they were then in use to be beached, and not to boats laid up in harbour, as contended for by the respondent, because it appears from the evidence that after the Act was passed the boats were not laid up for the winter in the harbour, but upon the ground in dispute, while the property belonged to Lord Aberdeen, and down to the date of the present complaint. Mr Aiton in his evidence, which seems quite candid, says, "I saw the particulars of the purchase when I got the estate. I noticed that a charge of 5s. was made for beaching boats." When the respondent therefore acquired the estate he was in the knowledge of the payment in question, and immediately after his purchase in 1865 receipts are granted by his factors to the complainers for 5s. "as beaching dues." The receipts are in the same terms down to 1873, and in 1870, when the respondent's son was collector, it appears from a notice which he issued in that year that beaching meant being "laid up on the lands of Boddam," thereby negativing the present contention of the respondent, that the statutory dues referred to boats laid up in harbour. There was thus, as I conceive, a complete adoption by the respondent of the custom which had existed from time immemorial of the fishermen beaching their boats on this ground, and I agree with your Lordships that the fishermen, who have all along been using this ground for beaching their boats on payment of the statutory dues are entitled to interdict in the terms proposed.

The LORD PRESIDENT was not present.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the complainers against Lord Curriehill's interlocutor, dated 10th December 1874, Recal the said interlocutor; find that the complainers are entitled to the use of the ground in dispute for laying up or beaching their boats in the winter season on payment to the respondent of 5s. for each boat so laid up or beached, and this so long as the respondent shall not have provided other safe and suitable accommodation for that purpose, either within the limits of the works proposed to be executed or completed by him under the Act of Parliament, 8th and 9th Vict., cap. 25, or elsewhere at Boddam, and to this extent and effect sustain the first and second pleas in law for the complainers; interdict, prohibit, and discharge, in terms of the prayer of the note of suspension and interdict as amended, and decern; find the complainers entitled to expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for the Complainers—Dean of Faculty (Clark) and Brown. Agent—Alexander Morison, S.S.C.

Counsel for the Respondent—Asher and Jamieson. Agent—John Auld, W.S.

Tuesday, March 2.

SECOND DIVISION.

[Lord Shand, Ordinary.

REID AND OTHERS (M'LEOD'S TRUSTEES) *v.* M'LEOD.

Testament—Disposition of Heritage—Statute 31 *and* 32 *Vict. c.* 101, *sec.* 20.

A person in possession of property, heritable and moveable, left a testamentary disposition by which he empowered his trustees, of whom the defender was one, "to realise all my heritable and moveable property when they see fit . . . . to intromit with my means and effects in every way competent to executors, guardians, tutors, or curators." *Held* that this conferred on the trustees right to the heritable estate, and that the deed was equivalent to a general disposition of the estate in their favour.

This was an action of adjudication in implement, raised by the trustees of the late Gordon M'Leod of Glencassley, Sutherlandshire, and Lochbay in Skye, against his son and heir-at-law George William Leslie M'Leod, the summons in which concluded that he should procure himself served heir to his father, and then convey the whole estate to the testamentary trustees in terms of his father's testamentary disposition and the Titles Act of 1868. The defender resisted the action on the ground that the testament contained no valid or effectual conveyance in favour of the trustees either at common law or under the said Act.

The case came before Lord Shand, as Ordinary, who, on the 24th December 1874, issued the following interlocutor:—"Having considered the cause, Finds that, in virtue of the statute 31 and 32 Vict. c. 101, sec. 20, the trust-disposition and settlement dated 27th October 1863, and recorded in the books of Council and Session 22d January 1873, by the late Gordon M'Leod, Esquire of Glencassley, Sutherlandshire, and of Lochbay in the isle of Skye, conferred on the trustees nominated by said deed right to the heritable estate which belonged to the said Gordon M'Leod at the time of his death, and that the said deed is equivalent to a general disposition of such estate in favour of the said trustees: Therefore repels the defences, and ordains the defender, as only son and heir of the said deceased Gordon M'Leod, to procure himself, at the pursuers' expense, served and decerned as heir to the said Gordon M'Leod under the proper character or characters required by the investitures or writs and titles of and connected with the lands and other heritable estate and effects mentioned in the summons, which pertained to the said Gordon M'Leod at the time of his death, or by other legal method to obtain the full heritable and irredeemable right thereto established in his person; and that by decree of service and infeftment, or other legal method, according to the state of the rights thereof; and immediately on completing thereof, to dispone and convey the said lands and other heritable estate and effects to the pursuers, and the survivors and survivor of them, as trustees foresaid, and their assignees and disponees; and for that purpose to make, grant, subscribe, and deliver valid and efficient dispositions, assignations, and conveyances thereof in their favour, containing all usual and necessary

