Ordinary did not intend to allow a proof *prout de jure* of a verbal lease of five years. If he did I would agree with your Lordships that it would be incompetent. There is a second question—can a verbal lease for five years contain within it a lease for one year? and that also I must answer in the negative.

But it is now alleged that while considering the lease of five years the landlord gave him a lease for one year. That may be proved by parole, and looking to the circumstances and to the fact that there was a garden which he tilled under the eye of the landlord, I think the complainer should be allowed a proof of the bargain for one year.

I think that the clause appointing the respondents to lead in the proof a fair and equitable addition, because they aver that the lease was for this peculiar period, and bring their action as against a tenant.

Lord Mure—I am quite satisfied that on the record, as remodelled, there are averments of two leases—one for five years, and another an interim lease of one year; and therefore the proof must be restricted as your Lordship proposes.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for Andrew Adams and Margaret Adams against Lord Young's interlocutor of 15th October 1875, recal the said interlocutor; find that the averment of the complainer, that Robert Duthie, when proprietor of the subjects now belonging to the respondents, promised and agreed to give the complainer a lease of the said subjects for five years from 4th December 1874, can be proved only by writing or by oath of party. *Quoad ultra* allow the parties a proof of their averments *prout de jure*, the respondents to lead in the proof, and the proof to proceed before Lord Deas on a day to be afterwards fixed by his Lordship; reserving all questions of expenses."

Counsel for Suspenders—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Respondents and Reclaimers—Asher. Agent—Alexander Morrison, S.S.C.

Wednesday, November 10.

FIRST DIVISION.

[Lord Curriehill.

MACFARLANE *v.* SCHOOL BOARD OF MOCHRUM AND BOARD OF EDUCATION FOR SCOTLAND.

School—Teacher—Removal from Office—Education (Scotland) Act, 1872, *sec.* 60, *sub-sec.* 2—*Jurisdiction.*

Held (1) that the Court of Session has jurisdiction to entertain an action of reduction of a resolution of a School Board, confirmed by the Board of Education, removing a teacher from office, under sec. 60, sub-sec. 2, of the Education Act, 1872, where it is averred that the proceedings have not been in conformity with the statute; and (2) that a special report by an inspector of schools under the said section of the statute, upon which a teacher may be removed from office, must deal not only with the state of the school and the scholars, but with the qualifications of the teacher.

Opinions that a resolution of the School Board so confirmed by the Board of Education is final, and not subject to review on the merits.

Opinions that certain averments of malice and oppression on the part of the School Board were not relevant to support such an action.

This action was brought by Mr Macfarlane, schoolmaster of the parish of Mochrum, against the School Board for that parish and the Board of Education for Scotland, for reduction of (1) a resolution of the School Board of that parish, dated January 6, 1875, removing him from the office of teacher; and (2) a minute by the Board of Education, dated February 26, 1875, confirming that resolution.

The material averments of the pursuer were as follows:—"(Cond. 4.) In the month of March 1874 the School Board . . . instructed their clerk to write to the Department requesting that Her Majesty's inspector make a special report regarding the Mochrum public school and its teacher. The inspector subsequently visited the school on 14th April 1874, and made a favourable report, and a government certificate of competency was sent to the pursuer as the result of said inspection. The School Board took no action, however, on said inspection and report." (Cond. 5.) "On 3d June 1874 the School Board . . . resolved to ask for another special report on the Mochrum School and teacher, and they did so without coming to any resolution to the effect that the teacher was inefficient, as they were bound to do in terms of the 60th section of 'The Education (Scotland) Act, 1872,' and although not two months had elapsed since the last report. In consequence of said request Her Majesty's inspector made a second inspection of the school on 27th October 1874, and thereafter issued his report thereon: said report is in the following terms:—

'In accordance with my instructions to report on Mochrum public school under section 66, I visited it on the 14th April 1874. Taking into consideration that it was its first inspection, I was able to report that it made on the whole a fair appearance in elementary work. I was afterwards instructed to report on the school under section 60 (2), and accordingly I again visited it on the 27th October 1874.

'As on the occasion of my former visit, I found that the examination schedule was not filled up, and that there were no registers, no time table, and no pupil teachers, although two candidates had been admitted at the previous inspection.

'There were 70 scholars present, and of these 39 were presented for examination under standards I. II. III. and IV., the same standards under which the scholars present in April were examined. I had no means of determining whether the same scholars were examined under the same standards on both occasions. The following were the results of the examination:—

'Standard I.—13 scholars. Reading and penmanship, on the whole, fair. Spelling and arith-

metic, moderate. Notation and subtraction, very imperfect.

'Standard II.—10 scholars. Reading and penmanship, fair. Spelling, moderate. Notation, very imperfect.

'Standard III.—10 scholars. Reading and penmanship, fair. 4 failed in writing, and none made a respectable pass in arithmetic.

'Standard IV.—6 scholars. Their knowledge of grammar was so imperfect that only 1 was fairly entitled to a pass in reading. 3 failed in writing and 4 in arithmetic.

'Grammar, history, and geography (Article 19 c.) were subjects quite unknown.

'The children under 7 read pretty fairly.

'On the whole, I consider that the resolution come to by the Mochrum School Board is borne out by the state of the school, and the result of the teacher's labours.'

