or their equivalent — opinion of Lord Rutherfurd Clark in *Marshall* v. *School Board of Ardrossan*, March 1881, quoted in Sellars' Manual of the Education Acts, 9th edition, p. 272.

Argued for defenders—Prior to 1872 the retiring allowance consisted of two-thirds of the fixed salary paid by the heritors, which did not include school fees. The Act of 1872 made no change in regard to retiring allowances.

At advising—

LORD YOUNG—I think the judgment of the Lord Ordinary is right.

A schoolmaster appointed after the passing of the Act of 1872 has no right to a retiring allowance at all. The School Board is authorised to grant a retiring allowance, but that is entirely in their judgment and discretion. We have nothing to do with the retiring allowance; that is in the judgment of the Board.

The question here regards an old schoolmaster—one who was in office when the Act was passed. It was thought fit not to put teachers of this class in the same position with respect to the retiring allowance, and also with respect to removability—but here we are only concerned with the retiring allowance—as schoolmasters appointed after the passing of the Act. It was thought proper and just to reserve to them what they were entitled to at the passing of the Act, and that is done by the words in section 55, "that such teachers" (that is, teachers appointed before the passing of the Act) "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."

This action has reference to the retiring allowance to which this old schoolmaster was entitled at the date of the passing of the Act of 1872. Here there is no contract or usage on the subject, and therefore we are only concerned with the retiring allowance to which by law he was entitled at the passing of the Act. Now, the only retiring allowance to which by law he was entitled was a certain proportion of his salary, not less than two-thirds of and not exceeding the whole salary. Now, the Act of 1861, which contains the above provisions, specifies the amount of the salary which is to be paid to the schoolmaster. This salary was in addition to the fees which were at that time payable direct to the schoolmaster, unless there was a contract whereby the fees should be paid to the trustees of the school, viz., the minister and heritors who had charge of the school. But the provision as to the salary is limited to the salary and does not extend to fees at all.

So I think in the present case, dealing with an old schoolmaster whose rights are regulated by the Act of 1861, the retiring allowance is limited to salary, and does not extend to fees. It makes no difference that fees are in the present case paid not directly to the schoolmaster, but are paid to the Board, who give the schoolmaster such proportion of them as they see fit. They are fees all the same, and are not to be taken into account any more than fees prior to the passing of the Act. My opinion, therefore, is in accordance with that of the Lord Ordinary, and I think accordingly that this reclaiming-note should be dismissed and the judgment adhered to.

LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for Pursuer—Deas. Agents—J. & A. Hastie, S.S.C.

Counsel for Defenders—Wilson. Agents—Constable & Johnstone, W.S.

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*Tuesday, December* 10.

## FIRST DIVISION.

[Sheriff of Inverness.

## BUCHANAN & COMPANY *v.* MACDONALD.

*Contract—Sale—Trade Discount—Invoice.*

By the terms of a verbal contract for the supply of goods from time to time to a retail merchant, it was agreed that upon payment of any current account an abatement of 35 per cent. should be allowed from the invoice price, irrespective of the period of payment. With each consignment of goods an invoice was sent containing the printed condition that accounts not paid in full within three months were not subject to discount.

*Held* that the condition in the invoices did not affect the original agreement, and that the purchaser was entitled to 35 per cent. discount upon accounts not paid within three months.

On 7th January 1894 Messrs R. Buchanan & Company, brewers, Inverness, raised an action in the Inverness Sheriff Court against John Macdonald, Fort-William, for payment of £45, being the amount of an account rendered by the pursuers for beer supplied by them to the defender. The beer had been supplied at various dates from May 2nd to July 21st 1894. On 1st August the pursuers wrote to the defender in the following terms:—"Dear Sir,—Considering the heavy loss we suffered from you last year, we beg to enclose statement of account, and write to say that we must have settlement in full before sending any more beer, the nett amount of the account, if paid now, being £30." On the 14th January 1895, two days before the date of the citation under the summons, the defender sent to the pursuers a cheque for £29, 5s., being the amount of the account less 35 per cent. discount, which the defender averred to be the usual trade discount allowed to him during his course of dealing with the pursuers.