clauses; and to deliver therewith the whole writs and title-deeds in his possession, in order that the full right of the same may be properly vested in the pursuers, as trustees foresaid, and the survivors and survivor of them and their foresaids, according to the true intent and meaning of the said trust-disposition and settlement, and obligation therein contained: Finds the parties respectively entitled to their expenses out of the trust-estate, and decerns *ad interim*.

"*Note.*—This case raises a question of much importance, and attended with difficulty, as to the effect of the provisions of section 20th of 'The Titles to Land Consolidation (Scotland) Act 1868,' 31 and 32 Vict. c. 101, by which an important change was made on the rules of law relating to the forms of conveyances or deeds *mortis causa*, intending to settle the succession to heritable property in this country.

"The pursuers of the action are the trustees and executors of the late Gordon M'Leod, who, at the date of his death, on 4th January 1873, was proprietor of the estate of Lochbay in the island of Skye, and of the estate of Glencassley in the county of Sutherland, under a deed of settlement written by himself, executed by him on 27th October 1863. After Mr M'Leod's death his trustees, on the assumption that in virtue of the statutory provision above referred to, his deed of settlement had the effect of a general disposition in their favour of his whole heritable estates, sold the estate of Lochbay for a large price, and I understand the purchaser accepted a title from the trustees. Thereafter, by missive of sale, dated in June and July last, the trustees further sold the estate of Glencassley to Mr Robert Brodie, writer in Glasgow, at the price of £28,290, payable on delivery of a valid conveyance, with a sufficient progress of writs. The purchaser has taken the objection that Mr M'Leod's deed of settlement does not confer on his trustees a valid right to his heritable estate, and a process of suspension as of a threatened charge for payment of the price was raised by him, in which the record was closed on 16th July last. A debate took place on this record immediately thereafter, at the close of which the cause was superseded by interlocutor, in order to allow Mr M'Leod's trustees to raise an action of adjudication in implement against the heir of Mr M'Leod, in terms of an offer to that effect contained in the answers for the trustees. I thought it proper to supersede consideration of the cause, because, in the first place, the heir-at-law of the late Mr M'Leod was the party really interested in the question whether the settlement gave an effectual right to the heritable estate, and he was no party to the process of suspension; and further, because it being provided by the section of the statute above mentioned that the deeds or writings, which are thereby declared to be equivalent to a general disposition of lands within the meaning of the statute, should be held to create in favour of the grantee of such deed an obligation upon the successors of the granter (which by the interpretation clause includes the heir) to make up titles in their persons to the lands, and convey the same to the grantee, I was further of opinion that in any view the purchaser was entitled to have a title so made up, either by conveyance by the heir or decree of adjudication against him, and was not bound to accept of a conveyance by the trustees only.

"The present action was therefore raised, concluding that the defender, the only son and heir of the late Mr M'Leod, should be ordained to make up titles and convey the estate of Glencassley to the pursuers, or otherwise that the estate should be adjudged from him. The defender being in minority, a curator *ad litem* was appointed to him before the record was closed; and the defence now stated by the minor heir and his curator raises the question directly whether the truster's settlement gives his trustees a valid right to his heritable estate, or whether he died intestate as regards heritage, and the defender, his heir-at-law, takes up the heritable estate as intestate succession. The estate of Glencassley was held by Mr M'Leod at the time of his death under a conveyance dated in November 1870 in favour of him 'and his heirs and assignees,' granted by Charles Stewart and others, the sellers, for the price of £24,000.