(Condescendence 6) "Said report was not made in accordance with the requirements of subsection 2 of section 60 of 'The Education (Scotland) Act, 1872,' inasmuch as it is not a report upon the teacher, but only upon the school. Said report was also unjust and unfair to the pursuer, owing to its having proceeded on an inspection which was made at a time when, owing to the actings of the School Board, and partly to other circumstances, the school was in a disorganised condition. A few days before the School Board requested the second inspection, they collected the accumulated school fees of three or four quarters, and charged fees which were not only higher than had been customary, but also very much higher than they themselves had advertised would be charged. In consequence of this about thirty of the scholars, chiefly those who were the most advanced, were withdrawn from the school. The School Board next resolved that the school vacation was to commence on 17th June, which was an unprecedentedly early date for an agricultural district, and they directed the school to be re-opened on 27th July, so near the commencement of the corn and potato harvest as to be quite fatal to the regular attendance of pupils in a country parish. The irregularity of attendance was further increased by the outbreak of an epidemic of whooping-cough, by which about fifty of the pupils were kept from school. The School Board had at first directed the pursuer to teach according to use and wont, but after the inspection in April they changed the system, and required the pursuer to teach according to the Scotch Education Code, 1873, and the new system was only beginning to get into working order when the school was broken up for the vacation. The said inspection of 27th October was thus made at a time when it was impossible for any teacher to have got his pupils into a fit state to undergo examination under a new system which had been so recently introduced, and under which, from interruption and irregularity of attendance, the teacher had not proper opportunities for preparing the pupils to undergo an examination. The members of the School Board were well aware of the state of things in the school, and in that knowledge they maliciously and oppressively requested a report from Her Majesty's inspector, with the purpose and in the expectation of obtaining a report from him unfavourable as to the state of the school, and upon which they might therefore venture to dismiss the pursuer. The pursuer believes and avers that the School Board, or the majority thereof, and notably the Rev. William Allan, the parish minister (to whose recent induction into the parish the pursuer, as an elder of the congregation, had been opposed, and who took the leading part both in public and in private in promoting the pretended dismissal of the pursuer), were actuated by malice and ill-will towards him in requesting a report at the time they did, when by their own actings they had thrown the school into a state of disorganisation." (Cond. 7.) "It was quite impossible for the pursuer, from the copy report furnished to him, to know why he should be dismissed, or upon what ground he was being found fault with. Said report does not even bear that he was inefficient; and it refers to a resolution, no copy of which was furnished to him, and of the terms of which he was entirely ignorant. The pursuer has thus been deprived of the opportunity to defend himself, which it was intended should be afforded to him by said Act."

The School Board explained that the visit of the inspector on 14th April was made in the ordinary course of his duty. The only special report was that of 27th October, and the "resolution" referred to therein was the resolution of March 1874 to require a special report.

The pursuer pleaded:—"1. The minute or judgment of the School Board of Mochrum, of date 6th January 1875, ought to be reduced in respect—(1) That the report upon which it proceeded was not a proper report in terms of 'The Education (Scotland) Act, 1872:' (2) That no proper copy of said report was furnished to the pursuer in terms of said Act: (3) That said judgment was malicious and unjust, and proceeded on a report which was itself unjust, and had been maliciously, oppressively, and unjustly obtained by the said School Board at the time it was so obtained: (4) That the whole proceedings of the School Board towards the pursuer in obtaining said report, and in dismissing the pursuer, were oppressive, malicious, and contrary to justice. 2. The minute or deliverance of the Board of Education for Scotland, dated 26th February 1875, ought to be reduced in respect—(1) That it followed upon the inept and wrongous proceedings mentioned in the foregoing plea: (2) That it proceeded upon reasons furnished by the School Board, which were incorrect in point of fact, and which the pursuer had no opportunity of answering: (3) That it was oppressive and unjust to the pursuer."

The School Board pleaded:—"(1) The special report of Her Majesty's inspector not being reduced, the present action is excluded. (2) The School Board's resolution removing the pursuer, and the confirmation thereof by the Board of Education, not being subject to the review of the Court, this action is excluded. (3) The pursuer's averments being irrelevant and insufficient, the action should be dismissed."

The Board of Education pleaded:—"(1) The pursuer's statements are irrelevant and insufficient to warrant the conclusions of the summons. (2) The deliverance of the Board of Education for Scotland sought to be reduced, having been pronounced in exercise of the jurisdiction conferred upon them by the said statute, is not subject to review, and the present action is incompetent.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 17*th July* 1875.—The Lord Ordinary having heard the counsel for the parties on the record which has been closed on the summons and preliminary defences, Finds that the action is not excluded or incompetent on any of the grounds stated in said defences: Therefore repels the defences so far as preliminary, reserving their effect as defences on the merits for future consideration; Appoints the defenders, the School Board of Mochrum, to satisfy the production by the first box-day in the ensuing vacation: And in respect the defenders, the Board of Education, state that they intend to reclaim against this interlocutor—grants leave to them to reclaim, and finds them liable in the expenses of the preliminary discussion, and appoints an account of said expenses to be lodged, and remits the same when lodged to the Auditor of Court to tax and to report.

"*Note.*—The School Board of Mochrum some months ago, under sec. 60 of the Education (Scotland) Act, 1872, pronounced a judgment, which was confirmed by the Board of Education, removing from his office the pursuer, who had been schoolmaster of the parish since 1848. In the present action the pursuer challenges the validity of the judgment of the School Board on various grounds, one of them being that the report of Her Majesty's inspector on which it proceeded was not a proper report in terms of the statute; and another that the whole proceedings of the School Board in procuring the report and dismissing the pursuer were oppressive, malicious, and contrary to justice. And he challenges the deliverance of the Board of Education on the ground that the judgment which it confirmed was inept; that the deliverance proceeded upon reasons furnished by the School Board which were incorrect in point of fact, and which the pursuer had no opportunity of answering; and that it was oppressive and unjust to the pursuer.

