brought about unduly by influence operating upon a facile disposition is irrelevant.

The conclusion to which I come is, that the deceased did make the gift, but, repenting of it and desirous of undoing her act, and under strong and excited feelings, made statements that it had not been made.

I have not failed to give consideration to the views of the evidence stated by the Lord Ordinary in his note, nor to the fact that the proof was led before him. In a case of nicely-balanced testimony, or where the substantiation of certain facts depended on the credit to be given to the conflicting statements of witnesses speaking to those facts, the consideration that a decision has been come to by a judge who saw the witness should have great weight. But here the material facts, so far as the evidence goes, other than that of the defender and Mrs Arbuckle, are independently made out. The question is one which mainly turns on the inference to be drawn from facts proved by the parties. Certain facts are unquestionably proved, as I think, on both sides, and the application of our own judgment as to the ultimate facts to be deduced from premises which are proved.

The Lord Ordinary has rested his judgment, besides the improbability of the fact of a gift at all, as to which I have had occasion to make observations already, partly on what he considers as real evidence. On the 2d October 1866, three weeks after the date of the alleged gift, the deceased executed a codicil by which she recalled the legacies bequeathed by a former will to Mrs M'Donald and Mrs M'Intyre, the combined amount of which was equal to the sum gifted, and constituted the defender her general disponee of personal and moveable estate. The observation was, that she cannot be supposed to have made a codicil which became of no avail by the giving away of all her funds. I think that the inference properly deducible is the other way. If she did give away the money which formed the only fund out of which the intended legacies were to have been paid, it was right that these legacies should be recalled. She told Pringle, before preparing the deed, that she had no money to pay these legacies, and he prepared the deed to her instructions accordingly. Further, the deed proves the position at that time held in her affections by the defender. The Lord Ordinary finds pursuer's statement on this point irreconcilable. I fail to see the inconsistency when explained by reference to her own statement as a cause for executing a deed.

The Lord Ordinary finds inconsistencies between the defender's allegation of a gift of the receipt, and his bringing back £29, of which he gets a return of £5. I do not see much in that observation. Her gift of a receipt for £815, with interest due, is not inconsistent with his bringing back the odd money, and its application to Miss Swan's use. As to Forbes and others, who describe the appearance of the deceased differently from the medical gentleman who was called in to see her, I think it must be held that she was not always in a quiet or undisturbed condition, but in a state in which excitement must have been followed by prostration, which would account for the different impressions formed as to her appearance. It is said that Mrs Mitchell speaks to an acknowledgment at a time before it is alleged to have been made, because she says she had not seen her for a year before death. This presents a difficulty certainly in the way of crediting her, although forgetfulness of, or mistakes as to, date are not infrequent. Hugh M'Leod speaks to a conversation on the day of the gift, being about seven in the evening and gaslight, a fact which is said to disprove his testimony. I do think M'Leod was giving a false oath, because he described gas-light as having been observed on that particular evening. It was, he says, *about* seven. I do not see how we may not hold that the hour was somewhat later, or that in that dark chamber, or, it may be, on that specially dark night, there was gas lighted when he conversed with the deceased. Further, abating every witness as to whose evidence the Lord Ordinary makes any special observation, there are still nine witnesses left attesting, as made to them, the very statements spoken to by these four.

I come therefore to the clear conclusion that the defender has proved donation. Had the facts or pleadings admitted of it, I should have readily come to a conclusion that the donation was *mortis causa* and revocable. But neither the statements of the witnesses nor the pleadings admit of the case being dealt with on that footing.

In conclusion, I may say that having reached the conclusion to which I come, I am glad that the result of it is a complete vindication of the very serious series of charges of fraud, perjury, and subornation of perjury on the part of the defender, to which an opposite view of the evidence must have led. I think it right to say that I hold that the defender is in my judgment free from the suspicion of having been guilty of these acts, and that there is nothing proved inconsistent with his having acted fairly and properly in his dealings with the deceased.

Lord Cowan differed, and held donation not proved.

Lord Benholme and Lord Neaves concurred with the Lord Justice-Clerk.

