Asher. Agents—Frasers, Stoddart, & Mackenzie, W.S.

---

* *Wednesday, October 23.*

SECOND DIVISION.

[Lord Young, Ordinary.

PERTH SCHOOL BOARD *v.* MAGISTRATES AND TOWN COUNCIL OF PERTH.

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

The 46th section of the Education (Scotland) Act 1872, provided *inter alia*, that the town council of every burgh should pay each year to the School Board whatever sum it had been its "custom" prior to the passing of the Act to contribute to the burgh school out of the common good of the burgh to be administered for the promotion of higher instruction. *Held* that that section of the Act applied to all cases where a contribution had been in use to be made, and not only to those where a sum had been by custom contributed of an invariable amount or for the prescriptive period, and that the sum to be fixed in future was the average annual expenditure taken for a period, say of ten years, immediately preceding 1872.

Observed that the object of the Education (Scotland) Act 1872 was to leave the funds of the burghs neither better nor worse than before, so far as they were applied to educa-

* Decided October 19, 1878.

tional purposes, the only change having reference to their administration.

This was an action brought by the School Board of Perth to have it declared that the Magistrates as representing the burgh of Perth were bound, in terms of section 46 of the Education (Scotland) Act 1872, to continue annually the payments (1) of £225, which prior to the passing of that Act they and their predecessors had been in the custom of contributing out of the common good for behoof of the burgh school; and (2) of about £100, formerly expended by them each year for repairs, insurance, prizes, school apparatus, and furniture.

The 46th section of the Education (Scotland) Act 1872 was as follows:—"When in any parish or burgh property or money has been or shall be vested in the heritors or kirk-session, or in any person or persons as trustees for behoof of such parish school, or in the town council or in the magistrates of any burgh, or in any person or persons as trustees for behoof of the burgh school, or for the promotion of any branch of education in such schools respectively, or to increase the income of any teacher thereof, the income or revenue of such property or money shall as it accrues be accounted for and paid to the school board of such parish or burgh, and shall be applied and administered by the said board according to the trusts attaching thereto; and the town council of every burgh shall at the term of Martinmas yearly pay to the school board thereof such sum as it has been the custom of such burgh prior to the passing of this Act to contribute to the burgh school out of the common good of the burgh or from other funds under their charge, and the same shall be applied and administered by the said school board for the purpose of promoting higher instruction; and it shall be lawful for the school board from time to time, with the sanction of the Board of Education, to vary or depart from the said trusts with a view to increase the efficiency of the parish or burgh school by raising the standard of education therein or otherwise; provided always that nothing herein contained shall prejudice or interfere with the rights of any teacher or retired teacher of a parish or burgh school under any contract subsisting at the passing of the Act."

The school in question originally comprised two separate institutions, the one called "the Grammar School," and the other "an Academy for Literature and the Sciences." Both were under the patronage and management of the Town Council, and were united in 1806. It was stated that the amount contributed yearly to them out of the burgh funds prior to 1872, and in particular from 1856, was £225, and that £100 was an average payment on the second branch claimed in the summons.

The defenders averred that by the Perth Burgh and Harbour Act 1856 the revenues of the burgh were appropriated to the liquidation of certain bonds of annuity, some of which still existed; that since this Act they had merely continued payment to teachers appointed for life before the Act, discontinuing them whenever a vacancy occurred; and that the £100, consisting of payments to tradesmen and for taxes in connection with the school buildings, was not a contribution within the meaning of section 46 to be applied for promoting higher instruction. Assuming, however, that such payments must enter into the calculation of the customary amount, they objected to the items of £42 paid in 1866 for wright work, a sum of £72 paid in 1869 for painter work, and two sums of £18 each paid in 1870-71 for private improvement rate expended in the construction of a permanent pavement and roadway. That expenditure was set forth in a statement produced in process.