"The objection stated to Mr M'Leod's deed of settlement as a general disposition of his heritable estate is, that it contains no words of conveyance, bequeathment, or gift, and that some word of this kind is still necessary in *mortis causa* deeds, in order to give right to heritable property. Before adverting to the terms of the statute with reference to this contention, it is proper to notice the terms used in Mr M'Leod's deed, which, as already noticed, bears to have been written by himself, and apparently without the assistance of any law-agent. The deed, on the narrative that 'it is expedient to provide for the proper upbringing and education of my children . . . in the event of my death while they or any of them are under the age of twenty-one years,' nominates, constitutes, and appoints the persons therein named 'to be my trustees and executors, and the curators and guardians of my said children,' including the defender. It expresses Mr M'Leod's wish that his children should, while under the age of sixteen years, be brought up by and under the personal superintendence of his sisters,' who shall, by the allowance from the interest of their 'own money by the late Mr Leslie of Dunlugas' (their grandfather's) 'trustees, and from the interest of my means and estate, be paid a suitable sum of board, and for school fees, and for other expenses needful;' and after directing payment of certain small legacies, the deed proceeds,—'I hereby empower my said trustees to realise all my heritable and moveable property when they see fit, and to invest the proceeds (after paying the said legacies, as well as my lawful debts, deathbed and funeral expenses) on good heritable bonds.' After directions for the distribution of certain articles of jewellery, the deed further goes on to empower 'my said trustees and executors . . . to intromit with my means and effects in every way competent to executors, guardians, tutors, or curators,' and to sue for and discharge debts or claims due to him; and after providing that the trustees shall be liable only for their actual intromissions, it deals with residue in these terms—'The whole residue of my estate will be divided equally amongst my said children on their attaining majority, or to their representatives.'

"It will be observed, on the one hand, that the deed contains no express words of conveyance, bequeathment, or gift of the truster's heritable estate, and the same observation may be made in regard to moveable property. On the other hand, it is quite clear that the granter regarded the deed as one which would give the trustees right to his

heritable property. He appoints the parties named to be trustees and executors; to be guardians of his heir-at-law, as well as of his other children; provides that the interest of his means and estate shall be applied for the maintenance and education of his children; and in express terms empowers his trustees to realise all his heritable and moveable property, and after payment out of the proceeds of his debts, to invest the remainder on good heritable bonds; and he directs the residue of his estate to be divided equally amongst his children, obviously including his only son and heir. It was maintained for the defender that this last clause as to residue applied only to the moveable estate, in respect of the words which immediately preceded it, which have reference to personal estate; but I am clearly of opinion that it was not the intention of the truster to limit the meaning of the word 'estate,' as used in the residuary clause to personal estate only. While the deed thus contains no transitive verb of conveyance it appoints trustees, empowers these trustees to realise and administer the truster's heritable property, directs the interest of his means and estate to be applied for behoof of his whole children, and directs the residue of his estate including in the truster's view his heritable estate, to be divided equally among his children. There being no objection to the deed as not duly tested the pursuers maintain that these provisions are sufficient under the statute to confer on them a right to the heritable estate, and to impose on the heir-at-law an obligation to grant them a conveyance.

"The first part of the section of the statute in question provides that, contrary to the established law previously existing, an owner of lands may settle the succession to the same, in the event of his death, not only by conveyances *de præsenti*, but by testamentary or *mortis causa* deeds or writings. It farther provides that 'no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands . . . . . shall be held to be invalid as a settlement of the lands to which such deed or writing applies on the ground that the granter has not used, with reference to such lands, the word 'dispone,' or other word or words importing a conveyance *de præsenti*.' This second part of the clause renders the use of the technical word 'dispone' unnecessary, and may be held as practically enacting that no technical expression shall be required to make an effectual conveyance. The succeeding part of the clause, which from this point proceeds to enact affirmatively what will in future be sufficient to give right to heritable estate, is the most important in the present question, and is to be construed not merely with reference to the direct effect of the words there used, but also with reference to their effect reflectively in the interpretation of what has gone before. The provision is, that 'where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing . . . . shall be decerned and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof.'

