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.

"The election will take place on Thursday the 30th day of September next, at 11 o'clock forenoon, and in the meantime candidates are requested to address their letters and transmit recommendations and testimonials with respect to their moral character, literary qualifications, and practical experience, to Mr Thomas Aitchison, clerk to the heritors, on or before the 15th day of September next. It is hoped that none but able and experienced teachers will apply.

"*Kelso*, 12*th August* 1858."

The following particulars were also furnished to persons applying for the situation:—

"GRAMMAR SCHOOL OF KELSO.

"The rector is the parochial schoolmaster of the parish of Kelso, and will draw the maximum salary of £34. The schoolmaster's house consists of two wings or divisions, which have been for some time occupied as separate dwellings, and let (the late rector having a house of his own) at the respective rents of £22 and £14. There is also a small garden and offices attached to the house, but the full statutory garden cannot be allocated.

"The school-house consists of one large room and two small ones. The average attendance of scholars has been from 60 to 70, and the late rector generally had from 10 to 15 boarders.

"The fees authorised by the heritors at their meeting upon 15th September 1855 were according to the following scale:—Latin per quarter, 7s. 6d."

(The scale of fees then follows.)

"*Kelso*, 18*th August* 1858."

The pursuer, who before had been classical master at Dumbarton Academy, was ultimately appointed "rector of the grammar school and schoolmaster of the parish school."

The defenders, the School Board of the parish of Kelso, on 7th January 1874 passed the following resolution:—"That all children receiving instruction in the several standards within the public school be taught together after the close of the present session." On 2d September 1874 the School Board adopted the recommendations of a sub-committee of their number appointed to consider and report upon the arrangements for the future management and organisation of the school. The said report contained *inter alia* the following recommendations:—

"(2) That in carrying out the resolution of the Board already referred to (7th January 1874), the whole school should, without distinction, be arranged according to the standards in six classes only (exclusive of infants), and so taught together according to their advancement, all subjects embraced within the standards (article 28, Scotch code 1874), including the additional subjects under article 19, c., and English literature and language (fourth schedule), which are to be taught to the classes receiving instruction in the three highest standards.

"(2) That standards IV., V., and VI., being the three highest classes, should be taught exclusively by the principal teacher; and that standards I., II., and III. should be taught by the male assistant teacher.

"(4) That children whose guardians desire that they should be taught any of the specific subjects (schedule IV.), with the exception of English literature and language, included in the standard instruction, should be classified and taught together, but that a specific subject should not be taught to any child who is placed in a standard lower than standard IV.

"(5) That instruction in specific subjects should be given by the principal and male assistant teachers.

"(6) That the principal teacher should be responsible for the order, discipline, and punctuality of the whole school, and for a minute compliance throughout the school with the requirements of the Scotch code (1874).

"(7) That the hours during which instruction in secular subjects is to be given should be from 9.45 A.M. to 1 P.M., and from 2 P.M to 4.10 P.M.

"(8) That the hours from 9.45 A.M. to 12 noon, and from 2 P.M. to 4.10 P.M., be devoted to instruction in subjects embraced within the standards, including English literature and language (schedule IV.), and additional subjects (article 19, c.), and that the hour from 12 to 1 be devoted to instruction in specific subjects; the girls, during this hour, to be taught by the female teacher plain needlework and cutting-out (article 17, f.); the other children, who are not receiving instructions in these branches, to be allowed an interval from 12 till 2.

"(9) That the fee to be charged for instruction in all subjects embraced within the standards (article 28, Scotch code, 1874), including the subjects therein printed in italics, and also including English literature and language (schedule IV.) should be 3s. 6d. per quarter for each child, payable in advance; and that the fee for instruction in specific subjects embraced within schedule IV. (exclusive of English literature and language), should be 5s. per quarter for each child for one specific subject, and 2s. 6d. per quarter for each child for each additional specific subject, payable in advance; and also that 1s. per session should be charged for each child at entry for pens and ink."

In reference to the changes thus made, the pursuer averred:—"The effect of the changes thus made is to abolish Kelso Grammar School, of which the pursuer was appointed rector as aforesaid. The public school of Kelso is now entirely devoted to elementary teaching; it is not now resorted to by the same class of pupils as attended Kelso Grammar School, and paid the high fees above mentioned for instruction in the higher branches of learning; and the course of study, and the scholastic arrangements, being now entirely different, it is certain that this defection will be permanent. The alteration in the subjects taught, and in the scale of fees, deprives the pursuer of a large part of the emoluments, on the faith of which he accepted his appointment. Further, the pursuer suffers greatly in social and professional status from the said changes, and the position and duties now imposed upon him are essentially different from those which he undertook in 1858."

