under the Act, the debt is contingent; because it cannot be known whether the result of the application may not be to extinguish it in whole or in part. But I do not think that the issue of the order makes any difference to the question.

But it is not enough that a bankrupt shall merely allege that he is a crofter. It must appear that he is in fact a crofter, and entitled as such to the benefits of the Act. I can quite imagine that a question of some difficulty might arise if the Lord Ordinary or the Sheriff were required to sustain or reject a plea that the debt upon which the sequestration proceeded was contingent—if it were necessary to inquire for that purpose into a disputed statement of facts, and determine whether in fact the bankrupt was a crofter or not. The Lord Ordinary in the Bill Chamber must proceed upon facts which can be instantly verified. But there is no difficulty of that kind here. I think the question for the consideration of the Lord Ordinary was not whether in point of fact the subject was a crofter holding or not, but whether the decree upon which he was asked to proceed was or was not a decree for the rent of a crofters' holding. I agree with Lord Adam that when the decree is read with reference to the record, it is evident that it is a decree for payment of the rent of an inn, and not of a crofter holding. The defence was that the tenant was a crofter, and that defence was withdrawn. If the question had been brought before the Commissioners in the first instance they must have considered and decided it in the explication of their statutory jurisdiction. But it was certainly a question which this Court had jurisdiction to decide; it was distinctly raised upon the record; and the defender could not withdraw it from the jurisdiction of the Court by withdrawing his defences for the purpose of appealing to a discretion which he had no title to invoke unless his defence was well founded. The decree which proceeded upon that withdrawal was final and conclusive between the parties, and there was thus sufficient evidence before the Lord Ordinary that the rent for which decree had been given was not the rent of a crofter holding.

It is satisfactory to be informed that the Sub-Commissioners have rejected the respondent's application, because it is thus apparent that the defence which was withdrawn in this Court was not well founded upon its merits. But we must proceed upon the decree, and not upon the subsequent deliverance of the Commissioners.

If the statutory requisites were satisfied, I agree with Lord Adam that the Lord Ordinary had no discretion as to granting or refusing the application for sequestration. His Lordship appears to have had some doubt upon that point, and therefore I think it is important that it should be known that the question was justly determined by the judgment of the Lord President in *Joel* v. *Gill*.

LORD PRESIDENT—I concur in the judgment proposed by Lord Adam, and on the grounds stated by his Lordship. I consider that the interlocutor of Lord Wellwood, pronounced on the record before him, concluded adversely to Mr Macleod the question whether the arrears of rent were due for such a holding as to make those arrears liable to be cancelled under the Crofters Act. Holding that decree, the petitioners were entitled to sequestration as creditors in a debt due and not contingent, and I think they ought to have obtained it.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him to grant sequestration as craved.

Counsel for the Petitioners — Baxter. Agents—Stuart & Stuart, W.S.

Counsel for the Respondent—M'Kechnie —Wilton. Agents — Emslie & Guthrie, S.S.C.

Tuesday, December 8.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

SMITH *v.* SCHOOL BOARD OF INVERARAY AND GLENARAY.

School—Teacher Appointed Prior to Education Act 1872 — *Contract between School Board and Teacher as to Emoluments—Power of School Board to Surrender Government Grants to Teacher.*

In 1873 the School Board of Inveraray entered into an agreement with the teacher of a parochial school within their district, who had been appointed before the passing of the Education Act, that the latter should be entitled, in addition to a salary of a certain amount, to "all the Government grants without any deductions except for the salary or salaries of a pupil teacher or pupil teachers." In 1885 an additional grant for attendance was made to the School Boards of Argyllshire and other Highland counties in consideration of the exceptionally heavy expenditure required to provide efficient education in these counties, and under the Code of 1887 a special grant for needlework was introduced.

Held—diss. Lord Young — (1) that these grants fell under the agreement concluded in 1873; (2) *following Somers* v. *School Board of Teviothead*, that it was *ultra vires* of a school board to enter into such an agreement.

By minute dated 23rd October 1873 the School Board of Inveraray and Glenaray "resolved to adhere to the arrangement contained in their minute of meeting of 3rd inst., viz., 'that Mr Smith' (who had been appointed teacher of the Burgh Parochial School in Inveraray in 1854) 'should have £5 in addition to his statutory salary of £35 on condition that he gives the use of two-thirds of the new class-room to be converted

into an infant school, . . . and that Mrs Smith be engaged by the board to give instructions to the girls attending Mr Smith's school in sewing and cutting out for an hour each day at a salary of £5 per annum (the engagement to be from year to year), on the understanding that Mr Smith will send all children under seven years of age to the infant school except when their parents object to their being so sent;' with the following alterations and explanations—(1) The Board are disposed to agree to give all the Government grants without any deductions except the salary or salaries of a pupil teacher or pupil teachers. The heating of that portion of the new class-room to be given for Mr Smith's use of course to be provided. . . . (4) This arrangement to take effect from and after the end of the current quarter, being 5th December next 1873."