Agent for Pursuers—James Buchanan, S.S.C.
Agent for Defender—Andrew Beveridge, S.S.C.

Friday, July 10.

WEIR *v.* CRAIK AND OTHERS.

School—Agreement—Breach of Agreement—Kirk-Session. Averments which held irrelevant to infer any obligation or breach of agreement on the parties called as defenders.

Observed, per Lord-Justice-Clerk, that personal liberty does not attach to members of a kirk-session on account of acts done by their predecessors in office.

The pursuer in this action is Alexander Campbell Weir, teacher, Glasgow, and the defenders are the Rev. Dr Craik and Others, members of the Kirk-Session of St George's Church, Glasgow, and, as such, managers of the school called the Brownfield Boys Industrial School, Glasgow. The pursuer concluded for payment of the following sums:—"(1) Of the sum of £11, 5s., being balance of salary due to him for the year 1863, with interest thereon at the rate of five per cent. per annum from the 1st day of January 1864 till paid; (2) Of the sum of £15, being salary due to the pursuer for the year 1864, with interest thereon at the said rate from the first day of January 1865 till paid; (3) Of the sum of £13, 1s. 7d. due to the pursuer for teaching poor children, conform to account to be produced herewith, and which is referred to, with interest thereon at the said rate from the 1st day

January 1865 till paid; (4) Of the sum of £125 sterling, in name of allowance for house rent, at the rate of £10 per annum from the 1st day of July 1852 to the 31st day of December 1864, with interest at the said rate on each annual allowance of £10, from the 1st day of July in each year, when the same became payable, till paid; (5) Of the sum of £20 in name of damages for breach of contract, and culpably neglecting to procure and pay the pursuer the grant of £20 in augmentation of his salary for the year 1863, with interest at the said rate on the said sum from the 31st day of January 1864, till paid; (6) Of the like sum of £20 in name of damages for breach of contract and culpably neglecting to procure and pay the pursuer the grant of £20 in augmentation of his salary for the year 1864, with interest at the said rate on the said sum from the 31st day of January 1865 till paid; (7) Of the sum of £15 in name of damages for breach of contract and culpably neglecting to procure and pay the pursuer the 'gratuities' or fees due for instructing three pupil teachers, conform to an account to be herewith produced, and which is referred to, with interest thereon at the said rate from the 31st day of January 1865 till paid."