The pursuers admitted payment of this sum, and craved decree for the balance, pleading that the defender had forfeited his right to the usual discount by the delay in payment. They produced an invoice which had been sent to the defender, containing the printed words—"Terms: three months; accounts not paid in full within that time not subject to discount."

In the account which was sued on, after the word "terms" there was a blank, the terms not having been filled in.

The Sheriff-Substitute allowed a proof, the result of which appears sufficiently in the opinions of the Court.

On 20th June 1895 the Sheriff-Substitute assoilzied the defender. The pursuers appealed to the Sheriff, who on 1st July recalled the Sheriff-Substitute's interlocutor and decerned against the defender. The defender appealed to the Court of Session.

Argued for the defender—(1) The rate of discount allowed had nothing to do with the date of payment, being merely a trade discount to regulate the price. The evidence showed that this had been the understanding of the parties when they contracted. On the other hand, in the case of *Duncan* v. *Aitchison & Company*, January 28, 1879, 6 R. 582, relied on by the pursuers, the evidence upon which the Court decided the case showed that there was no such understanding between the parties. Moreover, that was a case of bankruptcy, and clearly distinguishable. (2) The arrangement as to discount being part of the contract between the parties, it was incompetent to refer to the terms of the invoice, to which confessedly the defender's attention had not been called, and to which he had never agreed. The account on which the pursuers were suing contained no reference to these terms. The invoice did not constitute the contract, but was merely a possible source of evidence as to the meaning and intention of the contract, but in this case any such inference had been absolutely rebutted.

Argued for the pursuers—The invoice was the right place in which to express the conditions as to prompt payment. It contained a separate contract subsequent to the original one, but controlling it as specifying the conditions upon which discount was allowed. Accordingly, the defender having failed to observe these conditions was liable for the whole amount in the account—*Duncan* v. *Aitchison & Company, in re Cumberland*, July 24, 1876, L.R., 3 Ch. Div. 803. It was true the pursuers had on previous occasions extended the time allowed for payment, but that did not bar them from enforcing the terms of the invoice.

At advising—

LORD PRESIDENT—The question is, what was the contract as to the price of the beer sold to the defender? Now, the evidence of the defender is very distinct on this point. He says—"I agreed with the pursuers' traveller when I began to deal that I should receive 35 per cent. discount when I paid an account," and the rest of his evidence develops that statement, and makes it perfectly clear that the contract which the defender alleges, and to which he depones, was an agreement that when payment was made there should only be due the nominal price less 35 per cent. His case is that the discount was not a discount depending upon the period of payment, but an alteration of the market price of the beer. That direct testimony is corroborated in an important way by the evidence of the pursuers' traveller, who says—"When I got my first order from defender I made no arrangement with him as to the length of credit he was to be allowed." He goes on to say that in the settlement of the defender's accounts an abatement of 35 per cent. was allowed, and was recognised as the right of the defender, and the evidence makes it perfectly distinct that according to the usual manner in which the accounts were treated, the allowance of 35 per cent. was a matter of right irrespective altogether of whether the defender paid in two or three months or more. It is important also to note, as corroborating the testimony of the defender, that the pursuers, in writing to him on 1st August 1894, do not suggest the theory now maintained at the bar, for having some reason of their own for pulling up this customer sharply, they intimate that they would have payment in full although the period of three months had not then run out. I think, therefore, that it is proved that there was an agreement between the parties to the effect contended for by the defender.

The case for the pursuers is rested almost exclusively upon the terms of the invoices sent with each parcel of goods delivered to the defender, and they suggest that the invoices contain an expression of the contract made each time goods were sent. I reject that theory, because I hold it proved that there was an antecedent contract subsisting between the parties in the terms stated, and that the invoice was not sent to vary or to express the contract, but to furnish a statement of the amount of beer sent.