The defenders pleaded, *inter alia*—"(2) It not having been the custom of the burgh of Perth to contribute to the said school in the sense of the Education Act the sums now alleged and demanded, the action cannot be maintained. (3) The defenders are only liable to make good the claims of the present teachers in respect of the terms of their appointments. (4) The payments comprehended in the claim of £100 per annum were not sums contributed to the burgh school prior to the passing of the Act, and falling to be applied and administered for the purpose of promoting higher education."

The Lord Ordinary (YOUNG) pronounced an interlocutor finding and declaring "that it was the custom of the burgh of Perth prior to the passing of the Education (Scotland) Act 1872 to contribute to the burgh school out of the common good of the burgh the sum of two hundred and eighty-six pounds annually, and that the Town Council of the said burgh have been since the passing of said Act, and now are, bound at the term of Martinmas yearly to pay to the School Board thereof the sum of two hundred and eighty-six pounds, to be applied and administered by the said Board according to the provisions of said Act," and so far repelling the defences and decerning.

He added this note—"It is, I think, established by the defenders' admissions and statements that it was the custom of the burgh of Perth to contribute to the burgh school out of the common good of the burgh in the sense of section 46 of the Education Act 1872. No plea is founded on the Perth Burgh and Harbour Act referred to in the defenders' answer to condescendence 2, nor was any argument addressed to me upon it. I have on this subject therefore only to say that I concur in what seems to be the view of both parties, viz., that the Act in question has no bearing on the case, in respect that prior to the Education Act (as indeed since) the customary contribution out of the common good of a burgh to the support of a burgh school is a debt or obligation for which the burgh is responsible by law.

"With respect to the amount of the burgh's annual contribution, the parties are agreed that for teachers' salaries (exclusive of other charges) it may be taken to be £225. It is superfluous to say that the rights of existing teachers to this money under current contracts are reserved by the Education Act, and undisturbed by the judgment which I pronounce. The defenders' third plea, to the effect that their liability is confined to the teachers with whom they contracted, is I think clearly untenable. The contributions for maintaining the school buildings and the furniture therein are the subject of the defenders' fourth plea, and I think it also is untenable.

"Had section 46 of the Education Act only applied to burghs in which an invariable sum was customarily contributed annually to the burgh school, its application would probably have been very limited, if, indeed, it would have been

operative at all, for the common, if not universal, case was that the contributions were to a considerable extent variable according to the requirements of the school within the ability of the common good, without departure from the custom of the burgh in that matter to meet them. The administrators of the common good were also the managers of the school, by whom the expenditure on it was incurred and defrayed from time to time according to necessarily varying circumstances. It would have been manifestly inconvenient, and was so far as I know not according to the custom of any burgh, any more than of Perth, to make an invariable annual payment from the common good, whether required or not, and so to establish a school fund, accumulating in some periods and exhausted in others. The intention of the Education Act was to continue the charge or burden on the common good at its previous amount, and this may be satisfactorily effected notwithstanding of such periodical fluctuations as arose from varieties in the charges under such heads as those embraced in the statement produced. That statement (prepared by the pursuers) was, with the exception to be immediately noticed, agreed to by the defenders on a provisional assumption of the opinion which I have now expressed, and fairly enough, I think, arranges the matter on an average of ten years. The exception regards a charge applicable to the last two years for a private improvement rate, and my opinion is that it ought not to be taken into account.