The pursuer, *inter alia*, made the following statements:—"(2) The pursuer in August 1849 held the office of teacher of the Kersland Barony School, in the county of Ayr, when the defender Dr Craik, for himself as moderator, and on behalf of the said kirk-session, offered the pursuer the mastership of said Brownfield School, and requested him to accept of it. The pursuer stipulated with the defender Dr Craik, as a preliminary condition of his acceptance of the said office, that the session should, as early as possible, place the school under the minutes and regulations of the Committee of Privy Council and Education, in order that a grant in augmentation of the salary payable by the session, and grants for pupil teachers, might be obtained. To this condition Dr Craik and the defenders agreed, and undertook, not only to obtain the Government grant, but to pay to the pursuer all allowances, and to do whatever else was necessary to the attainment of the grant. The pursuer was of course to pass the necessary examinations. Upon this condition or understanding, the pursuer agreed to accept of the mastership of the school. (3) At a meeting of the kirk-session, held on 17th September 1849, the pursuer was elected to the office of teacher of the said school; but as it had not before been, and was not then under the said minutes of the Committee of the Privy Council, no notice is taken in the defenders' minute as produced of the stipulation regarding the Government grant, but it was part of the agreement that this grant should be obtained, the pursuer undergoing the necessary examinations, and the defenders complying with all the requisites of the minutes of the Privy Council. The same agreement and contract was renewed between the pursuer and Dr Craik, as authorised by the defenders, subsequent to 17th September 1849, and after the pursuer had entered upon his duties. In the meantime the pursuer was to have the same emoluments as his predecessor. These emoluments were a fixed salary of £10 and the whole of the school fees. Another condition was, that the engagement was to be terminable by either party on giving a written notice of three months to the other to that effect. The pursuer accepted of the said situation, on the express condition and under agreement with the defenders that on being found qualified he should obtain the Government grant, and that the defenders should do everything necessary for this purpose. On this footing the pursuer entered upon the discharge of the duties of school, on or about the middle of October 1849. (16) One of the conditions imposed by the regulations of the said Committee of Council on parties obtaining grants in augmentation of a teacher's salary, and which the defenders, having taken the benefit of the said regulations, were under an obligation to observe, was, that if the pursuer was not provided with a house, or suitable lodgings rent free, a further sum of £10 in lieu thereof should be paid annually by the defenders to the pursuer. This payment of the said money, equivalent for the house or suitable lodgings rent free, must be raised from voluntary contributions alone, and no part of it to be derived from school-fees. It must be paid over and above the 'minimum salary' specified in the said broad-sheet, and required by the said Committee's regulations, to be paid to the pursuer by the defenders, as appropriate to the two said divisions and grades under which the pursuer was classed before and after the year 1859, at which period the grade of his certificate was raised by the said Committee. The defenders well knew that by their agreement with the pursuer, and by their application to the Committee of Council for the examination of the pursuer for a certificate of merit, necessary to the enjoyment of an augmentation-grant, and by their obtaining the said grant, they became bound to implement the same from the 1st day of July 1852, being the date when the pursuer became a certified master. The defenders filled up annually the official school returns in such manner as apparently to show that they had complied with the said conditions as regards the payment of the 'minimum salary' and the 'money equivalent' for the house, thereby leading the said committee to believe that they had fulfilled the said conditions. By obtaining the grant in augmentation year after year, on the grounds of perfect compliance with the said conditions, the defenders have homologated their agreement with the pursuer, and they have partly implemented the same. By the study and trouble to which the pursuer submitted in preparing for and passing his examination, and procuring a certificate of merit, the defenders obtained a teacher for their school possessed of higher qualifications than those for which they had paid previous to 1852, and the efficiency and reputation of their school were correspondingly benefited. The defenders, however, failed to provide any 'house or lodgings rent free' for the pursuer, nor have they as yet, in lieu thereof, paid him the annual 'money equivalent' during the said period from the 1st day of July 1852 till the 31st day of December 1864. They are therefore indebted and resting-owing to the pursuer the sum of £125 sterling, in name of allowance in lieu of a house rent free during the said period, with interest on each annual allowance of £10, as concluded for, from the 1st day of July 1852, in the first instance, and from the 1st day of February in each year thereafter, when the same became payable, till paid."

He maintained the following pleas:—"(1) The defenders are bound to pay the pursuer the sum sued for in the name of salary, by the first and second conclusions of the summons, in terms of their contract with the pursuer on 17th September 1849, as modified on 14th January 1850. (2) The defenders having sent certain poor children to be instructed by the pursuer, under an agreement to pay school fees therefor, are liable to the pursuer in the

sum of £13, 1s. 7d., contained in the third conclusion of the summons. (3) The defenders having undertaken to pay the pursuer all allowances required by the Privy Council as requisites of a Government grant, and having applied for and obtained the assistance of the Education Committee of Privy Council for the pursuer's school, upon condition of their paying to the pursuer an annual allowance of £10, derived from voluntary contributions, in lieu of a house or suitable lodgings, over and above the salary derived also solely from voluntary contributions payable by the defenders to the pursuer, and double in amount of his augmentation grant, this condition formed a *jus quæsitum* in favour of the pursuer, and he is therefore entitled to decree in terms of the fourth conclusion of the summons. (4) *Separatim.* The pursuer is entitled to decree in terms of said fourth conclusion, in respect expressly, or otherwise by implication of law, from the acting of parties, the defenders contracted and agreed with him to fulfil all the conditions incumbent on them relative to obtaining for the pursuer the augmentation grant from the said Committee of Council on Education, as specified in the condescendence; and, *inter alia*, to pay the said annual allowance for rent. (5) The defenders, by breach of contract, by wilful neglect to discharge the proper duties of their office as school managers, and by want of ordinary care and diligence, having failed to procure for and pay to the pursuer the augmentation grants for the years 1863 and 1864, they are liable to the pursuer in reparation and damages to the amount of said two grants respectively, in terms of the fifth and sixth conclusions of the summons. (6) The defenders having, culpably and in breach of agreement, expressed and also legally implied with the pursuer thereanent, failed to procure and pay the pursuer the sum of £15, being the amount of 'gratuities' or fees for three pupil teachers, they are liable to the pursuer in reparation and damages to the amount of said gratuities, in terms of the seventh conclusion of the summons."