In these circumstances the summons concluded, 1st, for reduction of the minutes containing the resolution above narrated, and of the report of the sub-committee; 2d, for declarator to the following effect—"And whether the said minutes, resolutions, and report are reduced or not, it ought and should be found and declared by decree of our said Lords that the defenders are not entitled to order or insist that the whole children receiving instruc-

tion within the said public school of Kelso shall be taught together, and to abolish the grammar school of Kelso as a department of the parochial school of Kelso, taught as heretofore separately from the other or English department of the said public school, or to lower the school fees heretofore payable to the pursuer; or otherwise, it ought and should be found and declared, by decree foresaid, that the defenders are not entitled to order or insist that the whole children receiving instruction within the said public school of Kelso shall be taught together, and to abolish the grammar school of Kelso as a department of the parochial school of Kelso taught as heretofore separately from the other or English department of the said public school, or to lower the school fees heretofore payable to the pursuer, without making due compensation to the pursuer; and it ought and should be found and declared that the pursuer has right to the whole salary, fees, and emoluments arising from the said grammar school of Kelso which he enjoyed at the date of the passing of the Education (Scotland) Act, 1872, and to all salary, fees, and emoluments, and to all the rights and privileges conferred upon him in virtue of his appointment as rector of the said grammar school of Kelso, and schoolmaster of the parochial school of Kelso, by the heritors and ministers of the said parish of Kelso;" and 3d, for £5000 of damages.

The pursuer pleaded—"(1) The proceedings complained of being illegal, and *ultra vires* of the defenders, the pursuer is entitled to have them reduced. (2) In any event, the pursuer has right during his incumbency to the whole salary, fees, and emoluments which he enjoyed at the date of the Education (Scotland) Act, 1872. (3) It was not within the power of the defenders so to alter the constitution of the said school as to diminish the emoluments of the pursuer, and to injure him in his status and patrimonial interest. (4) At least such alterations could only competently be made, the rights of the pursuer being preserved entire, or due compensation being given to him. (5) In virtue of the rights conferred upon him by his appointment foresaid, the pursuer is entitled to reduction and declarator, or to declarator as concluded for. (6) The proceedings complained of having been illegal and wrongous, and the pursuer having suffered therefrom, he is entitled to reparation. (7) Generally, in the circumstances stated, the pursuer is entitled to decree, with expenses."

The defenders pleaded—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons, or any of them. (2) The pursuer has not stated, and there do not exist, any good grounds for decree of reduction as concluded for. (3) The action cannot be maintained, in respect that the proceedings complained of were taken by the defenders in virtue of the powers, obligations, and duties vested in and incumbent upon them in terms of the Education (Scotland) Act, 1872. (4) The whole material statements of the pursuer being unfounded in fact, and untenable in law, the defenders ought to be assoilzied, with expenses. (5) Generally, in the circumstances stated, the defenders are entitled to absolvitor, with expenses."

The Lord Ordinary (YOUNG) pronounced the following interlocutor—

"16*th December* 1874—The Lord Ordinary having heard counsel for the parties, and considered the record and process, sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns; finds the pursuer liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and report."