"In all the cases of removal of a schoolmaster under the Education Act which have hitherto been before the Court, the validity of the judgment of removal has invariably been assumed, and the only question has been whether the removal was occasioned by such fault on the part of the teacher as to disentitle him to a retiring allowance. In the present case, however, the schoolmaster challenges the validity of his removal altogether, and he concludes for reduction of the minute or judgment of the School Board dismissing him, and of the minute or deliverance of the Board of Education confirming that judgment, and for declarator that he is the teacher of the late parochial school of Mochrum, and that he alone is entitled to fulfil the duties of said office, and to receive the emoluments appertaining to him as such teacher.

"The pursuer has called as defenders both the School Board and the Board of Education, and preliminary defences have been lodged for both defenders against satisfying the production. Several of the pleas are manifestly defences upon the merits, and do not here require to be farther noticed. The pleas which the School Board maintain as preliminary and as excluding the action, are (1) That the special report of Her Majesty's Inspector upon which their judgment proceeded is not reduced; and (2) that their own judgment and the confirmation thereof by the Board of Education are not subject to the review of this Court. The Board of Education pleads that the action is incompetent, in respect that their deliverance which is sought to be reduced was pronounced in exercise of the jurisdiction conferred upon them by the statute, and is not subject to review.

"The objection to the action founded upon the statement that the report of the inspector has not been reduced is, in my opinion, ill-founded. It is not alleged by the pursuer that it is an untrue or dishonest report, or that the inspector was acting maliciously or oppressively in making it; and the report must therefore be deemed and taken to be a faithful, honest, and true report of the result of the inspector's examination. Whether it is a proper report in terms of the 60th section of the Act, and one upon which the defenders were entitled to proceed in removing the pursuer, is another and a totally different question, which in my opinion does not arise, and cannot be discussed as a preliminary defence to this action, which proceeds upon the footing that while the report is a true report of what the inspector observed, it was obtained by the School Board under circumstances which render their applying for it and acting upon it malicious, oppressive, and unjust."

"The other preliminary defences, however, raise questions of difficulty and of great importance in connection with the working of the Education Act, the main question being, whether and how far the judgment of a School Board dismissing a schoolmaster, and the deliverance of the Board of Education in confirming such judgment, are or are not subject to the review of the Court of Session? Now, so far as regards the merits of such judgments or deliverances, that is to say, the incompetency, unfitness, or inefficiency of the schoolmaster, and generally the sufficiency of the grounds upon which the judgment proceeded, it appears to me that all review is excluded. The grounds of removal are, I think, left entirely to the discretion of these statutory boards. The words of the statute conferring the jurisdiction are as follows:—'Any teacher of a public school, appointed previously to the passing of this Act, may be removed from his office in manner following, that is to say, . . . If the School Board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and teacher from Her Majesty's inspector charged with the duty of inspecting such school; and on receiving such report the School Board may, if they see cause, remove such teacher from office, providing that, before proceeding to give judgment on the matter, they shall furnish to the teacher a copy of such report, and that a judgment removing the teacher shall not have effect until confirmed by the Board of Education.' I think the fair, natural, and sound construction of the statute is, that the removal of a schoolmaster is subject to certain checks, to be at the discretion of the School Board, if they shall consider the teacher incompetent, unfit, or inefficient. These checks are, first, the preliminary one of requiring the School Board, before pronouncing any judgment, to procure a report upon the school and the teacher from one of Her Majesty's inspectors of schools.

And the other check is by declaring that the judgment of removal, when pronounced, shall not take effect until confirmed by the Board of Education.

"The intention of the Legislature clearly was (1) to secure that while the administration of the school, including the power of removing the teacher, was to be lodged in the hands of the representative body forming the School Board, such an important discretionary power should not be exercised without due deliberation on the part of the Board, with the assistance of a special report on the school and teacher by an experienced inspector; and (2) that in order to secure still further that justice should be done alike to the ratepayers and the teacher and the school, the confirmation of the Board of Education should be obtained before the judgment of removal could take effect. But I cannot think that it ever was intended that where all these precautions were duly observed the Court of Session should be made a court of review for investigating and discussing the educational requirements of every parish and school district and burgh of Scotland, the capabilities of the schoolmaster, and his fitness or unfitness for the office. And my opinion is not affected by the circumstances that, under the statute the confirmation by the Board of Education cannot be obtained after the lapse of three, or at most *four* years, from the passing of the Act, the existence of the Board being limited to one or other of these periods. The discretionary power will then be exercised by the School Board without the confirmation of any other Board, and unless flagrantly abused it will not be interfered with by the Court.

"In a case somewhat similar which recently arose under the Poor Law Act, which empowers the Board of Supervision to dismiss any inspector of the poor who may in their opinion be unfit for his office, it was held that the deliverance of the Board removing the inspector was final and conclusive, and could not be reviewed on its merits—*Clark* v. *the Board of Supervision*, 10th December 1873, 1 Rettie 261. And in all the cases which have arisen under the Education Act, particularly the cases of *Logiealmond*, 5th February 1875 and 21st May 1875, and *Glenshiel*, 28th May 1875, it was assumed in argument, and I think also in the opinions of several of the judges, that an honest judgment of removal by a School Board, confirmed by the Board of Education, could not be reviewed by this Court on its merits. But in all these cases, as well as in the case of the Board of Supervision, it seems to have been equally assumed that when a case of unfairness, malice, or oppression is stated against the School Board, this Court may interfere. Such interference, however, will not be by way of reviewing the judgment or investigating whether it proceeded on sufficient or insufficient grounds, but by inquiring whether the School Board, in their proceedings, have violated the provisions of the statute or exceeded the powers thereby conferred on them, or have oppressed, or were actuated by malice towards the schoolmaster.