From 1873 to 1886 inclusive the School Board paid Mr Smith all the Government grants received by them, subject only to the deduction named in the minute, but after 1886 they refused to pay him two of the grants which they received.

The first of these grants, which was given under minute of the Committee of Council on Education of Scotland dated 30th April 1885, commonly known as the "Highland Minute," was an additional grant for attendance made to the School Boards of Argyllshire and certain other Highland counties in consideration of the exceptionally heavy burden laid upon these boards in providing and maintaining schools for the scattered population. The second grant was a special grant for needlework introduced by the Code of 1887.

The School Board having persisted in their refusal to pay Mr Smith these grants, which amounted to about £18 and £2, 5s. a-year respectively, Smith in March 1891 brought an action against the Board for payment thereof with interest. The defenders resisted the claim of the pursuer, *inter alia*, on the ground (1) that the special grants in question were not in the contemplation of parties at the time when the agreement was made, and did not fall within its terms, and (2) that if the agreement covered these grants, it was *ultra vires* of the School Board to surrender to the pursuer sums which were intended by Parliament for relief of the ratepayers.

On 2nd June 1891 the Lord Ordinary (STORMONTH DARLING) decerned in terms of the conclusions of the summons.

"*Opinion.*—. . . I am of opinion that the pursuer is entitled to the sums which he claims.

"The defenders' averments of departure from the agreement do not touch the essential parts of it. They relate to certain minor and temporary matters connected with the infant school, which have nothing to do with the pursuer's right to the Government grants.

"The defence that the grants in question were special, and not in the contemplation of parties at the time of the agreement, is much more deserving of attention, though I do not think it is well founded. It is true that the minute of 30th April 1885 proceeded on the ground that some special aid was required for the Highland counties, owing to the scattered population requiring numerous small schools, and the consequent heavy burden laid on the rates. But this was no new discovery. The Act of 1872 had itself provided, by section 67, exceptionally favourable treatment as regards both building and other grants for the counties of Inverness, Argyll, Ross, Orkney, and Shetland (to which Parliament has since added Sutherland and Caithness), and the additional aid afforded under the minute of 1885 was chiefly by an increase in the rate of grant for average attendance. When it was agreed in 1873 that the pursuer should get 'all the Government grants,' it must have been foreseen not only that the ordinary grants might rise, but also that the favour already extended to schools in Argyllshire might be still further increased. An ingenious attempt was made by Mr Shaw for the defenders to assimilate the question to those cases (of which *Dunbar's Trustees* v. *British Fisheries Society*, 5 R. 350, *aff.* H. L., same vol., is the leading instance) in which obligations in relief of public burdens have been held not to cover new burdens imposed by supervenient legislation. But the principle of these cases is, not that an increase in the amount of the assessment resulting from subsequent legislation will take a burden out of the clause, but that to have this effect there must be a difference in the character or incidence of the burden. Accordingly, in *Dunbar's* case, although road assessments imposed by local Acts were held to be new burdens outside the clause of relief, the greatly enhanced poor rate introduced by the Act of 1845 was held to fall within it. I do not think therefore that these afford any support to the defenders' argument.

"The remaining plea—that it was *ultra vires* of the School Board to surrender these grants — necessarily depends to a large extent on the defenders' success in showing that the grants were new and special. For, after the judgment in *Somers* v. *School Board of Teviothead*, 7 R. 121, it would be hopeless to maintain that in dealing with an 'old' schoolmaster it is *ultra vires* of a school board to make a permanent arrangement, and to include in the emoluments so secured to him the Government grant. Nay, more, in that case (as noticed in the Lord Ordinary's note) an unsuccessful attempt was made by the School Board to distinguish a part of the grant, called the 'distance grant,' on the ground that it was subsequent and special. The distance grant is an addition made to meet the case of sparsely populated districts in any part of Scotland, and is of precisely the same character, and made with the same object as the increased grants to the Highland counties. The *Teviothead* case is therefore a strong authority in favour of the pursuer. But if I am right in holding that the grants under the 'Highland Minute' were simply ordinary grants at higher rates, there was nothing special

about them except as to the area over which they extended.

"I would only add that all grants for elementary education are intended, in a sense, to relieve the rates. Nor does it follow that they are diverted from their proper purpose by being allocated to an 'old' teacher, for the School Board have to satisfy his claims out of the school fund, and if they do not use the grant for that purpose, the burden would fall on the rates. Agreements like the one in question have an element of risk about them, but they are not on that account unlawful, and if the teacher in some cases is the gainer, the result might be different."