His Lordship gave the following Opinion—

"The pursuer is the schoolmaster, and the defenders are the School Board, of the parish of Kelso. The pursuer complains of two resolutions of the board, of date 7th January 1874 and 2d September 1874 respectively, and asks that they shall be reduced as illegal and *ultra vires* of the board 'in so far as they relate to the teaching together all children receiving instruction within the said public school (formerly the parish school) of Kelso, and restrict the time to be occupied in teaching Latin, Greek, modern languages, and mathematics, to one hour daily, and diminish the school fees in use to be charged by the pursuer prior to the passing of the Education (Scotland) Act, 1872.' There are also declaratory conclusions, resting generally on the same grounds as the reductive conclusions, and finally a conclusion for damages. It appears that so long ago as 1780 (the precise date is immaterial) the managers of this parish school saw fit to divide it into two departments—one (the higher) being devoted to Latin, Greek, and French, with which the parish schoolmaster was specially charged; and the other (the elementary) being devoted to the usual elementary teaching with which an assistant teacher appointed by the parish schoolmaster, subject to the approbation of the managers, was specially charged; but with the reasonable proviso that the parish schoolmaster should have the superintendence of the whole school. This system of separation was, with some modification of details which need not be specially noticed, continued till the School Board in the present year made the change now complained of. It subsisted when the pursuer was appointed in 1858, at which time also the school fees stood fixed by the proper authority, according to the scale set forth in condescendence 3, which subsisted till altered by the School Board this year. The questions for decision are—(1st) Whether, in changing this system of separation and lowering the scale of fees the School Board acted illegally and in excess of their powers? and (2d) whether, assuming the proceedings to be in themselves within the powers of the School Board, they were, nevertheless, in violation of the pursuer's legal rights, as the existing schoolmaster appointed prior to the recent Act? Both questions are distinctly raised by the pleas on record, but as the pursuer's counsel at the debate did not maintain the affirmative of the first, but of the second only—on which he exclusively rested his case in argument—I might perhaps have passed the first without further remark. But I am inclined to think it is expedient that I should express my opinion upon it irrespective of concession, as a clear view of it will be conducive to a right apprehension of the second question, on which the case, as it was argued, turns. Parish schools (and it is unnecessary to advert to any other) are now under the management of school boards, the old management by heritors and ministers being displaced, and all jurisdiction and authority of presbyteries with respect to them being abolished. The Act of 1872, by which this change was accomplished, does not specify the particulars or details involved in the notion of school management, which would have been an idle thing, had it been

possible. The management of a school by a board of managers is a simple and familiar notion, and everything which it comprehends is by the Act devolved upon the School Board of each parish, with respect to the Parish School. Further, the management of the board is not subjected to the supervision or control of any superior authority. The schools are indeed subject to inspection by Government inspectors, but this is only with reference to the distribution of the annual Parliamentary grant by the proper department of the Government, and as the most available means of ascertaining that the conditions prescribed by the department are observed by each school sharing in it. The Government inspectors are not the officers of the School Boards on the one hand, nor are the boards subject to any control by them on the other, except only through the indirect operation of giving or withholding the Parliamentary grant in relief of the rates according to their reports with reference to the fulfilment in each school of the conditions for the time in force for its distribution. The Government inspection extends equally to schools under private management which claim participation in the grant, and has the same indirect operation on their management. The only instance that occurs to me at this moment of a power on the part of School Boards to require any duty to be performed by a Government inspector, is to be found in section 60 of the Act, and if there is any other it is of the same character, as being specially and exceptionally enacted, the scheme of the statute being that the Government takes no concern with the management of any schools, but only informs itself, through its inspectors, that all schools (whether public or private) sharing in the grant comply with the conditions on which it is given. This, indeed, is the whole (though no doubt powerful) operation of the code, which affects school management not otherwise than this, that, subject to the limitations of section 67 of the Act, any school may obtain a share of the Parliamentary grant if the managers shall comply with the conditions therein prescribed, and otherwise not. It will be observed, on reference to the Act, that all the powers and duties of the Board of Education stand on specific enactments, and that they chiefly regard the division and conjunction of parishes, the election of School Boards, making suggestions to the Government for the distribution of the grant in Scotland, the institution of new public schools to supply deficiencies in the means of education in particular parishes and districts, and do not with respect to management subject the School Boards to any interference or control. Some special powers and duties are conferred or imposed on them—as, for example, by the conscience clause—but none, so far as my memory serves, enabling them to supersede or control a School Board in the management of its schools. Clauses 34 and 36 are instructive illustrations of the nature of the functions and powers of the Board of Education. By the former, they are enabled to test the accuracy and completeness of the returns relating to the means of education already provided by existing schools, whether public or private. This was necessary to enable them to determine what amount of Public School accommodation ought to be provided in the several parishes or districts. By the latter they are enabled to insist that every school established under the Act shall be efficiently maintained, and to prevent any School Board from practically frustrating the statutory determination respecting the requirements of its district by the expedient of simple neglect or discontinuance. I have adverted to this topic of the supremacy of the School Boards in the matter of school management, although no controversy is here directly raised upon it, because I think it is important to proceed to the consideration of the actual dispute with an accurate and clear view of the position of School Boards in this matter. That position, in my opinion, is that with regard to everything implied in the notion of school 'management' they are supreme, and responsible only to their constituents, like other representative and popularly elected bodies. It is almost unnecessary to express, what so clearly goes without expression, that they will not be permitted to transgress the law of the land, or to violate the legal rights of others. This, indeed, is a condition of all management and conduct, even the management which every one has of his own household and private affairs. The resolutions complained of are, on the face of them, acts of school management and nothing else, and as such were, according to the views which I have expressed, within the power of the School Board, unless they shall appear to involve a transgression of some public law or a violation of some legal right. And *first*, Do the resolutions involve any violation of public law? It was not maintained that they do, and it is indeed very clear that they do not. The policy or expediency, with reference to the efficiency of the school and the educational requirements of the parish, of the change thereby directed to be made in the conduct of the school, is a question on which there may be difference of opinion. But it is a question for the determination of the School Board as a board of management elected by the whole ratepaying population of the parish, and they having determined it, this Court has no authority whatever to interfere with their judgment. Such interference would imply a power and therefore a duty on the part of this Court to assume a supervising or controlling power with respect to the management of all the public schools in the country, than which nothing could be more at variance with the Act of Parliament which conferred the management on the people at large through the medium of boards popularly elected at short intervals without a suggestion of any supervision or control by this Court. *Second*, Do the resolutions violate any legal right on the part of the pursuer? On this question (as on the last) I lay aside in the meantime the matter of fees, which, as depending on a distinct clause of the Act of Parliament, I shall consider separately. In regard to the other matters embraced by the resolutions, the pursuer's case is that he is thereby prejudiced with respect to his 'tenure of office' as 'by law, contract, or usage secured' to him at the passing of the Act of 1872, contrary to his rights under section 55 of the Act. He refers to the manner in which the school was conducted at the date of his appointment, maintains that the terms of his appointment implied a contract for the continuance of the arrangements then subsisting, and contends that this constituted 'tenure of office' in the sense in which that expression is used in section 55 of the Act. I cannot assent to this argument. I think it clear that the expression 'tenure of office,' as used in section 55, means simply