The defenders upon their averments maintained the following pleas:—"(2) Sufficient funds having been provided to qualify the pursuer to receive the Privy Council grants, the pursuer has neither title nor interest to sue upon the Privy Council regulations, as to the sources from which these funds should be divided. (3) The pursuer's claim for an annual allowance in name of house rent is subject to the triennial prescription. (4) The pursuer having drawn the Privy Council grants from 1852 downwards on the footing of his salary of £15 and the school-fees being sufficient to qualify him in terms of the Privy Council regulations, is barred, *personali exceptione* and by acquiescence, from his present claim for allowance in name of house rent. (5) In any event, the allowance for house-rent being payable only out of voluntary contributions, the pursuer's claim therefor is untenable, in respect the defenders paid the pursuer annually, from voluntary contributions, a sum more than sufficient to meet the said allowance, or otherwise in respect the defenders are not in possession of any voluntary contributions to meet the said allowance. (7) The Education Department having entered into no contract, and incurred no legal obligation to pay the pursuer or defenders any grants or gratuities, the parties occupied merely the position of petitioners for the public bounty, and no agreement between them for the presentment and prosecution of their petition affords a legal ground of action to the pursuer. (8) The sum of £10 out of the pursuer's salary for 1863 having been paid by the defenders, on the pursuer's account, in virtue of their own and the Privy Council regulations for the management of the school, and in terms of official instructions, or otherwise with concurrence express or implied on the pursuer's part, the defenders are to that extent discharged of the sums contained in the first conclusion. (9) The grants for 1863 and 1864, and the £15 of gratuities for pupil-teachers, not having been received by the defenders from the Privy Council, the pursuer has no right of action for the same. (10) The grant for 1863 having been lost in consequence of the bad condition of pursuer's school, and the inspector's unfavourable report thereon, the pursuer's claim of damages is untenable."

The Lord Ordinary (Ormidale) pronounced the following interlocutor:—

"*Edinburgh, 19th November* 1867.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings,—Finds that it is admitted that the sums of £15 and £13, 1s. 7d., referred to in the *second* and *third* conclusions of the summons respectively, have been paid, and therefore that no further procedure is necessary under these conclusions; Finds that the pursuer's statements are irrelevant and insufficient to support the *fifth*, *sixth*, and *seventh* conclusions of the summons for two sums of £20 each and £15 respectively, and therefore assoilzies the defenders from the conclusions, and decerns: Finds, in regard to the other conclusions of the summons, viz., the *first* and *fourth*, that it is proper there ought to be some enquiry into the facts before they are disposed of; and appoints the case to be enrolled that parties may be heard as to the mode of enquiry to be adopted; in the meantime reserves all questions of expenses.

Note—The statements of the pursuer in this case are far from being clear or pointed. The consequence has been that the Lord Ordinary has hesitated whether he ought not at once to have dismissed the action in regard to all its conclusions, excepting the first, as to which the relevancy and sufficiency of the action was not disputed.