"Nor will it be enough for the schoolmaster simply to say that the School Board were actuated by malice towards him, unless he can also make out that the Board, knowing or believing the school to be temporarily in a state of disorganisation from causes beyond the control of the teacher, maliciously procured a visit and report from the inspector at a time and under circumstances calculated to convey to his mind the erroneous belief that the unsatisfactory state of the school was due to the incompetency, neglect, or inefficiency of the teacher. But if such a case shall be averred by a teacher, I think that it would not be right to prevent him from having his complaint investigated, merely because, in the ordinary case, an honest judgment of a School Board is final under the statute.

"In the present case, I have come to be of opinion that the averments of the pursuer amount substantially to the statement of a case of deviation from the statute, and of malice and oppression sufficiently distinct to entitle him to have it considered. He avers (1) that the inspector's report is not conform to the statute, because it is a report only upon the school and not upon the teacher. Had this been the sole ground of action, I should have hesitated to sustain it, because I think that the report, although not expressly, is virtually a report upon the teacher when tested by the result of his labours. But (2) the pursuer avers that the report was applied for when the school was disorganised by unusual proceedings of the Board regarding the school fees; by an outbreak of whooping-cough, which caused the absence of many of the scholars from tuition during the period preceding the inspection; by a sudden and unprecedented change in the vacation of the school, made by the School Board, in consequence of which, for a long time after the school re-opened in the end of July 1874, many of the children were detained for a considerable time from school by their parents for harvest work and potato-lifting, so that when the inspection took place in October thereafter they were necessarily in a very imperfect state of tuition, and that the Board had changed the subjects taught in the school from those which had been previously in use to the standards of the Revised Code, which it requires some time to render familiar to the scholars. These causes and others, all being beyond the pursuer's control, operated, it is said, to disorganise the school and to cause the scholars to be temporarily in a backward condition at the date of the inspector's visit, and to convey to his mind an entirely erroneous notion of the true average condition of the school, and of his fitness as a teacher; and he says that the School Board being aware of this state of matters, and having conceived personal animosity towards him in consequence of disputes and litigation between him and them regarding his salary and the collection of the school fees, they maliciously asked for the inspection at this juncture, in the hope and with the expectation of getting a report which would justify them in dismissing him. Now, I think that an action for the purpose of inquiring into averments such as these, and reducing the judgment of removal, if they are proved, is not a review of the judgment on its merits, but is an investigation into the honesty of the School Board throughout the whole proceedings in connection with the removal of the pursuer, and that is not excluded by the statute.

"I am therefore of opinion that, so far as the preliminary defences of the School Board are concerned, they are not well-founded.

"As to the defence for the Board of Education, I think that if the allegations of the pursuer regarding the judgment of the School Board are correct—and in the present discussion they must be assumed to be so—the deliverance of the Board of Education confirming that judgment must stand or fall with the judgment itself, although neither malice nor oppression nor irregularity is or can be averred against that Board. If the judgment of the School Board was irregular, malicious, and oppressive, the presumption is that the circumstances were unknown to the Board of Education when they confirmed the judgment, and that had they known all the facts they would have withheld their confirmation. They no doubt allege, although the pursuer does not admit the statement, that they gave the pursuer an opportunity of making any statement which he desired in reference to the judgment before they confirmed it, and it does not appear whether they made any investigations into the allegations which the pursuer now makes as to malice and oppression on the part of the School Board. These, however, are matters for investigation, if hereafter the allegation shall be found relevant.

"The present discussion, however, is not whether the pursuer has made averments in whole or in part relevant, for that is a question as to the merits of the action, but whether the defenders have stated sufficient grounds to exclude the action altogether as incompetent. And, on the whole matter, I am of opinion that the defences stated are not proper preliminary defences against satisfying the production; that they should therefore be repelled, so far as preliminary, reserving their effect as defences hereafter on the merits; and that the School Board should be ordered to satisfy the production. After the production is satisfied, defences will be ordered on the merits, and the relevancy of the averments of the pursuer, and the extent and mode of proof, will then fall to be discussed upon a closed record containing the full and final statements of both parties. At present I express no opinion as to whether all or any of these averments are sufficient, if proved, to entitle the pursuer to decree of reduction. This is not the proper stage for discussing that question. It is enough that a *prima facie* case of malice and oppression is stated to entitle him to have the production satisfied.

"As the defenders, the Board of Education, have intimated their intention to reclaim, they have been found liable in the expense of discussing the preliminary defences."

The defenders, the Board of Education, reclaimed.

Authorities cited—*Clark* v. *The Board of Supervision*, Dec. 10, 1873, 1 Rettie 261; *Morrison* v. *School Board of Glenshiel*, May 28, 1875, 2 Rettie 715; *Brown* v. *Heritors of Kilberry*, Nov. 15, 1825, 4 S. 174; *Ross* v. *Findlater*, March 2, 1826, 4 S. 514.