duration of office, or the time for which it is held by law, contract, or usage. The pursuer's counsel referred to the meaning attached to the word 'tenure' as used in the feudal law, but I cannot admit the analogy. To say that a parish schoolmaster holds office by the 'tenure' of teaching Latin and Greek in a separate class-room during so many hours a-day would be an unfamiliar, not to say a strange and unnatural, use of language. A parish schoolmaster held or had 'tenure' of his office *ad vitam aut culpam*, but a change in the mode of conducting the school, or in the branches taught—whether by reduction or addition—made by the managers of the school (the ministers and heritors) in the due course of management, was certainly not objectionable as a change of his 'tenure' of office. It was, on the contrary, implied in the appointment of every parish schoolmaster that he should submit and conform himself to the lawful management of the managers, and I should greatly doubt whether an express contract, whereby the managers bound themselves to make no change of management—however expedient or even necessary in the interests of the parish—would have been lawful or binding. A public body is not entitled so to tie itself by contract as that it shall be incapable of duly performing its public duty. But there is here no express contract, and the pursuer's case is therefore this—that the conduct and management of the school, as subsisting at the time of his appointment, must continue during his tenure of office, unless he shall consent to a change. I think the proposition is unreasonable and untenable, for it would paralyse the action of the managing body; and certainly no such intention is expressed or implied by the language of section 55 of the statute. It is not unnatural that the pursuer should feel hurt by the action of the new managing body in confining him more than formerly to the primary and proper purposes of an elementary school, supported by parish rates, and withdrawing him to a corresponding extent from the adjuncts of the higher branches. It was always considered a valuable feature of the parish schools of Scotland that, while instituted and maintained for the purpose of providing elementary instruction, their teachers were competent to give, and, compatibly with the other and more primary duties of the schools, found leisure to give, higher instruction to those (always a small percentage of the children) who desired and were able to receive it, and this feature will no doubt be preserved under the new management. But the system pursued in the Kelso school was at least open to serious question, for according to it the parochial schoolmaster was altogether withdrawn from the elementary school, and his whole time and labour devoted to teaching, in a separate building, the higher branches to 'boys intended for professional life' (Condescendence 1), and 'pupils drawn from a different social class' than were the children attending the elementary school (Condescendence 4). The statutory managers of the school having, with their knowledge of the locality and of all the circumstances necessary to form an intelligent judgment, determined that it is in the interest of the education under their charge to change the system, and to put the school on the same footing with board schools in general, I cannot presume to form an opinion that they have acted injudiciously. The general arguments on the one side and the other are obvious and trite enough, but to apply them to the particular case, and to strike the balance with a due regard to all the circumstances proper to be considered, is a task for which I am personally unqualified and judicially incompetent. I assume, as I think I am bound to do, that the proper authority has rightly judged of a matter which may be delicate and difficult, but is undoubtedly, in my opinion, within their province and duty to determine. And assuming this, I have no difficulty in holding that the feelings of the schoolmaster, though the furthest in the world from being reprehensible, cannot be allowed to prevail over the deliberate judgment of the board. The School Board will no doubt consult, and properly attach high importance to, the opinion of the teacher with reference to any contemplated change of school arrangements. But when his professional feelings appear to be in conflict with what the board regard as the true interest of the parish, it is not unreasonable that his opinion should be regarded with less confidence than it usually commands. With respect to the school fees, the pursuer's case is that the board have, by reducing the scale of 1855, which was in observance when he was appointed, prejudiced him in his emoluments, as secured to him by law or contract, contrary to section 55 of the Act. But (1st) I am not of opinion that the contract, express or implied, with the pursuer on his appointment, imported an obligation on the part of the heritors and minister to continue either the teaching or the fees on the then existing basis during his tenure of office, for such an obligation would have been in effect a renunciation for themselves and their successors of a great part of the management of the school committed to them by statute. (2d) By section 53 of the Act of 1872 the School Board is directed to fix the school fees, which are ordered to be paid to the treasurer of the board. I do not know, and it is probably still uncertain, whether the revenue of the school will be increased or diminished by the reduction of the scale. If the result shall be an increase (whether by the greater gross amount of the fees themselves or by a larger share of grant earned), there will be money enough to make good the pursuer's 'emoluments,' whatever meaning shall be attached to the term, and if it shall be a decrease, the deficiency must be made good by rates under the provisions of the Act. In neither case can the pursuer complain of the reduction as a violation of his right, which is only that his 'emoluments,' as secured to him by law or contract at the date of the Act shall not be prejudiced. I have already expressed my opinion that the continuance of the scale of fees of 1855 was not secured to him by law or contract; but assuming this opinion to be erroneous, the result would only be that his emoluments are, for the purpose of being made good to him by the board out of the school fund, to be estimated on that footing as at the passing of the Act. For I think it is impossible to maintain that section 55 overpowers section 53 to the effect of disabling the School Board from fixing the school fees during the tenure of office of a teacher appointed before the Act, and entitles such teacher directly to draw the fees according to the scale which was in observance at the passing of the Act. This view would of course also imply that the branches to be taught, and the time to be given to them respectively, should also be unchangeable during the teacher's tenure of office. Such a sacrifice of all other interests to

