ment by the pursuers of their rateable share—that is, five-sixths of the annual duty of £10 payable to Lord Blantyre—would not give rise to a claim of contribution against the defender, because the defender would be liable to Lord Blantyre for the remaining one-sixth, and would not be liable in any further payment whatever.

"I think therefore that it must be taken that the pursuers in making periodical payment of the full feu-duty of £10 did so not in avoidance of a personal action, but to avoid real diligence or the forfeiture of their feu.

"On this assumption I am of opinion that the pursuers' claim of relief is well-founded. Although in all questions of the superior's rights and legal remedies his feu-duties are to be treated as part of his reserve estate, yet in questions between the tenants, who are each in their several degrees responsible to him, I apprehend that his position is that of a creditor, and that the debtor who discharges the obligation has all the equities which the general law of the country accords to an obligant who is bound along with others. He has at least the 'benefit of division.' This, I think is implied, if not expressly found, in the opinions delivered in the case of *Guthrie* v. *Smith*, 8 R. 107. Because in that case, while a majority of the Judges held that the feuar who paid was not entitled to an assignation of the superior's real diligence, the decision is rested in the Lord President's opinion on the circumstance that such an assignation might be prejudicial to the superior's security for current feu-duties, and it is there plainly stated that the right of relief does not necessarily and in all circumstances carry with it the *jus cedendarum actionum*. Unless it had been clearly understood that the feuar who paid had a personal claim of relief, I do not think that it would have been at all necessary to consider whether the derived claim to an assignation of diligence ought to be allowed in the particular case."

Counsel for Pursuers—A. S. D. Thomson. Agent—Walter R. Patrick, Solicitor.

Counsel for Defender—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, November 6, 1886.

OUTER HOUSE.

[Lord M'Laren.

WATSON *v.* THE SCHOOL BOARD OF THE PARISH OF AVONDALE.

School—Parochial Side School—Wrongous Dismissal — Compensation — Arrears — Mora — *Parochial and Burgh Schools (Scotland) Act* 1861 (24 *and* 25 *Vict. c.* 107), *secs.* 4 *and* 6—*Education (Scotland) Act* 1872 (35 *and* 36 *Vict. c.* 62), *secs.* 38 *and* 55.

In 1861 the heritors of a parish, acting under the Parochial and Burgh Schools (Scotland) Act 1861 (24 and 25 Vict. c. 107), advertised for a teacher for a certain named school "recently constituted a parochial side school." An applicant was appointed in January 1862, and continued to hold office until 1875, when he was dismissed by the School Board, in spite of remonstrance made by him at the time. In an action at his instance against the School Board raised in 1886, *held* (1) that the pursuer was not barred by *mora* from prosecuting the action to the effect of obtaining, if he had been wrongously dismissed, an allowance to run from the date of the action; (2) that the pursuer was a parochial schoolmaster entitled to the privileges as regarded tenure and emoluments of a principal parish schoolmaster; (3) that he had been wrongously dismissed; and (4) that in the circumstances of the case, and in view of the provisions of the Acts of 1861 and 1872, compensation must take the form of damages.

By notice dated 29th September 1861 a meeting of the heritors of the parish of Avondale was called for the purpose, "on due consideration of the circumstances of this parish in respect of extent, population, and valued rent, of fixing the salary of the schoolmaster, and otherwise determining what may be deemed necessary for the parish under the Act 24 and 25 Vict. cap. 107, subject always to the appeal provided in the Act 43 Geo. III. cap. 54." The meeting was duly held, and it was agreed that the teacher of the East Strathaven School should in future receive a salary of £20 per annum, and the clerk was instructed to advertise for a teacher. The advertisement was in the following terms—"Wanted a teacher for the East Strathaven School, recently constituted a parochial side school, who must be qualified to teach all the branches of education usually taught in first-class parish schools, and also to provide competent instruction in sewing and knitting, &c. In addition to school fees, &c., a salary of £20 a-year, with comfortable house and garden, is provided." James Cumming Watson applied for the office, and after some communication, by letter dated 20th January 1862 intimated his acceptance thereof, and entered on his duties on the 5th February of that year. By minute of the heritors of 8th February 1862, £25 per annum was allocated as salary to the teacher of the said school. He had also Government grant, allowance for pupil-teachers, school fees (amounting to about £50 annually), and house and garden.