At advising—

Lord President—The pursuer of this action, Duncan Macfarlane, was teacher of the public school of the parish of Mochrum, but he was dismissed from that office by a minute or resolution of the School Board of the parish, dated 6th of January 1875, which was confirmed by a deliverance of the Board of Education on the 26th of February following. By this action of reduction he seeks to set aside both these resolutions—the resolution of the School Board dismissing him, and the resolution of the Board of Education confirming that dismissal.

The School Board of the parish maintain, among other defences, that their "resolution removing the pursuer, and the confirmation thereof by the Board of Education, not being subject to the review of the Court, this action is excluded;" and the Board of Education plead that their deliverance—"the deliverance of the Board of Education for Scotland, having been pronounced in exercise of the jurisdiction conferred upon them by the said statute, is not subject to review, and the present action is incompetent." These defences are stated as objections to satisfying the production.

The Lord Ordinary by his interlocutor has repelled these defences as preliminary, reserving their effect on the merits for future consideration; and he has further appointed the production to be satisfied. The School Board have acquiesced in the interlocutor, but the Board of Education bring it under review by this reclaiming note; and the question raised is undoubtedly one of considerable importance.

The pursuer was in office as parish schoolmaster of the parish at the passing of the Act of 1872; and he belongs therefore to a class of schoolmasters, who are dealt with in the statute in a somewhat exceptional way. The 60th section of the statute, particularly, provides for the manner in which they may be removed from office. In the event of their being charged with immoral conduct, or cruel or improper treatment of the scholars under their charge, the School Board must prosecute before the Sheriff, and the Sheriff is authorised to entertain the complaint, and to pronounce the schoolmaster to be guilty or not guilty after considering the evidence adduced; and it is further provided that his sentence shall be final and not subject to review.

But there is another class of cases provided for by the 2d sub-section of section 60, with which we are more immediately concerned. "If the School Board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's Inspector charged with the duty of inspecting such school; and on receiving such report the School Board may, if it see cause, remove such teacher from office;" but it is provided that, "before proceeding to give judgment on the matter, they shall furnish to the teacher a copy of such report," and also that their judgment is to have no effect until it is confirmed by the Board of Education. Now, it seems to me that although there is nothing said in this sub-section about the resolution of the School Board confirmed by the Board of Education being final and not subject to review, it still must be held to be quite as much so as a sentence of a Sheriff under the first sub-section would be. In short, I think that in the case of a Board of this kind, appointed by statute, and vested with a jurisdiction which does not belong to any court in the kingdom, and which is rather of an administrative than a judicial character, it is a matter of necessity that their

decision should be final, and should not be reviewable in a court of law.

But the pleas which are stated both by the School Board and by the Board of Education proceed upon a failure to distinguish between the review of a judgment of this kind by a court of law and the reduction of such a resolution or sentence as we have before us on the ground of incompetency. The School Board of a parish and the Board of Education are both of them the creatures of statute. They can do nothing except under statutory authority. They can exercise no power whatever, except that which is given to them by this statute; and if they do not conform to the conditions upon which the statute authorises them to exercise that power, then they are no longer acting under the statute, and their proceedings would be liable not to be reviewed, but to be set aside as incompetent. The same observations would apply to the sentence of a Sheriff under the first sub-section of section 60, although these are declared by the statute itself to be final, and not subject to review. If the Sheriff were to proceed to the trial of a schoolmaster for some offence which is not specified in that part of the statute, or if he were to conduct the trial in such a manner as to be inconsistent with what is prescribed in this part of the statute, his sentence would be subject to be set aside beyond all question, as not having the statutory authority which can alone give it validity and effect.

The Board of Education seemed to contend, in the argument which was addressed to us, that they stand in a peculiarly protected position here, as being in effect a department of Government. It appears to me that there can be no distinction of persons as regards a matter of this kind. Whatever is directed to be done by statute must be done as the statute enjoins, and if it is not done as the statute enjoins, this Court will set it aside. Suppose that the Board of Education—the proceedings of which are regulated to a great extent by the 3d section of the Act before us—were to proceed at one of its meetings, in the performance of a duty such as that which we are now considering, to violate some of the conditions which are thereby imposed upon them, it is provided, for example, that two members shall be a quorum—suppose they proceeded to pronounce sentence, or to confirm the sentence of a public School Board, by one of their number only, could it be maintained for one moment that that would have effect? It matters not in the least what the body may be who are to perform the statutory duty; if the duty is statutory, this Court has jurisdiction to determine whether it has been performed in the way that the statute has prescribed; and if it has not, this Court has jurisdiction to set it aside. But that is not review of a sentence in any proper sense of the term; and therefore the pleas which have been stated as objections to satisfying the production are in their form and expression inapplicable to the case before us, if I rightly understand that case,—what I understand to be the main ground of reduction being that the School Board of the parish of Mochrum did not proceed, in dealing with the pursuer, in the manner provided by the second sub-section of section 60.