"This concluding part of the clause of the statute, in providing what shall be taken to be sufficient to give a right to heritable estate, is evidently intended to put the law in regard to the forms necessary for the conveyance of heritage as nearly as possible on the same footing as the law regulating the forms necessary for the conveyance of moveables. In so far as express words of conveyance, gift, or bequeathment were required for an effectual *mortis causa* conveyance of personal estate, they shall still be necessary in regard to heritage, but if words short of this will be sufficient to give right to moveables, the same rule shall be applied, in so far as the language used by the testator admits of it, in regard to heritage.

"The general evil which the provision of the statute was intended to remedy was the failure of the law in requiring the use of a particular form of language to give effect to the will of the testator in regard to his heritable estate where his will was clearly expressed, and the statute should be construed so as to provide as far as possible a complete remedy for that evil. In regard to the disposal or destination of personal estate, any clear expression of the testator's will or intention, without reference to any particular form of expression contained in a document sufficiently tested, was and is sufficient and effectual.—Bell's Principles, section 1862. It appears to me, on a consideration of the terms of section 20th of the statute, that its intention was to make the law the same in regard to heritable estate. If that be the purpose of the statute, it should be so construed, if the language admit of it, as to produce that effect. I am of opinion that, giving to the language its fair meaning, that is its true effect; and that if a testamentary deed or writing, although it does not contain words of direct conveyance of heritable estate, yet contains a distinct expression of the granter's will and intention by the deed to carry right to heritage, the deed will be effectual for that purpose.

"Thus, if a testator nominates and appoints certain persons to be 'trustees to administer and dispose of my whole heritable estate, subject to the following directions,' and then gives instructions as to the realisation and disposal of his whole property, or if a testator appoints certain persons to be trustees of my estates, heritable and moveable, and goes on to give powers of administration, and directions as to how his property, real and personal, is to be disposed of, as it is clear that, although the deed contains no transitive verb, or direct words of conveyance, it was the testator's will and intention, as expressed by himself, that his trustees should have right to his heritable property for the purposes of his deed, I think the deed would be effectual under the statute. It appears to me the same result would follow if a testator nominated and appointed 'A B, my son, to be heir of the whole heritable estate belonging to me at the time of my death,' or 'to be heir to succeed to me in the whole heritable estate belonging to me at the time of my death,' whether subject to certain conditions or obligations or otherwise. Such language would be a clear expression of the testator's will and intention that his deed should give right to heritage, and would therefore, in my opinion, be equivalent to a general disposition under the statute. It is obvious that in the cases just supposed of a nomination of trustees, or trustees and executors of personal estate, or to administer personal estate, the deed would be sufficient

to confer right to moveables; and as the words are sufficient to have that effect I think it follows from the statute that, where the same words plainly refer to lands, they must receive the same effect in regard to heritage.

"In the course of the argument the defender pleaded that a simple nomination by a testator of an heir would not be equivalent in effect to a general disposition of heritable estate, and expressions to that effect in the opinion of the Lord President in the case of *Edmond*, to be immediately noticed, were founded on. The question has not yet occurred for decision, but it is quite obvious that a bare nomination of an heir, without any additional words showing that the nomination is made expressly in order to give right to the testator's whole heritable estate, is in a very different position from such a nomination if followed by words clearly expressive of the testator's will and intention to that effect. The nomination of an executor, or the nomination of an executor and universal legatory, have known and settled meanings in the law, as fully explained in the opinions of the learned Judges in the case of *White* v. *Finlay*, 15th November 1861, 24 D. 38. The bare nomination of an heir has no such settled meaning, for the term is sometimes used to designate an heir *in mobilibus*, and varies in its signification according to the relation it holds to other terms preceding and following it in the deed in which it occurs. There are thus reasons for holding that the provisions of the statute may not be sufficient to make the mere nomination of an heir equivalent in effect to a general disposition. The case is, however, different where the nomination is followed by words showing the plain will and intention that the person nominated should succeed to heritable estate.