"But, having regard to the pursuer's statements in the 2d, 3d, and 16th articles of his condescendence looked at together, the Lord Ordinary has, although with difficulty, come to be of opinion that some investigation would be proper before determining anything in relation to the fourth conclusion of the summons; and, as it involves a question of doubtful relevancy, he has to suggest a proof before answer, which may also embrace the first conclusion of the summons, as to which no question of relevancy was raised. In support of the 5th, 6th, and 7th conclusions of the summons, from which the Lord Ordinary has assoilzied the defenders, the pursuer founded particularly on the statements in articles 17, 18, and 20 of his condescendence. But it is obvious, on a careful consideration of the statements in these articles, that they rather contradict than support the grounds upon which alone the pursuer attempted to maintain the conclusions in question. Thus, in regard to the fifth conclusion for £20 of grant by the Privy Council for the year 1863, it is clear that it was the fault not of the defenders, but of the pursuer himself, that he did not receive the grant, for in article 17 of his condescendence he expressly says that it was withheld 'on the ground of the inspector's partially unfavourable report' of his school. In regard, again, to the pursuer's 6th conclusion for £20, being the Privy

Council grant for the year 1864, the cause of his not receiving it, as stated by himself in article 18 of his condescendence, was his dismissal from the school previous to its becoming due, which dismissal the defenders were, on the showing of the pursuer himself, entitled to make. And, in regard to the 7th conclusion, the pursuer's own statements in condescendence 20 show that the defenders cannot be made liable to him for the alleged loss on which it is founded."

The defenders reclaimed.

CLARK and R. V. CAMPBELL for them.

GIFFORD, MAIR, and REID in answer.

At advising—

LORD JUSTICE-CLERK—The case, in so far as contested, involves the relevancy of the four last conclusions of the summons. The matter involved in the first conclusion is, with the assent of both parties, to be inquired into; the second and third are superseded, payment having been made of the sums concluded for.

The fourth and the remaining conclusions depend upon alleged liability said to arise out of various breaches of an obligation of a somewhat peculiar description. It is said the defenders bound themselves to fulfil to the pursuer, who is a teacher, all the conditions requisite on the part of the managers and contributors of schools placed on the Privy Council grant, to enable him to receive the grant, and in the performance of this duty they are said to have failed, in regard to the subject-matter of the fourth conclusion, for a period of twelve consecutive years, and as to the others, during some of the later years of the period during which he taught the school. Before considering more minutely the ground of liability, it seems to me of importance to inquire who under this action, are to be held as the defenders; the character in which liability is sought to be enforced; and to what effect decree is meant to be demanded.

The narrative in the record relates to acts and neglects, contracts and breaches of contract, by the kirk-session of St George's, Glasgow. There is only one individual manager introduced in the detail, which is minute, of the transactions out of which liability is deduced, and that is the name of the moderator, Dr Craik, who is said to have made certain statements before the pursuer's appointment, and to have failed in his duty as correspondent, in name of the session, with the Secretary of the Privy Council.

Even to this extent the statements are not made as of individual acts, but as made by authority, and for behoof of the kirk-session, and the breach of agreement is said to be a breach, not of the moderator individually, but of the body of the session which is said to have represented.

The obviously logical result of such a statement applicable to alleged contract, and failure of duty in relation to it, would be a conclusion against the body whose agreement, and neglect or failure to perform, form the subject of complaint. I cannot find any conclusion in the summons expressly against the kirk-session as such. The kirk-session is a body corporate, and the form of convening such a body is familiar in practice, and is certainly not used in this summons. The conclusion which I do find is directed against certain individuals named, who are said to be all "members of the kirk-session of St George's, and as such *managers of the school called the Brounfield Boys Industrial School, Glasgow.*" I should presume that the decree asked is intended to fix no corporate responsibility, from the establishment of which no benefit could well be contemplated, but the responsibility of the individuals whose names are specified.

The action was raised in September 1866, and the parties called are the then actual members of the session, and as such, the then managers of the school. Though the kirk-session of St George's might, in its corporate character, be well cited by citation of all the existing members at the time, it could be cited only of course in its capacity of kirk-session, and for implement of a proper obligation of such a body. Here there is the double difficulty of reading the summons as one against the session, without any decree being asked against the session as such, and that in reality the conclusion is against the parties called as members of session, but as managers of a school which they, as belonging to the session, are said to be the administrators.