those (real or supposed) of the teacher, would be unreasonable, and I find nothing in the Act to countenance it. Therefore, without deciding in this case what claims the pursuer may have against the board under section 55, I have no doubt whatever that the board acted within their powers, and without violating any legal right of his, when they reduced the school fees. The conclusion for damages, which rests on the erroneous, as I think, assumption that the School Board have done the pursuer an injury, I must of course hold to be untenable."

The pursuers reclaimed, and argued (1) That the School Board had not power to abolish the distinction between the grammar school and parish school, thereby altering the whole character of the institution; (2) That in doing so they had violated the provisions of the 55th section of the Education Scotland Act 1872.

The defenders argued that they were quite entitled in law to make the changes which they did. The action, so far as founded on the 55th section of the Education Act, must be dismissed, for to claim under it the pursuer required to show specifically the emoluments at the date of the alterations complained of and at the date of complaint.

At advising—

Lord Deas—The pursuer in this case was before 1858 classical master in the Dumbarton Academy, and in that year he was appointed rector of the grammar school and master of the parochial school in Kelso—the grammar school then forming part of the parish school. From that time till recently the pursuer performed the duties of rector, and taught classical and other branches of higher education, and, with the assistance of another, he also taught the more elementary branches of education. The School Board of Kelso recently made alterations in the regulations of the school, to the effect that the higher branches should not be taught at all, or at all events should be subordinate to the elementary branches. This resolution of the School Board is what Mr Hunter objects to, and he seeks to reduce the minutes of meeting in which they are embodied. It is impossible to doubt that Mr Hunter dislikes the change. It is very natural that he should do so, for his position and standing in his profession are changed, and his acquirements are such as to qualify him for much higher work than he is now called upon to perform. But although I acknowledge that there is hardship, I am clearly of opinion that the Education Act of 1872 fully authorises the School Board to make the changes which they have made, and that therefore they are entitled to be assoilzied. That is all which I think it necessary to say.