"It was maintained by the defender that the words 'such deed or writing,' introducing the third or concluding part of the clause to which I have specially referred, refers back to the previous words, 'deed or writing purporting to convey or bequeath lands,' and thus imports these words into that part of the clause which refers specially to what is sufficient to give right to moveable estate, as a test for an effectual deed as to heritage. On this assumption it was maintained that, as the deed must be one 'purporting to convey or bequeath lands,' an express word of conveyance or gift is necessary. I am disposed to think that, on a sound construction of the statute, the words referred to must be imported into the last clause, but I do not think that these words make it necessary that the deed should contain a transitive word of conveyance. To hold this would, I think, practically take away the whole force of the provision of the Act which refers to the form or terms of deeds sufficient to give a right to moveable property. But the words, 'purporting to convey' cannot, I think, be construed as equivalent to meaning or intending to use express words of conveyance, or anything more than meaning or intending or bearing to convey, and such meaning or intention may be clearly shown without express words of conveyance. The word 'purport,' taken from the French *pour* (for) *porter* (to bear), does not appear to me to have the limited meaning for which the defender contends. In the view of the statute which, for the reasons I have just stated, appears to me to be the sound one, I think it clearly follows that the deed in question gives a valid right to heritage under the statute. The powers expressly given to the trustees to deal with the heritable property, and to dispose of it as directed in the deed, plainly show that it was the testator's will and intention to give right to heritage. The case cannot, I think, be distinguished from that which I have already considered by way of illustration, in which the testator appoints trustees of his estate, heritable and moveable, or appoints trustees to administer and dispose of his estate, heritable and moveable, in terms of directions given.

"Three cases have occurred in which the Court have construed the provisions of section 20th of the statute. Two of these, which were decided by the First Division of the Court, viz., *Pitcairn*, 25th February 1870, 8 Macph. 604, and *Edmund*, 30th January 1873, 11 Macph. 348, raised only the question whether the words used by the testator covered and included heritable property. In the former of these cases the word 'effects,' and in the latter the words 'money, bonds, debts, business and other effects whatsoever,' were held to relate to moveable estate only. The Court were not called on to decide in either of these cases whether an express word of gift or conveyancing was necessary. There are certain expressions in the opinions of the Lord President and Lord Deas which seem to indicate a different view of the statute from that which I have adopted. These expressions were, however, *obiter*, not necessary to the decision of the case, and the point now directly raised was not before the Court for decision. I have therefore not felt myself bound by the expressions referred to. If they should be regarded, as maintained by the defender, as expressing the opinion that words of direct gift or conveyance are required to give a right to heritable estate, although not required to give right to personal estate, I must, with much deference, say that I do not concur in that view of the statute. It appears to me, however, that the expressions referred to do not go the length which the defender in argument maintained.

"The remaining case of *Hardie's Trustees*, 13th May 1871, 9 Macph. 736, which was decided by the Second Division of the Court, is I think a direct authority on the present question. The testator in that case had not used any direct words of conveyance, but merely appointed trustees with power to take charge of his farm and means and moveables, and power to manage the farm or give it up, as they thought best for his family. This deed was held to give right to the lease, which, as heritable property, could only be carried by a deed in such a form as would carry heritable estate. If, in addition to the farm, the testator had mentioned heritable estate generally, or particular lands belonging to him, the decision would obviously have been the same, and applied to such lands as were referred to.

"It may be noticed that in 'The Conveyancing (Scotland) Act, 1874,' (37 and 38 Victoria, cap. 94), which came into operation on the 1st of October last, it is provided by section 27 that it shall not be competent to object to the validity of a deed as a conveyance of heritage on the ground that it does not contain the word 'dispone,' provided it contains any other word or words importing a conveyance, or transference, or present intention to convey or transfer. As the words of this statute are different from those of the Act 1868, by which the present question must be determined,

it does not appear to me that this enactment can be referred to with advantage in the construction of the earlier Act. It was the purpose of that Act to deal with *mortis causa* deeds, as distinguished from *de præsenti* deeds of conveyance, intended at once to take effect. It appears to me, therefore, to be proper to determine the construction of that statute with reference to its own terms only, particularly as the language of the later Act is quite different. The later statute provides that words importing a present intention to convey or transfer (even in the absence of words importing conveyance or transference) shall be sufficient. The language of the earlier Act refers rather to the intention to confer a right than the intention to convey. There may or may not be a difference in the effect of the expressions, but I do not think it necessary or proper to enter on this question in the present case."