Now, it is necessary to attend very particularly to what are the alleged deviations from the statute. It does not appear to me that the allegation in the 4th article of the condescendence is of much importance, because I think it sufficiently appears upon the face of that article itself that the report, which is said to have been obtained from the inspector somewhere in the month of April 1874, was not a special report, and was not intended by him to be a special report within the meaning of the 2d sub-section, and therefore the proceedings begin with what is alleged in the 5th article, where it is said that on the 3d of June 1874 the School Board "resolved to ask for another special report on the Mochrum school and teacher, and they did so without coming to any resolution to the effect that the teacher was inefficient, as they were bound to do in terms of the 60th section of the Education (Scotland) Act, 1872." Now I do not think there is any departure from the statute in what is here alleged. I do not think the School Board were under any necessity of coming to a resolution, or recording their resolution in a minute, before they applied to the inspector to give them a special report. What the statute says is, that if they shall consider that the teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school. Now, of course, if by a resolution is merely meant an act of the will, then unquestionably there must have been such before they could go to the inspector. But if by a resolution is meant a recorded resolution—a minute of the body,—then I can see no countenance for that contention in this part of the statute. It is enough that they should make up their minds to have a special report without recording that in their minutes. But then the report which they obtain from the inspector is open to some very serious observations. He reports that he has visited the school, and he states very particularly how many scholars were present, viz., 70,—that 39 of these "were presented for examination under standards 1, 2, 3, and 4, the same standards under which the scholars present in April were examined. I had no means of determining whether the same scholars were examined under the same standards on both occasions." And then he gives the result of the examination; and unquestionably the result was unsatisfactory—that is to say, the scholars appear to have been very little advanced. They do not seem to have learned much; they are not good in arithmetic; they are not good in spelling, and in a great many other things they are very deficient. All that is reported with considerable detail, and in the end he says, "grammar, history, and geography were subjects quite unknown." Now nobody can doubt that that is a very unsatisfactory state of the school; but down to this point of the report there is not a word said about the schoolmaster; and the remaining paragraph is expressed thus, "On the whole, I consider that the resolution come to by the Mochrum School Board is borne out by the state of the school and the result of the teacher's labours." Now, that is the report which is presented to the Board; and a copy of it is furnished to the teacher, the object of which, of course, is that he may be enabled to state any objections that he has to the report, or give any explanations that may be necessary for the purpose of defending himself; and he complains of this report in the first place, that while it is a report upon the school, it is not a report

upon the teacher at all, and that there is nothing stated here against him personally against which he is called upon to defend himself; and in the second place he says that when the inspector states his opinion that the resolution come to by the Mochrum School Board is borne out by the state of the school, he does not know what the inspector means, for he is not aware of any such resolution as is here referred to, and he does not know what that resolution was. Now the answer which is given to this allegation upon the part of the pursuer is somewhat important. It is "admitted that Her Majesty's Inspector made his inspection under said section of the statute on 27th October 1874, and his report is referred to for its terms. The resolution referred to by the inspector is the School Board's resolution of 11th March 1874, to require a special report under the said 60th section of the Act." Now it would appear from this answer that there had been a resolution to require a special report from the inspector upon the 11th of March; and if so, that would be a very sufficient answer to the objection which is otherwise unfounded, that there was no such resolution. But while the inspector's report is certainly quite sufficient to justify the School Board's resolution of the 11th of March 1874 to require a special report, surely the special report itself ought to lead to something further before it can be acted upon. The School Board, when they see the school in a state of inefficiency as they conceive, are entitled to require a special report, and the inspector's special report is that they were justified in coming to that resolution, and that is all the length it goes. Now, that seems a very anomalous and extraordinary result, because the statute contemplates a very different report as a special report. The School Board are to require a special report regarding the school and the teacher from Her Majesty's Inspector of Schools, and here is a report which deals with the school, represents the unfavourable condition in which it appears, and then concludes by saying that that unfavourable condition of the school justifies the School Board in having asked him to make a special report, and there is not a word about the teacher at all. Now, we have seen enough of the working of this Act, and we know enough generally of the subject of elementary teaching and those in whose hands it is vested, to be aware that a school may be in a very unfavourable condition indeed without the fault of the teacher. Such things have been, and will be again; and there cannot be a better illustration than what this gentleman, the pursuer, himself alleges to have been the cause of the bad appearance of his scholars when the inspector visited the school. He says there had been an epidemic of whooping-cough, which had carried away a great many of the scholars for a very long time, that there had been a number of other untoward circumstances that had prevented the scholars from attending the school, and that, in point of fact, from these causes they could not but be in the unfavourable condition in which the inspector reports them to be. Now, that may be all perfectly true, or it may not be true; we know nothing about that at present; but at all events it shows that a school may be in a very bad condition indeed from accidental causes over which the teacher has no control; and certainly a report to the effect that a school is in that condition is not a report concerning the teacher, or stating anything with regard to the teacher that can justify his dismissal under the 2d sub-section, because the ground of dismissal is quite distinctly specified; it must be incompetency, unfitness, or inefficiency. Now, I confess, it appears to me that this was not such a report as the School Board were entitled to use as the ground for removing the schoolmaster from office. The statute, I think, is very distinct upon this subject. The School Board may have formed a bad opinion of the school and of the teacher; indeed, it is almost assumed that before they ask for an inspector's report they have at least an unfavourable impression of the school and of the teacher; and they go to Her Majesty's Inspector for the purpose of having that impression confirmed or removed. It is therefore quite plain that what they must receive from the inspector, in order to justify further action, is a report which shall deal with the teacher as well as the school, and which shall give them ground, which they had not without such a report, for proceeding to remove the teacher from office. If they see cause, they may remove such teacher from office, that is to say, if they see such cause in the report which has been presented to them.