Lord Ardmillan—The action before us is at the instance of Mr Hunter, teacher of the parochial school of Kelso, who was appointed in 1858 by the heritors and minister. The conclusion of the action is for reduction of two resolutions of the School Board of Kelso, acting under provisions of the statute of 1872, and for damages to the extent of £5000. The resolutions are alleged to have been illegal, and *ultra vires* of the School Board, and the damages are claimed in respect of wrong done by such unlawful resolutions.

If the resolutions complained of,—the terms of which I need not again repeat,—were not illegal and *ultra vires*, then the pursuer has no right to claim reparation as for a wrong, and the conclusion for damages cannot be sustained. If his emoluments as teacher shall be ascertained to have been injuriously affected by the resolutions of the Board, there may arise a question in regard to compensation. No such question is, however, now before us. This action is for reduction, and for damages in respect of wrong done, and injury incurred, up to the date of action. The first resolution complained of was in January 1874, the second resolution was on 2d September 1874. The resolutions were acted on in the subsequent part of September 1874, the school being opened on the 21st September 1874. This action was raised on the 12th of October 1874. The pursuer claims £5000 for loss and damage suffered by him up to the date of the action, that is, between the beginning of September and the 12th of October—a large sum, and a short period. The claim is not put on the record, and it cannot now be fairly represented as a claim for compensation for loss of emoluments under the statute. The recognition of a right to compensation for loss of emoluments assumes the validity of the act of the Board. But this action is for reduction of the act of the Board as illegal and *ultra vires* "null and void and of no avail," and for damages in respect of such unlawful act. If the pursuer has a good claim to compensation we have no desire to prejudice it, and no decision in this action can operate to his prejudice in regard to such a claim. The most important elements in the consideration of such a claim for compensation do not yet exist. We are not informed, and I, at least, have no idea, what effect the resolutions complained of will have on the amount of school fees—whether the amount of fees will be increased or diminished by the change effected. The fact whether there is any loss to be compensated has not been ascertained.

On the question raised and argued on the construction of the 55th section of the Act of 1872, I confess I have not felt any difficulty. Reading that section along with the other sections of the statute, I agree entirely in the construction adopted and explained by Lord Young. I have no doubt of the power of the School Board under the Act to do all that they have done here, and no doubt of the lawfulness of what they have done. It appears to me impossible to construe the words "tenure of office" in the 55th section as conferring on the teacher of a parochial school, appointed previous to the Act of 1872, a right to insist on maintaining, without change, the same arrangements in the conduct and management of the school, the nature and extent of the education, and the amount of fees exacted, as subsisted at the date of his appointment. By no fair construction of the words "tenure of office" can the claim on the part of the teacher of a power to control the management, and to defeat and defy the School Board, be supported. The powers of direction and management given to the School Board under the Act of 1872 are necessarily wide, and the use of these powers for the introduction of elementary education is the very thing intended. The main object of that statute was to secure, to as large an extent as possible, useful elementary education. It was not indeed intended to extinguish or supersede the higher education in all schools under the atatute. Provision is made for maintaining, in certain places, and under certain circumstances, that higher education. But a wide discretion is necessarily left to the School Board. That discretion