Under the School Board the emoluments were commuted for £95, and in addition the use of the house and garden as formerly. In 1875 the Board, on the footing that the pursuer was not an old parochial teacher, but held office at their pleasure only, and thinking the school inefficiently conducted, dismissed him by resolution of 28th October 1875.

In February 1886 he raised this action against the School Board to have it declared that he was at the passing of the Education (Scotland) Act 1872, and had for several years prior thereto, been teacher of the East Strathaven School, Avondale, and as such entitled to the tenure thereof, and to the emoluments and retiring allowance pertaining thereto, as the same were by law, contract, or usage secured to or enjoyed by him, and that the Board were not entitled to dismiss him without securing him in these emoluments and retiring allowance; further, for decree for £110 a-year, payable half-yearly, during his lifetime, and beginning at Martinmas 1875, in which year he was dismissed by the Board; or otherwise, for an annual payment equal to the retiring allowance to which he had

right at such rate as might be settled in the process; or otherwise, for £3000 as damages for illegal and unwarrantable dismissal.

The pursuer averred that he was parochial teacher, and the school a parochial school; and further, that "from the date of his appointment as above mentioned until the passing of the Education (Scotland) Act 1872 the pursuer acted as schoolmaster of the said school, and the school was recognised by the heritors and the Education Department as a parochial side school. The trustees of the Ferguson Bequest withdrew the grant to the said school on the ground that it was a parochial school. For the same reason the trustees of the Burgh and Parochial Schoolmasters' Widows' Fund compelled the pursuer to become a subscriber to the said fund."

The defenders denied that the school was a parochial school, or the pursuer a parochial teacher. They stated—"After the passing of the Education (Scotland) Act 1872 the said school was, under the 38th section of that Act, transferred to the defenders by the minister and managers of the Chapel Church, who were then infeft in said school and the schoolmaster's house. The Chapel Church was not a parish or *quoad sacra* parish church, the said school was not a parochial school or a parochial side school, and the heritors of the parish never had any title thereto, and never expended any money in repairing or upholding the same."

The pursuer further alleged that his dismissal "was unwarrantable and wrongous." This the Board denied, stating that "the pursuer at first refused to obey the intimation of dismissal sent to him by the defenders, but about a month afterwards he left Strathaven, having obtained a situation as teacher in Arran, and for many years no communication of any kind from him reached the defenders. Recently the pursuer intimated a claim of damages against the defenders, which they refused to recognise. The pursuer acquiesced in his dismissal at the time when he the school, and he long ago abandoned any claims he might have in respect of his dismissal."

The pursuer pleaded—"(1) In respect of the pursuer's office, the defenders could not dismiss him except upon the footing of giving him a suitable retiring allowance. (2) In respect of the provisions of the Education (Scotland) Act 1872, the pursuer is entitled to his emoluments, or to a retiring allowance. (3) The pursuer having been without fault wrongously dismissed from his said office, is entitled to damages. (4) Generally, the pursuer is entitled to decree under one or other of the alternative conclusions of the summons, with expenses."

The defenders pleaded—"(1) The pursuer's statements are irrelevant, and insufficient to support his pleas. (2) The Chapel School not having been a parochial side school, but having been transferred to the defenders in terms of the 38th section of the Education (Scotland) Act 1872, the pursuer held office only during the pleasure of the defenders, and was liable to dismissal by them at any time. (3) The pursuer not having been a parochial schoolmaster at the date of the passing of the Education (Scotland) Act 1872, and having held office subsequent to that date during the pleasure of the defenders, they were entitled to dismiss him from office. (4) The pursuer having conducted the said school in an inefficient manner, was justly dismissed by the defenders. (5) *Mora*, and acquiescence. (6) In any view, the damages claimed by the pursuer are excessive."

The Lord Ordinary (M'Laren) heard argument on the Procedure Roll on the questions whether the pursuer could competently claim damages by award, and whether, if so, he could claim such from the ratepayers in 1886 in respect of an alleged injury done to him by the Board who represented them in 1875.