Assuming that the action were well laid against the session, what would the effect of a decree be? Of course it could only lead to funds belonging to the session being attached in fulfilment of the decree. Liabilities as to a school set up by its members are not proper liabilities of a kirk-session. The funds of the session would thus, if any such existed,—which is contrary to all probability,—be made to be evicted to meet claims rested upon an agreement into which the session proper—I mean the session as a corporate body performing certain known functions—could not legitimately enter so as to bind its funds or the corporation. It would be extremely difficult to see how the agreement of the session at any one time could transmit against their successors in a case apart from the ordinary province of a session, or how the members of the body could involve sessional funds in liability by failure to carry out such an agreement. I do not think that the pursuer contemplated any such result in framing this summons as a mere decree against the session *qua* such, and that the case must be regarded as one in which personal liability is sought to be attached to the individuals called and named.

If any clear conception at all existed in the mind of the framers of this summons as to the ground of action it must, I think, have been, that the session having agreed to do certain things, and the parties who formed the members of the session from time to time having failed to do them, the actual members of the session at the time when an action is brought are liable personally in all the alleged consequences. This is the case which seems to be presented in the pleas in law; at all events it is the ground necessary to raise the liability sought to be enforced. There being no allegation, except one of contract, said to be entered into between the pursuer and the session, and of acts of failure, or breach of contract, on the part of the session,—the defender, that is individual members, can be found liable only if it should be found that their position in law as actual members of the session involves a liability for fulfilment of contracts entered into by former members, with or without their functions as members of session. and reparation of loss occasioned by the breach of them, on the part of those who may have been members at any time, and failed to carry them out.

The original contract libelled on is said to have been entered into in 1849, prior to the removal of the pursuer to Glasgow. It is said to have formed part of the conditions of his appointment. There is an averment of a renewal of the contract

subsequently,—time and place and occasion not specified; lastly, it is said that the agreement was homologated by the defender by obligation grants from the Privy Council year after year, this having been done from July 1852 to January 1863. The failure embraced in the fourth conclusion, of alleged payment of a sum of £10 for house rent from voluntary contributions, extends from 1st July 1852 to the 31st December 1864. For all that was done from 1849 for contracts entered into, renewed or homologated, and for breaches of these the individual defenders are sought indiscriminately to be made personally responsible. The members of the kirk-session are and were, since 1849, managers of the Brownfield School; and as the kirk-session in 1849 entered into an agreement as to its management, and the kirk-session in future years, or the then members, acted, it is said, in breach of the agreement, so that damages are due; therefore the actual members at the date of the action are to be responsible in payment of these damages.

A kirk-session is, so far as regards its actual constitution, a fluctuating body; its numbers are affected by the death, removal from the parish, or resignation of the elders; its numbers are recruited from time to time by the ordination of new elders. The fact of a numerous city kirk-session remaining precisely the same for a period of seventeen years would be little less than a miracle. Yet that condition of the fact would be absolutely necessary to warrant the personal decerniture craved. Individual responsibility must be rested upon individual actings, unless indeed it be attached by the mere fact of joining the body, so as to render a new member of a kirk-session liable for all the contracts regularly or irregularly entered into by any former session, and for all the neglects or breaches of such contracts, regular or irregular, by any persons who may have been a majority of its constitution—a doctrine clearly inadmissible. Rejecting such a principle as extravagant, we must have the individual acts set out, by reason of which the individual defenders are sought to be subjected to individual responsibility.

The act of establishing a school, and obtaining support for it, though a very right and proper thing for a kirk-session to do, is not, as I have already said, within the province of a kirk-session, viewed with respect to its proper functions. It is wholly extrinsic to the duties to be done by that ecclesiastical court according to the law of its constitution. Therefore, acts done by its members as to such an extrinsic thing, though they may bind the parties who act, cannot bind the body. Far less, I should say, can the imputed neglects and failure of former members of session bind new members. The defenders are called in this action, as the members of session and managers, as at September 1866; they may have joined the session and the management a year after the pursuer ceased to have connection with the school. Viewing the summons as embracing personal conclusions, I hold it utterly untenable, except on the footing of a view of the law which common sense and practice and principle alike repudiate. Kirk-sessions would not easily be kept up if a personal liability were *eo ipso* to attach to the entrants for all transactions of their predecessors, within or without their ordinary powers. Those members of the body who entered into the contract may be called upon to answer for their act in doing so; those who broke it, for the consequences of their misconduct; but the personal responsibility arises from personal acts. And it seems to be inconsistent with the plainest principles of law that decree should go out against defenders for acts done and breaches committed with which the individuals charged may have no more concern than any one of ourselves.