may sometimes be difficult to exercise. It may sometimes in our opinion be erroneously exercised, that is, we might be disposed to exercise it otherwise; but if it is exercised honestly and regularly in promoting the objects of the statute, that exercise cannot be held to be illegal and *ultra vires* and wrongous, so as to subject the Board to damages. On this point also I agree in the views expressed by Lord Young. The statute provides protection to teachers appointed prior to the Act against prejudice caused by the provisions of the Act in respect of "tenure of office, emoluments, or retiring allowance." In regard to the tenure of office, as I understand the words, the protection is that such previously appointed teacher shall not be liable to dismissal at pleasure, but shall be only liable to dismissal, under section 60th, for fault, or for ascertained inefficiency and unfitness. The protection in regard to emoluments, if "secured or enjoyed by law, contract, or usage," is by providing compensation; and the protection in regard to retiring allowance is given in the second sub-section of the 60th clause. But apart from compensation, which is not now raised, and cannot now be determined, there is no provision to meet such a case as that now put, of damage said to have been caused by the introduction of elementary education, and the limiting of the higher education in an ordinary parish school. The result of my consideration of the provision of the statute is, that unless the resolutions complained of were contrary to law, and beyond the power of the School Board, there is no ground for the claim of damages. Accordingly, the Solicitor-General found it necessary for his argument to maintain that the question here involved is really the question of power—of the power of the School Board to introduce elementary education, to the effect of limiting to some extent the amount of the higher education, as given at the date of the teacher's appointment. It was even maintained that the Board were bound to take the education up just as it stood at the date of the teacher's appointment, and to continue it without a change. This argument does not commend itself to my mind. There is nothing in the statute to support it, and on general principles I think it is not sound. The heritors and minister were not, in my opinion, entitled to bind their successors to abide, without alteration, by the arrangements which they had chosen to make with the master. There was no contract with the pursuer in 1858 in regard to the mode of conducting or distributing the teaching of the higher or of the elementary education in the school which a Court of law can hold as now binding on the present School Board, or as precluding the School Board from taking the steps here complained of, or as subjecting the School Board to a claim of damages at the instance of the teacher.

The change effected by the introduction of elementary education was, in my opinion, within the power of the School Board, and was according to the true meaning of the provisions of the statute, and was especially in accordance with the aim and spirit of the statute. To maintain that the School Board was bound to continue the whole arrangements for management and teaching of the school, as existing at the date of the teacher's appointment many years ago, and was not entitled to introduce elementary education into such a school, appears to me quite extravagant. The introduction and maintenance of elementary education is one of the primary purposes of the Act of 1872. There may be cases in which, having regard to the special circumstances of the parish or district, a greater or a less proportion of the higher education may be deemed right and expedient. It may even be that in this parish of Kelso there may be reasons why the higher education which had been previously given ought not to have been so seriously diminished, but might well have been continued to a greater extent than has been done. But that is a question not of power but of discretion. With the discretion or expediency of the resolutions we have not the whole materials for decision, and are not entitled to interfere, even though we may have some sympathy with the teacher. It is only if the act of the Board was illegal, *ultra vires*, and wrongous, that damages are claimed or can be claimed by the teacher.

I am therefore of opinion that we should adhere to the judgment of the Lord Ordinary, assoilzing the defenders from the conclusions of this action, but without prejudice to any claim which the pursuer may have for compensation in respect of ascertained loss of emoluments.

Lord Mure—I concur that it was within the powers of the School Board to resolve both that the higher branches of education should no longer be taught in this school, and that the fees should be lowered.

An argument was submitted to us to the effect that the School Board had not power to make those changes, because they came in place of the heritors and minister, who could not have done so. Now, I doubt if any body of heritors could have compelled their successors to carry on any system going beyond the requirements of elementary education, and so I don't think that the heritors could have been prohibited from doing what the School Board have now done. But even if that were not so, I am of opinion that under the Education Act the School Board have full power to do what they have here done.

The only question which remains is whether there is any claim for damages. I agree with your Lordships that there is no claim for damages in the ordinary sense of the word, for the School Board have not exceeded their powers. Under the 55th section of the Act the schoolmaster has right of action for compensation for any prejudice which he may have suffered from lowering of the school fees. I would suggest that that question should be kept open, which it would not be if we were to assoilzie the defenders absolutely from the conclusions of the summons.

The Lord President was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Reclaiming Note for George Duncan Hunter against Lord Young's Interlocutor of 16th December 1874; adhere to the Interlocutor and refuse the Reclaiming Note, but without prejudice to any claim which the pursuer may be able hereafter to establish on the ground of diminished emoluments arising from the proceedings here complained of; find the pursuer liable in additional expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for the Pursuers—Robertson. Agent—David Hunter, S.S.C.

Counsel for the Defenders—Darling. Agent—J. Stormonth Darling, W.S.

Tuesday, March 9.

SECOND DIVISION.

[Lord Shand, Ordinary.

WALLACE *v.* COMMISSIONERS OF POLICE OF DUNDEE AND OTHERS.

Declarator—Interdict—Right of Way—Prescriptive Use—Interruption—Proof.