On the 24th June 1886 the Lord Ordinary, after a re-hearing on these questions, repelled the second and third pleas-in-law for the defenders and allowed a proof.

"*Opinion.*—I have again considered this case after a re-hearing on the two points referred to in my [former] note—(1) The question whether relief under this action can be given otherwise than by an award of damages? and (2) whether the action is open to exception on the ground that it is directed against the ratepayers of the present year, while the wrong complained of was done in the year 1875? It was admitted by Mr M'Kechnie for the pursuer that the claim for past damage or arrear of salary is cut off by the operation of the principle or rule of law that present ratepayers cannot be compelled to satisfy claims which ought to have been made and enforced against ratepayers of previous years. On this subject the decisions relating to claims upon the assessment for the poor are directly in point. In the present case the obligation of the School Board was to provide an annual payment or allowance to the pursuer in lieu of his emoluments as schoolmaster or teacher of a side school established by the heritors, and there can be no doubt that each yearly instalment of the allowance is a burden on the rates of the particular year. The effect of decerning for arrears, or a sum of damages in lieu of arrears, would be to render the ratepayers of the present year liable for a sum of money no part of which is a proper burden on the rates of this year.

"But it is argued for the pursuer that the objection is obviated by restricting the claim to an annual payment commencing at the date of the action, because under a decree thus restricted the ratepayers of the present and future years would not be called on to make any different contribution from that which they must have made if the action had been instituted immediately after the pursuer's dismissal. The Poor Law cases support the distinction contended for. Taking the three cases cited in which claims of relief by one parish against another were held to be extinguished by *mora*, I find that in *Hay* v. *Knox*, 12 D. 1260, the defender admitted liability for the future maintenance of the pauper; in *Hay* v. *Jack*, 15 D. 391, the action only concluded for arrears, the liability for future aliment being undertaken by the defendant parish; and in *Jack* v. *Simpson*, 2 Macph. 1221, there was again an admission by the defender that his parish was liable for all payments subsequent to the date of the notice of action.

"I am therefore satisfied that the pursuer is entitled to prosecute this action to the effect of showing, if he can, that he has been wrongfully dismissed, and that he has a right to an allowance, to run from the date of the action.

"I did at one time entertain a doubt as to whether a jury or the Court could award compensation to the pursuer in the shape of an annuity. If the Act of Parliament had given the heritors a discretion, as, for example, if it had empowered them to award a sum 'not exceeding' the amount of his salary, or to award such annuity as in all the circumstances should seem just, then I should have felt great difficulty in undertaking to exercise the discretion which the statute vested in the heritors. In such a case we should most probably sist proceedings to allow an application to be made in the first instance to the School Board as coming in place of the heritors. But on examining the statutes it appears to me that there is no question of discretion; that the amount of the pursuer's retiring allowance is fixed by the statute; and that if the pursuer was dismissed without cause he is entitled to have the amount of his allowance constituted by decree.

"I need not here repeat the words of the 55th section of the Education (Scotland) Act 1872, because that enactment merely reserves the rights of the existing schoolmasters which were secured to them by previous statutes.

"The provision on which the pursuer's right is founded is the 6th section of the Parochial and Burgh Schools Act 1861. This clause empowers the heritors and minister (whose functions have devolved on the School Board) to require the teacher of any side school in their parish, on a notice of not less than three months, to resign his office on their providing to him during his life an annual payment equal in amount to the full salary to which at the date of the passing of this Act he had right by law, together with the annual value of any dwelling-house, &c., and then if the teacher does not resign, his right to his office shall cease and determine at the end of the prescribed period of three months. Two objections may be suggested to the claim under this clause—(1) This was not a proceeding in which notice was given to resign; and (2) the clause appears to contemplate the case of teachers *in esse* at the date of the Act, while in this case the pursuer's appointment is subsequent in date to the Act. The first objection is sufficiently met by the observation that if the defenders can justify their dismissal then they are clearly outside the clause; but if they cannot justify their dismissal their case is not made any better by their omission to give the pursuer notice to resign, to which he was entitled. To the second objection it appears to be a sufficient reply that although the case actually dealt with is that of an existing teacher of a side school, yet it is recognised by the Education Act of 1872 that teachers of side schools hold office *ad vitum aut culpam*, and we see from the Act of 1861 what is the right (in respect of future emoluments) of a teacher holding office by such a tenure, and displaced without his consent. It is noticeable that section 4 of the Act of 1851, which relates to the discontinuance of side schools, gives the teacher of a discontinued school the same allowance as is given to a teacher who is required to resign."