The case rests upon an alleged agreement with the kirk-session, by which that body are supposed to have undertaken to get the school connected with the Privy Council, and corresponding allowance made good to him, and that precisely in the form and shape required by the regulations of the Privy Council. The session, *qua* such, could not validly contract so as to bind the body as such.

Assuming this difficulty to be got over, and that the undertaking of a session in connection with the establishment of a school could be binding to the effect of involving future members in pecuniary responsibility, is there here an averment of obligation relevant to be admitted by probation? Such a body's actings are shown only by their recorded acts. We have a record of the pursuer's appointment, a minute of the terms and conditions is produced, and these terms were concluded and accepted. One condition is that the pursuer shall have the emoluments of his predecessor; another, that he may be dismissed on three months' notice; and so on. Now it is said, and offered to be proved by parole evidence, that, as part of these conditions, there was the agreement now sought to be enforced. I deny the competency of redarguing the written agreement of controlling, varying, or subverting the written conditions by parole, and that is what is proposed to be done. I further hold, that these conditions, having been settled and reduced to writing, all prievious communings on the subject must be discarded from consideration. If so, and if a new agreement, different *in substantialibus* from the former—more onerous on the contracting parties—admittedly extending their obligations, and involving in responsibilities of a wider and more ample kind; varying, as is assumed, their power to dismiss, and putting matters on a new basis of obligation, it is not too much to say that we should expect to find it set out with specifications of time, place, and circumstances, and a reference made to the authentic act by which the new obligations were undertaken. If there be an act binding the kirk-session, it must needs have formed the subject of deliberation of that body, and been recorded. There are two parties to the supposed new contract—the pursuer and the session. He cannot pretend ignorance of the matter in which he formed the principal party. The substitution of a new for the old agreement is not relevantly libelled, even if parole proof were competent as to the statement that the alleged old agreement entered into with Dr Craik for the session was homologated by payments in future years towards his salary. This is, as it appears to me, a statement wholly insufficient and imperfect, one which does not only not libel on the acts of individuals, but not even on any act of the kirk-session, in any sufficient manner.

If so, the case, under the four last conclusions, falls to the ground. That the members of session subscribed or got subscriptions to add to the pursuer's salary, and aided in getting the school on the Privy Council grant; of itself is no evidence, except of liberality on the part of the session, and a desire to promote the interests of the defenders and the school. To rear up obligation by implica-

tion out of these facts by themselves is to my mind extravagant.

The fourth conclusion is for payment of a sum of £10 a-year from 1852 to 1864. Independently of the fatal objections arising from the defects in the statements and conclusions which I have noticed; the nature of the claim and the circumstances under which it is preferred seem sufficient to dispose of it. The Privy Council fix a minimum salary as necessary to be provided, in order that the teacher shall obtain their grant; and, in addition, a house or £10 a-year, to be paid out of voluntary subscriptions. The pursuer got the Government grant. He got £10, and more than that, in addition during every year; but, as he says he will show that the £10 of addition was not raised by voluntary subscription, as the Privy Council thought it was, he shall have the £10 out of the pockets of the defenders. The pursuer having got and pocketed his grant during each of the twelve years without objection, notice, or demand—especially seeing that the body was necessarily changing—could not now insist on it. Moreover, the requirement of the Privy Council was a matter for that body to deal with, as it was simply required by them as a basis for giving what was actually given. Then, that parties should be bound to pay what should have been raised by voluntary subscription, where it is not set out what was subscribed, or that any failure occurred in getting the subscriptions, is not clear. An agreement to such a precise effect would require to be alleged very articulately indeed.