The defender reclaimed to the Second Division, but their Lordships adhered to the Lord Ordinary's interlocutor.

At advising—

Lord Justice-Clerk — This is an important question, but even if it had been raised for the first time in this case, I should not have had much doubt. But now that this question has been deliberately decided, I think we are not at liberty to re-open it.

It is said that the cases already decided in the First Division do not affect the construction of the statute that is raised here.

In the first of these cases heritage was held not to have been included under a conveyance of "effects." In the second, a bequest of whole property, but which was limited by a subsequent enumeration, was held to carry moveable estate only.

It has been said, with reference to the case of *Edmond*, that some expressions used in that case seem to indicate that the intention of the statute was merely to remove the necessity for words of *de præsenti* conveyance, but still to require some conveying words, and that the indication of intention in the deed to convey heritage is not enough.

I think that is not the true purpose of the 20th section of the Act—no doubt the first part of this section might seem to favour such a view, but the second part puts the matter beyond doubt. After providing that not only conveyances *de præsenti*, but also testamentary writings, may be used for the conveyance of lands, and after enacting that no testamentary writings with respect to lands shall be invalid for want of the word "dispone, or other words importing a conveyance *de præsenti*," the section goes on, "and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and be taken to be equivalent to a general disposition of such lands, within the meaning of the nineteenth section hereof, by the granter of such deed or writing in favour of the grantee or of the legatee of such lands, and shall be held to create, and shall create, in favour of such grantee or legatee, an obligation upon the successors of the granter of such deed or writing to make up titles in their own persons to such lands, and to convey the same to such granter or legatee." Applying now these words to the present case, the only question is, whether, if they had been used with regard to moveables, there are here words sufficient to confer a right upon the executors. On that point I have no doubt the language of the deed is plain; it confers power upon the trustees to realise the whole property, heritable and moveable; it empowers them to intromit with his means and effects in every way competent, and to distribute equally amongst all his children. This being sufficient to convey the moveables, and having, as required by the statute, reference to heritage, it is a valid and sufficient conveyance of the heritage also. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Neaves—I am of the same opinion. I hold the purpose of the statute to be manifest—to remove for ever the necessity for this technicality of an *inter vivos* conveyance in order to carry heritage. Moveables have always been carried by a *mortis causa* conveyance, and the purpose of the Act was to put the same rule in force with regard to heritage. But then, in the next place, the word dispone is not to be required, still there must be in the deed the intention to convey the heritage—the deed must be a giving deed. There are many words that may suffice for this purpose. It is not necessary to say that the person in whose favour the deed is conceived shall be the heir of the granter in order to give him a right to the subject. The appointment of a party to be executor may be enough to put him in the position of having such a right. Here we have a plain appointment of these parties as executors with a right to deal with and realise the whole property, heritable and moveable, with a purpose added which exhausts the whole objects of the trust.

The gift to the children is the formal and beneficial purpose. There is a substantially clear and explicit donation to trustees and to the children through them.

Lord Ormidale—I am of the same opinion. In the first place, there is hardly any doubt that the statute was intended to be remedial, and in the next place there is as little doubt what it was that it was intended to remedy.

Formerly the most valuable estate in moveables could be carried by a testamentary writing without any formal words of *de præsenti* conveyance, but heritage of the most trifling character could not be so carried. That was a great hardship, and the only wonder is that it was permitted to last so long as it did. I think we are bound to give the most liberal interpretation to the statute if necessary, but here I think there is quite enough in the statute to entitle us to arrive at the conclusion as stated by Lord Neaves.