On a proof being taken the Lord Ordinary on 6th November pronounced this interlocutor:—"Finds that the pursuer was wrongously dismissed by the defenders from his office of teacher of the East Strathaven School in the parish of Avondale; that they are liable to him in damages for such wrongous dismissal; assesses the damage at the sum of £190 sterling, and decerns; finds the pursuer entitled to expenses, &c.

"*Opinion.*—I have already had occasion to consider the legal question that has been argued in this case, but while expressing my views I thought that the case could not be decided without fuller investigation of the facts than could be made upon the mere documents, and a proof has accordingly been taken. In the main, however, I think that the case on both sides rests upon documentary evidence with the explanations that have been given of the circumstances in which the letters and minutes were written. The claim made by Mr Watson is rested upon the hypothesis that he is a parochial schoolmaster. He claims to be teacher not of the principal school of the parish of Avondale, but of a parish school of the class recognised in the Act of 1861 (24 and 25 Vict. cap. 107) under the denomination of a side school. There is a series of provisions in that Act applicable to side schools. Under section 4 a school may be discontinued upon the condition of giving compensation to the teacher equal to his full retiring allowance. I think he is styled a schoolmaster under the Act, and if a school is discontinued under section 4 he receives his full salary and the value of his house for life. Under section 6 the heritors may also require the schoolmaster of a side school to resign, apparently without reason assigned. But if they do so they are also to pay him a sum equal to his salary for life. Under section 19 of the same statute, which applies to schoolmasters generally—and therefore I presume to schoolmasters of side schools—a schoolmaster may be retired in respect of old age or inefficiency, and in that case he is to receive an amount for life not less than two-thirds of his salary, and not exceeding the full salary. That clause evidently contemplates the dismissal or retirement of a schoolmaster for good causes, although these causes may not imply any blame upon his part, while the earlier clauses relate to arbitrary dismissal by the Board on the ground of public conveniences. From these various clauses I have come to the conclusion without much difficulty that schools maintained by the heritors out of public money during the period antecedent to the passing of the Education Act of 1872 were recognised as in a certain sense parish schools, entitling the incumbent to the privileges of a person holding office for life, and that I conceive to have been the position of Mr Watson. Now, it does not appear to me that the Education Act of 1872 made any difference in his position either in regard to the terms of his office or as to the compensation to which he was entitled on being dismissed. I think he takes the benefit of the clauses in the Education Act securing all schoolmasters in the tenure of their offices and emoluments, and that he could only be proceeded against in the same way as any master of a principal parish school. Apparently that was the view that was at first taken of Mr Watson's position by the School Board itself, although they eventually receded from that view. Now, the evidence shows that for some months, I think at least a year, before the ground of action arose the School Board had been dissatisfied with Mr Watson, and were inclined to deal somewhat strictly with him. I do not say they may not

have had reason, because it appears that the attendance at the school had been falling off. Notwithstanding that there was a deficiency for school accommodation there was difficulty in getting parents to send their children to that particular school. Now, the mode in which the controversy first arose between Mr Watson and the Board was that they took him to task for not having correctly kept the attendance register of his school. They found on comparing the schedule which he (Mr Watson) presented to them to be returned to the Education Department that apparently it was not supported by the attendance register; and from the long minute read to me, prepared some time in the autumn of 1874, it appears that there had been two interviews between Mr Watson and the Board at which he professed that he was unable to rectify the schedule, and that he had kept the attendance register in some way that could only be understood by himself.

"But before leaving this part of the case I must say that it is clearly proved that from that time forward Mr Watson did keep the attendance register correctly. This fact is certified by the Inspector of Schools, and it also appears that there would have been no difficulty in filling up the schedule and obtaining the Government grant from that time forward.