As to the remaining conclusions, they are, if possible, more extravagant.

The fifth conclusion asks payment of a sum of augmented salary "withheld on the ground of a partially unfavourable report" of the Government inspectors, as the Lord Ordinary has stated. The sixth is framed upon the footing of the dismissal on three months' notice stipulated for in his appointment, because these three months did not coincide with the three months before the close of the Privy Council year, and because allowances for parts of years are not made by the Privy Council, assumes that the fundamental conditions of a teacher's appointment in the matter of notice are abrogated by the reception of a Government grant. The last is (1) for an allowance of £3 for wages for teaching a pupil teacher, who had not been taught during the period required; (2) for an allowance for teaching a person who, partly by his own fault, was not retained on the roll of pupil teachers, the actual teaching of a pupil teacher being necessary to found the claim in favour of the pursuer to receive an allowance. Another is said to be rested on terminating the engagement of the pursuer a few days before the close of the school year, which assumes a restriction of the power of dismissal formerly spoken to, or a supposed duty to get the inspector to examine the school on a day sooner than the day of actual examination, for which there is no ground stated.

The result will be, if your Lordships agree, that the interlocutor of the Lord Ordinary should be recalled so far as brought under review by Dr Craik and the other defenders, and adhered to in so far as reclaimed against by the pursuer.

The other judges concurred.

Agent for Pursuer—M. Lawson, S.S.C.

Agents for Defenders—J. & R. D. Ross, W.S.

Thursday, July 16.

FIRST DIVISION.

STEWART *v.* TENNANT AND OTHERS.

Title—Heritage—Superiority—Adjudication in Implement—Trust—Progress of Titles—Prescription. In 1792 A executed a last will and testament in the English form disposing of, *inter alia*, his Scotch estates. After A's death his eldest son B, in respect that the English testament did not enable the testamentary trustees to make up proper feudal titles to the Scotch estates, executed in 1794 a disposition in the Scotch form disponing, conveying, and making over to them these estates for the uses and purposes expressed in the English will. At the same time B completed regular feudal titles to the estates in his own person in fee-simple, as his father's heir-at-law. The trustees were infeft and possessed the estates till 1804, when B took possession, and continued to do so till his death in 1844, having meanwhile acquired the superiority of the estates. His only son C then completed his title to the superiority as heir of his father, and obtained decree of adjudication in implement in the Court of Session against the heirs of the deceased trustees (the last of whom died in 1821) adjudging the estates from them to himself and the heirs-male of his body. After infeftment on the decree he consolidated the property with the superiority. Thereafter C sold the estate, but the purchaser being doubtful of his title, he brought an action of declarator of his right to sell. *Held* (1) that B possessed the estate as beneficiary of the trust, and not adversely to the trustees, consequently that positive prescription did not run in favour of B nor negative prescription against the trustees; and (2) that the titles completed by C after his father's death were valid and effectual to vest the lands in him in fee-simple, and enable him to convey the lands in fee-simple to a purchaser.

This was an action raised by Charles Stewart, Esq., of Ardsheal, Argyllshire, against Robert Tennant, Esq., of Ballachelish, and others, to have it found and declared that the pursuer has good and undoubted right to sell the estate of Ardsheal, and to have the defender ordained to pay the price he has by minute of agreement with the pursuer consented to give therefor. The defender demurred to complete the transaction and pay the stipulated price, on the ground that the pursuer's right over the estate was limited, and certain interests in the estate had been created by deeds executed by his grandfather and his father. It appeared that Duncan Stewart of Ardsheal, the pursuer's grandfather, by last will and testament (in the English form) dated 9th August 1792, made a settlement of his whole estate, both real and personal. His personal estate he gave and bequeathed to and among all his children equally, share and share alike, in the terms and under the conditions therein mentioned; and by the same deed he further gave and devised his lands and estate of Ardsheal and other lands in Argyllshire, held by him in fee-simple, to trustees for the uses and purposes, and upon the trusts therein expressed and declared, with a direction to such trustees from time to time to nominate and appoint a new trustee or trustees in