LORD M'LAREN—I agree entirely with your Lordship, and have only a few observations to add. In the first place, I think that the word "discount" has no technical or universal meaning. In what is perhaps its most common meaning it is equivalent to the payment of interest in advance; as, for example, when a banker advances the amount upon a bill of exchange which is not yet due, discounting the interest up to the day of payment. It is used in another sense for the abatement which is given on a debt, because payment is made at an earlier date than it is customary for such debts to be paid. We know that some business firms have different rates of discount which they allow for payments at different periods. But here the word is used in a different sense, as applying to a case where there is a universal and nominal price for an article, while the fluctuations of the market price, or the desirability of establishing an account with a particular individual, are met by

alterations in the rate of discount allowed to customers. It is impossible to imagine that so high a rate of discount as 35 per cent. could be allowed merely in consideration of prompt payment. The figures are altogether disproportionate to such an arrangement, and there is nothing incredible or indeed improbable in the defender's evidence that he was promised 35 per cent discount irrespective of the time of payment of his current account. The only contrary evidence is contained in the terms of the invoice, but I have always understood that a collateral document such as this can only be referred to as modifying a contract in so far as the contract refers to it. Here, according to all the evidence before us, that of the pursuers' agent and of the defender, the verbal contract was in no way subject to the conditions in the invoices which were afterwards sent to the defender to inform him of the quantity and price of the barrels sent, and of the dates at which he was to receive the consignments. I know of no legal principle requiring the defender to be bound by conditions appearing in a printed paper such as this invoice, which bears no relation to the contract of sale, which was not sent to the purchaser as a proposal for an alteration of the contract previously made, and to which his attention was not specially called.

LORD KINNEAR and LORD ADAM concurred.

The Court recalled the judgment of the Sheriff and assoilzied the defender.

Counsel for the Pursuers—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Salvesen—Clyde. Agents—Gill & Pringle, W.S.

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*Wednesday, December* 11.

## FIRST DIVISION.

## MACKAY *v.* THURSO HARBOUR TRUSTEES.

*Process—Expenses—Minute of Abandonment—Judicature Act* 1825 (6 *Geo. IV. cap.* 120), *section* 10.

By section 10 of the Judicature Act it is provided that a pursuer has the right to abandon an action "on paying full expenses to the defender."

*Held* that where the defender in an action does not consent to absolvitor being pronounced, a minute of abandonment by the pursuer, which does not bear to be under the statute, and in reference to which there is no tender of expenses, is incompetent.

In an action at the instance of John Mackay, contractor, and Roderick Scott, trustee on his sequestrated estate, against the Thurso River Harbour Trustees, the pursuers reclaimed against the judgment of the Lord Ordinary. Subsequently Mr Scott lodged a minute in which he stated that "the minuter had now ascertained that he was unable to verify the cause of action as set out in the summons, and that the estate under his charge would not yield funds to pay the costs of litigation, that he had been recommended by the creditors to abandon further proceedings, and craved leave for himself to abandon the action." No tender of expenses was made in the minute or by the minuter's counsel.

Section 10 of the Judicature Act provides that a pursuer has the power "to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent."

The respondents argued that it was incompetent to abandon the action except on payment of expenses, in accordance with the provisions of the Judicature Act and relative Act of Sederunt—A. of S., July 16, 1828, sec. 115.

At advising—

LORD PRESIDENT—If this minute of abandonment had been presented in accordance with the Judicature Act, our course would would have been clear; the defenders' account of expenses is remitted to the auditor, and, on the taxed expenses being paid the action is then dismissed. But this minute does not purport to be under the statute, and it has been admitted at the bar that it was of distinct intention that it was not presented under the statute. Now, we have no mode of dealing with such a minute, and, accordingly, I am of opinion that we must refuse it. The pursuer will then be in a position to consider what steps he should take next.

LORD ADAM—I am of the same opinion. The minuter craves leave for certain reasons to abandon the action unconditionally, to get clear of it free of all expense. Now, apart from the consent of the defenders, we could not grant such a motion. A minute of abandonment under the Act of Sederunt is presented under special conditions, viz., payment by the minuter of all expenses, which must be performed before the motion can be granted, but there is no method of dealing with such a minute as this, and accordingly I agree that we must refuse it

LORD M'LAREN—I concur. I think it is perfectly plain that the pursuer can only abandon the action under the condition of paying the defenders' expenses. Although he does not offer to do so in the minute which he has lodged, still, if his counsel had stated that he was willing to pay these expenses, I have no doubt that your Lordships would have remitted the defenders' account to the auditor, with the view of the necessary qualification being inserted in the interlocutor. But when it appears that the pursuer is not willing to pay the defenders' expenses, I think that our only course is to refuse the minute.

LORD KINNEAR concurred.