si sine liberis, in England they do not. However that may be, the case of *Young* v. *Robertson* has settled questions of this nature in the case of proper lapsed shares. I should have thought that a lapsed share was properly a share lapsed by the death of the testator, but *Young* v. *Robertson* goes beyond that. Here, however, the case is different from the general one, for it seems to me that the "share" that the children are to take is the share that the mother would have taken in a certain event which has not happened, viz., her survival of the term of payment. Now, this would have included one-third of Mrs Fife's share of the estate. I see here no lapsed share in what I consider the proper sense of the term, and I think the children of Mrs Brown should participate. That is the way in which I should have construed this settlement, though not without some difficulty, but your Lordships have decided the case otherwise.

The Court therefore answered the first question in the negative, the second in the affirmative, the third in the negative, and found it unnecessary to answer the fourth.

Counsel for First Parties — Kinnear — Mackintosh. Agents—J. & J. Ross, W.S.

Counsel for Second Parties—Balfour—Robertson. Agents—Murray, Beith, & Murray, W.S.

Counsel for Third Parties—Jameson. Agents—Murray, Beith, & Murray, W.S.

Friday, October 31.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

SOMERS *v.* THE SCHOOL BOARD OF TEVIOTHEAD.

School—"Old" Schoolmaster—Fees—Agreement—Power to Contract—Education.

An "old" schoolmaster agreed in 1873 with a School Board, appointed under the Education Act, to accept of a fixed salary, with in addition "the Government grant in so far as that exceeded £20." Subsequently a different Board in 1876 resolved to limit the proportion of Government grant to the average sum the teacher "has received for the last three years." *Held*, in an action of declarator raised against the Board by the schoolmaster, that the agreement between the parties must receive effect, as it had not been *ultra vires* of the Board, and was binding upon their successors.

This was an action raised by John Somers, teacher of the public (formerly parochial) school of Teviothead, against the School Board of that parish, concluding for declarator that the pursuer, so long as he continued to perform the duties of teacher of the public school of Teviothead, was entitled under an agreement to that effect, constituted by minute of the School Board dated 22d July, and holograph letter of acceptance by him dated 6th August 1873, and what followed thereon, to payment by the defenders and their successors in office of an annual salary of £95 sterling, as also the whole Government grant earned in respect of the school in so far as it exceeded £20 per annum. There were also conclusions for implement of the agreement and for payment.

The two letters referred to in the summons were as follows:—

"*Hawick, 22d July* 1873.

DEAR SIR,—At a meeting of the Board held yesterday it was resolved that your salary shall 'consist of the sum of £95, and that in addition to this you should get the Government grant in so far as that exceeds £20.'—Yours, &c.

"ROBERT PURDOM, *Clerk.*

"*Teviothead, 6th August* 1873.

DEAR SIR,—I accept of the terms of salary stated in your letter to me of date 22d July last, but prefer that I should be allowed to draw my salary in the old way till 31st October, which is the end of the school year.—Yours, &c.,

"JOHN SOMERS."

On 2d October 1876 the Board passed a resolution in the following terms:—"That the proportion of the Government grant for the school which the teacher is to receive be for the present limited to the average sum which he has received for the last three years, reserving to the Board the allocation of any sum that may be earned in addition to such average—this arrangement to begin after the expiry of the present school year."

Allegations were made by the defenders as to the state of efficiency of the school, which were denied by the pursuer, who alleged that there had been no material change of circumstances.

The pursuer pleaded—"The agreement founded on being binding on the defenders, the pursuer is entitled to decree—(1) of declarator; (2) of implement; and (3) of payment, with interest and expenses, all as concluded for."

The defenders pleaded, *inter alia*—"(2) The defenders are entitled to absolvitor, with expenses, in respect—1st, that the Government grant is subject to their disposal; 2d, that the resolution founded on has been competently and effectually altered by the defenders. (4) The pursuer's vested interests being saved entire, and the defenders having done nothing to interfere therewith, but, on the contrary, having always been willing to concede these to the pursuer, the present action is unfounded, and ought to be dismissed."

The Lord Ordinary (RUTHERFURD CLARK) pronounced an interlocutor declaring and decerning in terms of the libel. He added this note:—

"*Note.*—The pursuer became schoolmaster of the parish of Teviothead in 1871. In July 1873, after the passing of the Education Act, his salary was fixed at £95 per annum, with the addition of the Government grant in so far as it exceeded £20. The question is, whether the pursuer is entitled to claim that salary during his tenure of office, or whether the defenders are entitled to reduce it?

"The defenders did not contend that they could touch the salary of £95, which they alleged represented the emoluments which the pursuer was in use to draw before the passing of the Education Act. But they maintained that they are entitled to reduce the proportion of the Government grant or to withdraw it altogether.