The first part of the section in review is negative; it provides that some things shall not be any longer necessary—*de præsenti* conveyance and the use of the word "dispone." The deed may be of a testamentary character. Then comes the explanation of what will be enough to convey heritage under the Act.

I cannot think we require any assistance from decisions to explain the meaning of the section, the words of the statute seem to me quite enough. It provides—"where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing . . . . shall be decerned and taken to be equivalent to a general disposition of such lands, within the meaning of the 19th section hereof."

Now, it seems not disputed, but conceded, that we have in the present deed enough to carry moveables, and it seems equally clear that we have language referable to heritage. There is power given to the trustees to realise the property both heritable and moveable, to realise and divide. This cannot be limited to the moveables alone. The deed is enough to carry moveables, the words of the bequest to trustees is referable to the heritage, and therefore under the statute it is enough to convey the heritage.

LORD GIFFORD—I am entirely of the same opinion. If there seemed any conflict between the decisions in the other Division of the Court and the view that we entertain, it would be necessary to consult before deciding, but I do not so read the judgments in the cases which have been before the First Division.

On the statute itself there appears to me to be no difficulty. The 20th section defines that whatever language in a deed *mortis causa* would give a right to moveables shall, if the intention of the deed be to that effect, give the same rights to heritage. I cannot doubt that that is what was intended by the truster in this deed.

The Court pronounced the following interlocutor:—

> "The Court having heard counsel on the reclaiming note for George W. L. M'Leod, and curator against Lord Shand's interlocutor of 24th December 1874—refuse said note, and adhere to the Lord Ordinary's interlocutor; find the parties respectively entitled to expenses out of the trust-estate, and decern; and remit to the Auditor to tax the expenses and to report."

Counsel for the Heir-at-law—Fraser and the Hon. H. J. Moncreiff. Agents—Murray, Beith & Murray, W.S.

Counsel for the Trustees—Dean of Faculty (Clark), Q.C. and M'Laren. Agent—Knox Crawford, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Lord Young, Ordinary

HUNTER *v.* SCHOOL BOARD OF KELSO.

School—School Board, Powers of—Schoolmaster, Tenure of Office and Emoluments—The Education (Scotland) Act 1872, § 55.

A parish school had for a long period been divided into two departments, called respectively the Grammar School and the English School—in the former of which were taught classical and modern languages, mathematics, and other branches of higher education, and in the latter elementary education only. The parochial schoolmaster was rector of the grammar school, and devoted himself almost entirely to the higher education, having assistants to aid him in the other work of the school. The School Board confined the teaching in the school to elementary education, thereby abolishing the grammar school. *Held* that the School Board were entitled to make this change, but without prejudice to any claim which the schoolmaster might afterwards be able to establish on the ground of diminished emoluments arising from the proceedings complained of.

This was an action of reduction, declarator, and damages at the instance of George Duncan Hunter, rector of the Grammar School of Kelso, and principal teacher of the public school there, against the School Board of the parish, in the following circumstances.

In the parish school at Kelso classical and modern languages, mathematics, and other branches of higher education had for a long period been taught, besides the usual elementary branches. The school thus consisted of two divisions or departments, popularly known as the Grammar and English schools. The head master of this school was called the rector of the Grammar school, and he was also parochial schoolmaster. He was aided by one or more assistant teachers. What were called the grammer school and the English school were conducted in different rooms. In 1858, there being a vacancy in the rectorship, the heritors advertised in the following terms:—

"KELSO GRAMMAR SCHOOL.

"RECTOR WANTED.

"In consequence of the resignation of Dr Fergusson, rector of the Grammer School of Kelso, a successor to him in that situation is immediately wanted.

"The rector will be entitled to the maximum salary as well as the school fees, and to a house capable of accommodating a large number of boarders.

"Besides the Latin, Greek, French, and German languages, the rector must be qualified to instruct his pupils in Grecian and Roman antiquities, and in ancient and modern geography, and mathematics.

"Under the superintendence of Dr Fergusson the school has been kept and left in a flourishing condition, and to a teacher of ability and experience the present is an opening of great promise.