It has been alleged further by the pursuer that the members of the School Board had been actuated by malice in their proceedings against him; and it is said, further, that they have acted oppressively towards him. Now, I have great difficulty in seeing how malice can be any ground, or even any element in a ground, for setting aside such a resolution as this, passed by the School Board and confirmed by the Board of Education. If this teacher was inefficient, and was reported to be inefficient by Her Majesty's Inspector, then it was the duty of the School Board to remove him; and it was the duty of the Board of Education to confirm that resolution. But it is quite possible, and not a thing by any means unknown in practice, that parties should perform an unpleasant duty of that kind, or what would be an unpleasant duty to impartial persons, with a great zest and liking for the duty, or, in other words, maliciously. They may have been gratifying their own private malice at the same time that they were performing an obvious act of public duty. But will that invalidate the act of public duty? Most certainly not. If the thing ought to be done, the circumstance that the person who did it has the greatest rancour and hatred against the object of that resolution, will not make the resolution invalid if it is well-founded in itself. And therefore I dismiss from consideration altogether the allegations of malice in this case. I think they have no relevancy whatever. Whether a case of oppression could be made out, as distinguished from malice altogether, against a public board in the execution of a statutory duty, I give no opinion. I think there is no case alleged here to justify any interference upon our part, except upon the ground which I have dealt with, viz., deviation from the statute; but upon that ground I arrive at the same conclusion with the Lord Ordinary. I think the pursuer has relevantly averred a deviation from the statute, in respect that this is not such a report of the inspector of schools as that inspector was called upon to give, or such a report as the School Board were en-

titled to proceed upon, to remove the schoolmaster; and that being so, the confirmation by the Board of Education can never make it any better. On the contrary, the basis of the whole proceedings being bad, all that has followed upon it must necessarily fall.

Lord Deas—As regards the amount of control that this Court may competently exercise over a School Board in a different form of process from a reduction, I do not think it necessary to say anything. That is a delicate matter, and a matter upon which I rather think there has been some judicial difference of opinion. It is not necessary to go into it here, because this is a process of reduction; and, as applicable to this form of process, I very much agree with nearly all the observations which have been made by your Lordship. More particularly, I agree with your Lordship in thinking that there are here relevant averments of deviation from the statute. As regards the report of the inspector, upon which the School Board professedly proceeded, I am, in particular, of opinion with your Lordship that there is a great distinction between a report upon the state of the school and a report (which is what the statute requires) upon the effieiency of the schoolmaster, more especially if the fact averred by the schoolmaster be true, viz., that the state of the school arose from causes (several of which he specifies) over which he had no control. He says that the School Board, after the lapse of several quarters, during which certain fees had been charged, had suddenly raised the fees beyond what they had ever been before, and beyond the amount which they themselves had advertised, and that from scholars who had been allowed to attend for several quarters without paying fees at all, they had resolved to exact in slump the arrears of fees at a higher rate than they were able to pay, and that in consequence about thirty of them left the school. Then, he says that the whooping-cough was prevalent among the children, and from that cause about fifty more were absent at the time this report was made, making eighty altogether; and there is a third reason which he states for a number more being absent, viz., that the School Board had determined that the vacation should commence at a different time from what they used to do, and to terminate at a different time, viz., at a season of the year (27th July) when the corn and potato harvest was coming on, at which, it is evidently meant to be said, a number of the scholars were usually employed during the vacation. From these causes it is said the number of scholars was very greatly reduced, the absentees including a great many of the more advanced scholars, who were therefore not seen by the inspector.

The pursuer avers all these things, and he avers still more. Perhaps it is not so, though we have nothing to do at present with probabilities; he avers that all that was done on purpose in order to get rid of him. I cannot doubt the relevancy of all that, whatever may be said about malice; and it is always a most delicate matter to know what exactly infers malice in point of law. I agree with the observations made by your Lordship about that,—that it is a delicate matter to define what amounts to malice in cases of this kind; but apart from that altogether, I think if he proves these facts it will show how very different a report upon the school is from a report upon the schoolmaster.

With these explanations, I entirely concur with your Lordship's observations, and I think it unnecessary to say any more.

Lord Ardmillan—This is an important question. The action is one of reduction of the judgment of the Mochrum School Board, confirmed by the Board of Education, and it cannot be otherwise therefore than an important one. I concur in the result of the opinions of both your Lordships, and that is in appointing the production to be satisfied, and in declining to dismiss the action *in limine* as altogether unfounded. I have on former occasions expressed, and I still entertain, the opinion that the judgment of the School Board under the 2d sub-section of the 60th clause of the statute, proceeding on the report of Her Majesty's Inspector of Schools, and affirmed by the Board of Education, is not reviewable on the merits. Where the ground of removal is stated, and that ground is within the provisions of the statute, and the procedure has been according to the statue, I think that review is excluded. The judgment of the Board is conclusive on the fact of inefficiency. The matter is within the power and the discretion of the School Board, and is left to their decision, qualified by the checks afforded by the inspector's report, and by the supervision and the deliverance of the Board of Education.

When the procedure for removal of a schoolmaster is according to the enactments of the statute, in my opinion the law trusts the School Board, and correctly and wisely abstains from interfering with the discretion of the Board. But if the School Board has not obeyed the statute, which alone is the source of the jurisdiction exercised,—if the statutory pre-requisites to a judgment of the Board have been neglected or omitted, if the judgment is not according to the statute, but is pronounced in disregard of its provisions, then the protection of the statute cannot cover the judgment, and cannot avail the Board.