"In the opinion of the Lord Ordinary, the pur-

suer is right. He thinks that the true meaning of the transaction of 1873 was that the pursuer should receive the emoluments then fixed so long as he held office. No destinction is drawn between one part and another, and in the absence of express stipulation it is difficult to hold that one part was to be permanent and the other at the pleasure of the defenders. It appears to the Lord Ordinary that the salary was attached to the office, and was therefore as permanent as the office.

"A subordinate question was raised with reference to a part of the Government grant called the 'Distance Grant.' The allowance was made after 1873, but in the opinion of the Lord Ordinary it is a mere addition to the existing Government grant accorded in consequence of the greater difficulty, and therefore of the greater merit, of earning it."

The defenders reclaimed, and argued — The policy of the Education Act indicated the intention of the Legislature as to the binding character of the acts of a School Board on its successors. A shifting body of persons were erected into a School Board who were subject to the varying views in this manner of the ratepayers. [Lord Justice-Clerk—Can a School Board bind their successors to any arrangements made as to a bargain estimating emoluments?] It could not be denied that so far as it was a bargain about vested interests it was binding. The Act so provided. But it was different where a bargain was made, not as to vested interests, but as to an extra sum to be paid.

Argued for the respondent—The "old" schoolmaster held a *munus publicum*, and therefore he enjoyed a right to his emoluments not *ex contractu* but in virtue of his office. The *Carluke* case settled the right to fees generically, not to the fees as they stood in 1872. There were certain things reserved to the teacher by law, and these could not be altered save by express contract. This being a bargain for the salary of a public office, was as binding as the original right in place of which it came.

Authorities — *Morrison* v. *Abernethy School Board*, July 3, 1876, 3 R. 945; *Macfarlane* v. *School Board of Mochrum*, May 27, 1875, 12 Scot. Law Rep. 457; *Fraser* v. *School Board of Carluke*, June 14, 1877, 4 R. 892.

At advising—

Lord Justice-Clerk—I am quite satisfied with the Lord Ordinary's interlocutor. I do not at all dispute the absolute power of administration given to the School Board by the statute or their fitness to discharge the duties of their office. But we have here to deal with vested interests created before the present Board came into existence—interests as to which the pursuer was entitled to deal with the Board and the Board with him. He was entitled to get the school fees—I do not mean that they were to be collected by himself, but through the medium and machinery of the School Board and their treasurer. Instead of that it was arranged between the two parties in July 1873 that he should receive an equivalent, and an agreement was entered into to that effect.

Since that a new School Board has been elected and come into power—the argument is that they are not bound by what the late Board did in this matter. If there were any foundation for such a contention, I should say that the Act was very imperfect. School Boards are, I think, as much entitled to contract in regard to matters within their province as any other public bodies.

I regret the controversies which appear to have given rise to this litigation, and I think the parties would have done better to have settled their differences in a spirit of mutual accommodation.

Lord Ormidale—I also think that the Lord Ordinary has come to a right conclusion. *Firstly*, Was this a contract between the schoolmaster and his Board? It seems to me that it was so both as regards the form and the substance. There can be no doubt that the resolution of which we have seen the terms was actually passed, but that it was not to have effect until it had been acceded to by the schoolmaster. His assent was given. The clerk to the Board called on the schoolmaster to know his decision, and learned that he agreed to the terms offered. *Secondly*, Was this a contract into which the School Board could validly enter? Was there any doubt of their power thus to contract? I do not think there was. In place of ascertaining from year to year the amount of the fees (fees which by the statute the School Board were bound to hand over to the schoolmaster in some form or another), these fees were commuted for a fixed sum of £95; but one provision in the arrangement—and an important provision—fixed that the teacher was also to get all the Government grant above £20. Now, as to all these matters it is evident that the School Board had most important interests, and the arrangement entered into seems to have been equitable and fair. As to the Government grant, that might in amount exceed what had been got in previous years, or it might be withdrawn altogether; but all these considerations were fairly submitted to the parties who, with them presumably in view, entered into the agreement. On both sides there were contingent risks in favour of and against the terms of the agreement; so we can only hold that these risks were duly weighed.

But an argument has been advanced that while the schoolmaster might be bound, the Board were not; or to put it otherwise, that the bargain was one-sided, for the schoolmaster could at any moment get rid of it by resigning, while the Board could not get rid of their bargain. That may be quite true, but it does not signify, for a similar state of matters may be seen in many agreements. We might take an example from the judicial bench itself, where the Judges might any day resign but could not be dismissed.

Lord Gifford concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Millie. Agents—J. & A. Hastie, S.S.C.

Counsel for Defenders (Reclaimer)—Trayner—J. A. Reid. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.