"I have expressed my views in more detail than was perhaps necessary, looking to the disposition which the defenders manifested at the debate. The record is prepared so as formally to submit critical and subtle views (as I regard them) in defence; but at the debate the defenders seemed rather to desire a judgment on them for their guidance and justification as trustees than to press them to the effect of obtaining from the common good of the burgh a larger sum for other purposes at the cost of a precisely corresponding sacrifice of the cause of higher education within the burgh. They are not in truth—and this they appeared to realise—contending with an enemy, but with the proper legal guardian of the higher education of the burgh, which is otherwise under their own guardianship. When they were the guardians of education also, the annual cost to the common good of the school in which it was given was so and so. The pursuers ask judgment to the effect that this charge to the common good shall be continued as it stood before the Act which transferred the management to them, so that the cause of education shall not suffer the prejudice of a diminution. I think this is according to the statute. There is here no question about rates, for prior to the Act of 1872 there were no education rates within the burgh, and rates authorised and levied for another purpose could not be used for that. The common good of a burgh consists of the burgh property (including customs and market dues), exclusive of assessments, which are all statutory and appropriated. Education was one of the purposes for which this property was bestowed, and the Act of 1872 (which changed the management only) aimed at leaving the burden on the common good as it stood, and was in fact borne prior to the Act. Whether or not this aim is accomplished in a case of the commonest kind of its class is the only question of general interest in the present case."

The defenders reclaimed, and argued, in addition to their former pleas, that the "custom" referred to in the statute meant a custom legally binding—one which had endured at least forty years.

At advising—

Lord Gifford—This is one of the cases, of which several have recently occurred, between School Boards in burghs and the Town Council or Magistrates of such burghs, under the 46th section of the Education (Scotland) Act 1872.

Prior to the passing of the Education Act of 1872 it was the custom and usage in many of the burghs—probably in most or in all burghs which were possessed of burgh property or common good—to apply part of the annual revenue from such property or common good toward the support of the burgh school, of which school prior to 1872 the Magistrates and Council were the administrators and managers.

By the Education Act the administration and management of burgh schools was vested, instead of in the Magistrates and Council as formerly, in the School Board of such burgh, to be elected in terms of the statute. But this change in the management or mode of administration of the school was not intended to make any difference whatever upon the school funds or on the property or revenues formerly applicable in or towards the maintenance of the schools. All these funds or revenues were to be received and administered by the School Board in exactly the same way as they had been formerly received and administered for behoof of the school by the Magistrates and Town Council. In short, while the administrators were changed, the funds to be administered were to remain precisely as before, and this in addition to the powers of assessment contained in the Act.

To carry out this purpose the 46th section of the statute was enacted. This section has two branches. By the first branch provision is made for the case of property or money being vested in trust either in the heritors or kirk-session, or in the Town Council or Magistrates, or in any person or persons for behoof of the school, or any branch of education therein, or to increase the income of any teacher thereof, and in such cases the statute provides that the income or revenue of such property or money shall be paid to the School Board, and shall be applied by them according to the trust.

The second branch of the section provides for the case of the Magistrates and Town Council themselves having been in use prior to 1872 to apply part of the common good or revenue of the burgh towards the support of the burgh school, and the enactment is that this customary payment shall be continued. The words are—"And the town council of every burgh shall at the term of Martinmas yearly pay to the school board thereof such sum as it has been the custom of such burgh prior to the passing of this Act to contribute to the burgh school out of the common good of the burgh or from other funds under their charge, and the same shall be applied and administered by the said school board for the purpose of promoting higher instruction."

I am of opinion that the effect of this provision is to convert the amount of the customary payments made by any burgh for behoof of a burgh school into a permanent annual debt to be paid after 1872 to the School Board of the burgh appointed in terms of the Act. The sum so to be paid is not intended to relieve the school rates or school assessment, but is specially destined to a different purpose from the ordinary school rates, for the statute enacts that "the same shall be applied and administered by the said School Board for the purpose of promoting higher instruction," so that the Town Council's customary contribution is created a permanent debt dedicated to secondary or higher education.