Review in the proper meaning of the term is, in my opinion, excluded; but if the judgment is contrary to the statute, it can on that ground be quashed or set aside. Deviation from the statute on the part of a body created by the statute is cognisable by the Court, and that is sufficient in the present position of this cause, for the defender's pleas are reserved to be considered on the merits. All that we now do is to open the door of the Court for consideration of the case presented by the pursuer. I need not repeat what your Lordship in the chair has so well said. I agree in the view which your Lordship has stated of the procedure. I do not place my opinion on the absence of a recorded resolution prior to the inspector's report. But if there was no resolution by the School Board in regard to the efficiency of the teacher prior to the inspector's report, but if that report on the 27th of October, giving the result of his visits on the 14th of April and on the 27th of October, is to be read without such prior resolution, then the report says nothing of the efficiency or inefficiency of the teacher. Now so far as yet appears there was no prior resolution in regard to the teacher to the effect required before his removal. At all

events we have it not before us. And if there was no such resolution, then the report does not set forth inefficiency at all, because the report only refers to the non-existing resolution; and nothing more than the report was communicated to the teacher. Thus the ground of removal has not been reported on or made known as directed by the statute. If the report of the inspector had stated distinctly that the teacher was inefficient, the absence of a recorded prior resolution would not in that case have been a fatal objection. If, on the other hand, there had been a recorded prior resolution that the teacher was inefficient, then the omission of the matter in the report, expressed as it is apart from the expression of the resolution, would not have been so, for then the report would have supported the existing prior resolution. But here, in the absence of a resolution, the report, which only refers to a resolution, and does not distinctly set forth inefficiency, appears to me to be defective. Although it is a very intelligent report, and evidently the production of a very intelligent inspector, still it is not a report which, read alone, declares the schoolmaster inefficient. It requires to be read with reference to the resolution referred to at its close,—"I consider that the resolution come to by the Mochrum School Board is borne out by the state of the school, and the result of the teacher's labours." Now, there being no such resolution, these words have no meaning as bearing upon the efficiency or inefficiency of the teacher. Had there been such a resolution, these words would have confirmed it, but there is apparently (and at present) no such resolution. I therefore think that the pleas of the defenders against satisfying the production have been rightly repelled by the Lord Ordinary. Viewing them as foreclosing the action, I think the Lord Ordinary has properly repelled them.

But another objection has been stated, and I cannot give effect to it. I do not proceed at all upon the separate ground that malice is here alleged. The malice that is alleged is set forth in this way—"The pursuer believes and avers that the School Board, or the majority thereof, and notably the Rev. William Allan, the parish minister (to whose recent induction into the parish the pursuer, as an elder of the congregation, had been opposed, and who took the leading part, both in public and in private, in promoting the pretended dismissal of the pursuer), were actuated by malice and ill-will." Now, I cannot pay any regard to that. I quite agree with your Lordship in the chair that these allegations against the School Board, and specially against the minister of the parish, might perhaps avail to support an action of damages, with which we have nothing to do, but cannot avail to support reduction of the judgment of the School Board, confirmed by the Board of Education. If the malice were proved, the judgment might be right, although there was malice in the minds of one or more of the parties. But I have some doubt as to whether that part of the case can be really insisted in. It is suggested, though it is not distinctly alleged on the record—but it was again suggested at the bar—that the pursuer had no opportunity of defending himself before the Board of Education. This is very improbable, and it is specifically and distinctly denied by the Board of Education; and one of the results of permitting this cause to proceed will be to ascertain the truth on this point, and to permit the pursuer to show, and to permit the Board to show on the other hand, whether he had or had not the opportunity of defending himself before the Board of Education. The averments of the Board of Education are most specific. They state the documents he put in, and the explanations he offered. He says he had no opportunity, and it will be one of the advantages of letting the case proceed to see whether that statement, which is made on the pursuer's own knowledge, and must be known to himself, is truth or falsehood.

Lord Mure—I so entirely concur in the views of your Lordship in the chair, both in regard to the general rules for the interpretation of a statute of this description as to the finality of proceedings on the part of the Board, and as to the application of these rules to the circumstances of this case, that I really feel it quite unnecessary to say more than that I entirely concur in your Lordship's opinion. But I may be allowed to say, with reference to the first of these resolutions, that it appears to me that the decisions of this Court and of the House of Lords on the School Act of 1803 (43 Geo. III.), with reference to these matters, lay down rules which are quite sufficient for our guidance in dealing with this case as to the incompetency of this Court entertaining a reduction of this sort. I allude to the well-known case of *Brown* v. *The Heritors of Kilberry*, 15th November 1825, in this Court, and to *Ross* v. *Findlater*, March 2, 1826, both reported in 4 Shaw, and the first of which was affirmed in the House of Lords, apparently without the slightest hesitation, on 12th June 1829, by Lord Chancellor Lyndhurst (3 Wilson and Shaw 441). There, although the proceedings of the Presbytery were declared final, and not subject to review by any court, civil or ecclesiastical, owing to a deviation from the course which the statute requires as to the mode of proceeding this Court was held to have jurisdiction to entertain a complaint. In this case there is an allegation that the report which the statute makes it essential to be laid before the School Board as to the conduct of the teacher was not in compliance with the statute. That, I apprehend, is a very serious objection indeed, and one which quite entitles the party who makes it to have the proceedings inquired into.

The Court adhered.

Counsel for the Pursuer—Balfour — Jameson. Agent—George Cotton, S.S.C.

Counsel for the Board of Education—Dean of Faculty (Watson) — Trayner. Agent — Donald Beith, W.S.

Counsel for the School Board—R. V. Campbell. Agents—Maitland & Lyon, W.S.