"Now, these meetings to which I have referred took place in the autumn of 1874, and Mr Watson was dismissed in 1875, and it is as clear as possible that the School Board not having treated the offence as a ground of dismissal at the time were not entitled after the lapse of a year to go back upon a matter of that kind, however negligent Mr Watson may have been in the past. And I do not find in the minute dismissing him that the School Board rested their dismissal on that ground. There is no reference to the attendance register. They say in effect that they dismiss him in the interest of the parish, I suppose because they thought they could get a better teacher.

"Resuming the narrative, I find that in consequence of the position taken up by the School Board (that they were dissatisfied with Mr Watson's schedule and could not rectify it), the Education Department refused to sustain the claim of Avondale to participate in the Government grant for that school. I rather think that the School Board wished to bring matters to that point, and they then inquired what was their redress. The Education Department in a letter dated 7th December 1874 disclaim the responsibility of advising, but they suggest for the consideration of the School Board that in case of any clear dereliction of duty on the part of the schoolmaster, their remedy would be under section 60, sub-section 2, of the Education Act. By-and-bye the School Board proceed to act upon that suggestion, and they first write to Dr Taylor, who was then the secretary of the Education Board for Scotland, inviting him to be the medium of communication with the Education Department. He points out that the proper statutory course is that the Board should communicate with the Scottish Education Department in London direct. That, I understand, was done. We have not the letter here, but we have a letter from the Education Department in answer acknowleging their memorial, and stating that it is a memorial praying that they should make a special inspection in terms of section 60, sub-section 2, with a view to the dismissal of the schoolmaster on the ground of incompetency and inefficiency. So that there is no doubt proceedings were regularly taken under that section. An inspection was made, and the report of the inspector, dated 8th July 1875, which is a report bearing to be in pursuance of a remit under the same section, sets forth that the inspector finds that the school is fairly efficient, and he practically declines to recommend the Board to take action under the statute, because unless the report was to the effect that the schoolmaster was incompetent or inefficient, then no further procedure could be taken by the School Board under the statute. Accordingly, having failed in their endeavour, the idea occurs—I think it was suggested in correspondence with Dr Taylor—that after all Mr Watson might not be a schoolmaster but merely a teacher, having no status, but only holding a yearly office, and the opinion of counsel was taken upon that subject. I have not the memorial before me, and have no means of knowing how far the opinion given upon the memorial was well founded with reference to the facts stated. I assume that everything was according to the opinion upon the facts stated, but I am not here to consider that opinion at all except as a fact in the case, that the School Board did not proceed precipitately, but upon legal advice. My own opinion, as already stated, is that Mr Watson was a schoolmaster entitled to the privileges of such an office at common law.

"The School Board having obtained their opinion proceeded to pass the resolution on 28th October 1875, recorded in their minute, in which they set forth simply that it is not for the public interest that Mr Watson should continue in charge of the school, and therefore they dismiss him.

"Now, considering the whole circumstances of the case, I conclude by saying that I think Mr Watson's behaviour to the Board after receiving his dismissal was extremely temperate and reasonable. He naturally refused to give up his post, conceiving that he had not been legally dealt with. But upon hearing that an action would be raised, and unwilling to go into litigation, he wrote stating that he would be willing to give up the school and schoolhouse at once, trusting to receive an adequate acknowledgment of his claims by the School Board. An answer was written by Mr Gebbie on behalf of the School Board, which I interpret as virtually assenting to Mr Watson's offer, and after receiving that letter followed by Mr Watson's retirement and acceptance of another situation, I think that the School Board were not entitled to resile from that arrangement, but were bound to give him reasonable compensation in terms of the understanding upon which Mr Watson went out. I must further say that I think Mr Watson was willing to go upon very reasonable terms, because from a subsequent letter it appears he was prepared to accept two-thirds of the old salary, *i.e.*, two-thirds of £25 per annum. However, he has not followed up his claim by action until now, having kept open his right by successive letters. But I suppose under the pressure of having lost another situation he has been induced to follow up his claim with a view to a de-

cision now. I have already in a previous judgment said that I could not recognise a claim to arrears, because that would be burdening the present ratepayers with an annuity which, if matters had been amicably settled, ought to have been paid year by year by the ratepayers of the respective years.