The only question which was seriously contested turned upon the legal effect of the words "the custom of such burgh prior to the passing of this Act," and it seemed to be contended on behalf of the Lord Provost and Magistrates of Perth that to constitute a customary payment in the sense of the statute the sum paid must either have been paid as a matter of obligation against the Town Council on the one hand, and as a matter of right on the part of the burgh school on the other hand, or otherwise the payment must have subsisted without interruption from time immemorial, or at least for forty years. I do not so read the words of the statute. I think the custom referred to in the statute does not mean either obligation on the part of the Town Council or right on the part of the burgh school. It is sufficient that a contribution in point of fact has been in use to be made, even although it should depend upon the mere good pleasure of the Town Council, and were dependent upon an annual grant or act of Council. Nor do I think that the custom pointed at by the Education Act is a custom which must have subsisted from time immemorial or for forty years. I think a much shorter duration than that of forty years will suffice to establish a custom in the sense of the Education Act. What precise time will be required is left indefinite by the statute, and will depend upon the circumstances in which the payments have been made. The statute seems to have purposely left this point unfixed, and necessarily a reasonable discretion must be exercised in each particular case.

In the present case the Lord Provost, Magistrates, and Town Council of Perth seem to have been in the custom from a very early period—a period far exceeding forty years—of applying part of the common good of the burgh towards the endowment or support both of the original Grammar School and the original Academy, and afterwards for behoof of the united institutions, and the only real question in the present case is, As the amounts paid from time to time varied, what shall be held to be the true amount of the customary contribution?

Now, upon this point I am satisfied with the result reached by the Lord Ordinary. I do not think it is of any consequence to consider what was the precise application of the sums from time to time contributed. Whether the sums were paid as fixed salaries to the teachers in addition to the school fees, or as retiring allowances to superannuated teachers, or in supporting or repairing the school buildings, or in paying taxes or insurance thereon, they are all payments for behoof of the school, and as such must now be permanently made to the School Board. Where the amount of these payments varied from year to year, as in the present case, the only fair way is to take an average extending over a reasonable number of years, and I think this has been done in the present case. I do not sympathise with the objections stated by the Town Council, to the effect that certain payments for wright work and for painter work should not be included in the average, because these were special grants made in the years 1866 and 1869, and were not annually recurring sums. No doubt in other years, from 1862 downwards, the annual sums for wright work and painter work are very small, but as such work requires from time to time to be renewed, that is the very reason why the considerable expense of occasional renewal must be spread over a number of years. There may be more difficulty with the private improvement rate, which I understand is a temporary tax. But this only affects the average to the extent of between £3 and £4, and allowance has been made for this by the Lord Ordinary, and I think the judgment of the Lord Ordinary ought to be affirmed. As observed by your Lordship in the chair in the *Dunbar* case, (*School Board of Dunbar* v. *Magistrates and Town Council of Dunbar*, March 18, 1876, 3 Rettie 631, 13 Scot. Law Rep. 391) the view of the statute evidently was that the passing of the Education Act should leave the burghs of Scotland in reference to their funds neither better nor worse than they were before, the only change having reference to the administration and not to the amount of the funds formerly dedicated to educational purposes.

Lord Ormidale—It appears to me that the Lord Ordinary has arrived at a right conclusion in this case; and therefore that his judgment ought to be adhered to.

The whole matter depends upon what is the true meaning and effect of the enactment in the 46th section of the Education Act.

I cannot think that it comprehends only such contributions as it can be shown the burgh has been in the custom of making towards the support of its school for a period of forty years or any other prescriptive period. That is not said, nor is it to be inferred from the terms of the enactment, which must, as I read them, be taken in their ordinary rather than in any technical sense. And so taking them, it is not necessary to hold, on the one hand, that any very lengthened or precise period of time is indispensable, or, on the other hand, that any time, however short, is sufficient. The matter must be judged of in some degree according to the circumstances of each case in which the question arises. The Lord Ordinary has in the present instance proceeded where necessary on an average of ten years, which I think with him is in the circumstances suitable and correct. Of payments made for that period it may well be said in the words of the Act that "it has been the custom of the burgh to make such contributions."

Nor do I think that to bring the contributions within the operation of the enactment they must have been invariably of the same amount. There is nothing in terms of the enactment that I can construe to this effect. But it does not follow that either the largest or the smallest contribution that may have been made during ten years or other period is to be adopted. This matter,

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 "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.

* Decided October 19, 1878.

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