The proprietor of a close in Dundee, who had absolute ownership under his titles except as to one part over which there was a servitude of light, claimed right to shut up the close and to build upon it.

The Police Commissioners asserted right to the close as a public thoroughfare under their control, and averred prescriptive use of forty years by the public.

Held, on the proof, that the proprietor had proved sufficient interruption to prevent the establishment of a right-of-way by forty years use, and that the control of the close by the police for the purposes of cleansing, lighting, and repairing gives no right to them in a question of right-of-way.

This was an action of declarator and interdict brought by John Wallace, iron merchant in Dundee, against the Police Commissioners of Dundee and others, in which he sought to have it found and declared that a portion of a certain close in Dundee, known as Butchart's Close, extending back from the Murraygate of Dundee for about 160 feet, is comprehended in and forms part of the property of the pursuer, and that he is entitled to shut it up and build upon it. The pursuer further craved interdict against the defenders using, entering, or passing over the said close, or generally from interfering with or molesting him in the full and free use of the close as his property.

The pursuer admitted that the north end of the close, towards the Meadowfield, is subject to a servitude of light in favour of a dwelling house situated there, and he therefore did not claim right to build over that part of the close.

The pursuer produced and founded upon his titles, one of which, dated 12th November 1873, contains the following declaration:—"Declaring always as it is by the disposition in my favour provided and declared, that neither the proprietors of the remainder of the said subjects last before described and not hereby disponed, nor their tenants, shall be entitled to object to the shutting up or building upon the portion of Butchart's Close upon or opposite to the subjects hereby disponed, should my said disponee or his foresaids wish to shut up or build upon the same, and on the other hand, it is also hereby declared that neither my said disponee nor his foresaids, nor his or their tenants, shall be entitled to object to the shutting up or building upon the portion of Butchart's Close upon or opposite to the remainder of the subjects not hereby disponed, should they wish to shut up or build upon the same." He also asserted that the close was his own exclusive property, free from any servitude or other right of passage or any other restriction.

The Commissioners of Police denied that the close in question was the private property of the pursuer, and averred that it was one of the public thoroughfares of Dundee, under the charge of the Police Commissioners, and paved, cleansed, and lighted by them; and further that the close had existed and been used as a thoroughfare and had been known only in that character for upwards of forty years.

The Lord Ordinary (SHAND) ordered a proof, and on the 6th of November issued the following interlocutor:—"Having heard counsel and considered the proof—Finds that for forty years and upwards prior to the raising of the present action, there existed a public right of way for foot passengers through the close or passage known as Butchart's Close in Dundee, between Murraygate and Meadowside of Dundee: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuer liable to the defenders in expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

The pursuer reclaimed, and the Court appointed the case to be heard before seven Judges.

At advising—

LORD DEAS—The pursuer in this case is proprietor of certain subjects in Dundee, which are described in the disposition in favour of his author, William Butchart, dated 13th December 1790, as "All and Haill that tenement of land, back houses, and garden, which sometime belonged to Alexander Watson," "lying in the burgh of Dundee, on the north side of the Murraygate thereof, betwixt the lands sometime of Mr James Fiethie, now of on the west, the lands sometime of Alexander Bower and Samuel Chandler, now of on the east, the common meadows on the north, and the said street on the south parts."

The defenders allege that a lane or close called Butchart's Close, leading through the pursuer's property from the Murraygate on the north to what is now called Meadowside or Meadowside Street on the south, has been used by the public as a public close or street for foot passengers for the period of the long prescription, and consequently that a right of public foot-road exists over it, which the pursuer is not entitled to obstruct or interfere with.

The proof and productions do not furnish us with a precise description of the subjects through which the close runs, without the aid of verbal explanations, for which I was much indebted to the Dean of Faculty, on the one hand, and the Solicitor-General on the other, and which made that description quite intelligible. I do not say that these verbal explanations were essential to judgment, but they removed a certain vagueness which, to my mind at least, was unsatisfactory. Taking the benefit of them, I understand the nature of the pursuer's subjects to be this:—The length of the ground comprehended in the disposition just quoted of 1790, between the Murraygate and Woodside Street, is about 164 feet and a half, and in breadth, between the houses fronting Murraygate and backwards, is from 30 to 35 feet. The ground seems to run from the Murraygate towards Woodside Street in somewhat of a north easterly direction, but which is described in the