"I have some difficulty in arriving at a clear conclusion whether the compensation to which I think Mr Watson is undoubtedly entitled for the future should be given in the form of an annuity or in the form of a lump sum of money, because I have great difficulty in seeing under which clause of the various statutes cited the annuity could be awarded. It could not be given under the Act of 1861, because that must be settled at the time in the exercise of the power given by section 6; and if it could not be given under that section I think that probably the same objection would apply to the Court settling an annuity under the Act of 1872. I rather incline to think that I must fall back upon the remedy of damages, which is the universal remedy in all cases for breach of contract when other modes of compensation fail. It appears to me, to express the ground of judgment in a single sentence, that the School Board wrongfully dismissed Mr Watson in proceeding upon an error of judgment regarding his position as a schoolmaster. But that having done so they agreed with him to consider his claim not to full compensation under the statute, but to a reasonable equivalent for the injury that they had done him, he at the same time looking out for another situation. In short, they agreed to treat the case in the same way that a master is bound to treat the case of a servant whom he has wrongfully dismissed. And I think I will best dispose of the case by giving what the School Board would probably have given if they had acted on the arrangement made when Mr Watson retired.

"In all the circumstances of the case I think that a sum of £190, being equal to two years' emoluments of the office, is fair compensation having regard to the time that has elapsed and that we are only dealing with the future. If the compensation were to be made on the basis of the full salary, of course two years would be inadequate, but the sum that I give is a sum which is to be spread over a larger number of years in instalments of considerably less amount than salary, it is unnecessary to say in what way it may be competent, whether it may be six years' salary at a third, or four years at half salary, and of course I also find the pursuer entitled to expenses."

Counsel for Pursuer — M'Kechnie — Crole. Agent—W. B. Rainnie, S.S.C.

Counsel for Defenders—Guthrie Smith—Ure. Agents—Adamson & Gulland, W.S.

Saturday, January 22, 1887.

OUTER HOUSE.

[Lord M'Laren.

MARTIN'S TRUSTEES *v.* MARTIN AND OTHERS.

Succession—Donatio mortis causa.

Held (by Lord M'Laren, Ordinary)—The three requisites which have been laid down as essential to the constitution of a *donatio mortis causa*—viz., that the gift must be made *intuitu mortis*, that it must be made by a *de presenti* act or deed, and that the subject, or document of title representing the subject, must be delivered to the donee or to some-one on his behalf—have not been abrogated, but it is sufficient that the gift is made in contemplation of death, although the giver is not apparently in immediate danger of death, that the donor states to the donee or man of business or confidential friend that the subject is given in the manner intended, and that the delivery is *longi manu*.

Circumstances in which *donatio mortis causa* as thus explained *held* to be proved.

Mrs Jane Brown or Martin died at Strathaven in July 1885. She left a settlement dated in 1876, by which she conveyed her whole estate, heritable and moveable, to trustees, specially including in the conveyance the estate of her deceased brother John Brown, to which she had succeeded. She directed the residue, after payment of certain legacies, to be divided into six equal shares, five of which were to be paid to her children and grandchildren, and the sixth as she might by subsequent writing direct, and in the event of no such writing being made, it was to be divided by her son among such missionary or charitable and religious objects as might be pointed out by him.

She left certain other legacies by separate writing in 1882. After her death there were found in her house a number of deposit-receipts all dated subsequent to 1882, and all bearing that the various sums had been deposited by her for behoof of the objects therein respectively specified, *e.g.*, "for the Aged Ministers and Aged Missionaries Fund of the United Presbyterian Church," "for the Foreign Mission Fund of the United Presbyterian Church," &c. The said receipts were endorsed by deceased, and were renewals of others which had been framed in the same terms, the interest on which had been uplifted by the deceased from time to time and handed to the various charities named in each, the principal sums being re-deposited. This had been done for several years before her death, and it was proved in this action that she had so deposited the money with the intention, which she had often expressed, of making donations of the sums contained in them to the various objects named in them.

In this process of multiplepoinding for distribution of her estate, the various Schemes mentioned in these receipts claimed the amount contained in them as *mortis causa* donations.

After a proof the Lord Ordinary (M'Laren) sustained these claims to the sums contained in the receipts.

"*Opinion.*—In this case fortunately there can