The defenders reclaimed, and argued—The grant under the Highland Minute was really a grant made for the special purpose of relieving the rates of heavy building expenses, and when the agreement was entered into the parties had before them the Act of 1872, which by section 67 provided that after that year no grant of that kind should be made. Clearly, therefore, such a grant could not have been in the contemplation of the parties at the date of the agreement. Assuming, however, that it fell under the agreement, it was *ultra vires* of a school board to surrender to a teacher grants intended for the relief of the rates so as to bind their successors. The result of construing the agreement in the way contended for by the pursuer would be that money granted by Parliament for a particular purpose would be applied to one quite different. This objection did not apply to the claim made in the case of *Somers*, and that case therefore did not govern the present. The Lord Ordinary was not fully apprised of the importance of *Dunbar's* case, because new burdens of the same kind as existing burdens would not fall under such a clause as that which was the subject of consideration in that case.

Argued for the pursuer—The agreement between the parties was expressed in general terms, and it might fairly be held that new grants fell under it. As regarded the grant made under the Highland Minute, that was an additional grant of the same character as one existing when the agreement was entered into. There could therefore be little doubt that it must be held to fall under the agreement between the parties. As to the plea that it was *ultra vires* of a school board to enter into such an agreement, the contrary was established by the case of *Somers*.

At advising—

LORD JUSTICE-CLERK — The pursuer is teacher of the Church Square Public School, Inverary. He was parochial teacher at the passing of the Act of 1872, and after the Act of 1872 was passed he and the new School Board negotiated and entered into an arrangement as to what were to be his emoluments of office for the future. Parochial teachers hold their offices as public offices *ad vitam aut culpam*. The Act of 1872 did not disturb their position, and after it passed school boards negotiated, as this School Board did, with the parochial schoolmasters who continued in office under them as to what were to be the emoluments of these masters for the future. According to law the schoolmaster was entitled to all the school fees, and the only change the Act made was that the school boards, through their officer, were bound to collect these fees instead of the parochial schoolmaster. The convenience of the School Board in making their arrangements as to salaries made it advisable that a different and more definite scheme should be adopted for paying the teacher. For this purpose in the present case the School Board entered into an arrangement with the pursuer by which the emoluments of the latter were to include "all the Government grants without any deductions except the salary or salaries of a pupil teacher or pupil teachers."

The first question for our consideration is, had the School Board any power to enter into such a contract? Whatever difficulty might have been experienced if the question had been raised immediately after the passing of the Act of 1872, there can be none now, for the matter has been directly decided in the case of *Somers*, where it was held that an arrangement by which the Government grant was disposed of for the benefit of the parochial schoolmaster is an arrangement which the School Board are entitled to make. This decision is clear and direct, and binding on us, unless we have such strong doubt of its soundness as to make it our duty to send the case to be heard before a fuller bench. I have no such difficulty or doubt, and accept that case as an authority.

The second question for our consideration is—the arrangement being competent, what is the effect of the clause making it? Is the pursuer entitled under that clause in the present circumstances to the whole Government grants, including the new grant of 1885? It is plain that the School Board in making the contract with the pursuer could not have expressed it in more general terms. The contract might have stated that the teacher's emoluments were not to exceed the Government grants as at that date, or were to consist of the Government grants until a new arrangement was made. The contract is not so limited; it is expressed, we must hold purposely, in general terms. It is quite plain that under that agreement if the Government grants were reduced by Parliament or otherwise the schoolmaster would have to suffer a reduction of salary. He took that risk. In the same manner it seems to me that the School Board took the risk of the Government grants becoming of greater value, and of this schoolmaster being proportionately benefitted.

In these circumstances (1) the question as to the right of the School Board to enter into this agreement being settled by the case of *Somers*, and (2) there being no doubt as to the true meaning of the agreement, I think that the Lord Ordinary's interlocutor should be affirmed.

LORD YOUNG—I think the present case is distinguishable in a material feature from that of *Somers*, but further, that case was not in my opinion well decided, and I am prepared, and indeed consider it my duty, to express an opinion in this case contrary to the views that there prevailed. I entirely dissent from the view that we are bound to accept any decision as absolutely binding upon us. The Supreme Court is not to be disabled from reconsidering a judgment pronounced—it may be twenty years ago—without the necessity of sending the matter to the whole Court, or of increasing the number of Judges considering it. It would require a statute to make previous decisions binding. No doubt in matters of form the Court will wisely uphold any rules already laid down, and where there has been a series of judgments good sense prescribes that we shall not depart from the law so established, but it is totally different with individual cases.

But the case of *Somers* is, as I have said, distinguishable from the present. There an old teacher, who had right to the school fees, transacted with the school board as to the terms upon which he would part with them. The subject itself was a proper matter for contract. The question was whether the school board could legally give him in exchange what they agreed to give. Here there was no matter for contract. The chief interest of that case was whether the school board could contract away for any period of time the Government grant. Here the contract, or what is said to be a contract, was made in 1873—eighteen years ago—and the proposition we are asked to affirm is, that by that contract the Government grant now, and for so long as the pursuer shall live and retain the position of schoolmaster, is not to be under the management of the school board. They are not to be entitled to administer it according to their discretion as to what is best for the school because of this arrangement entered into eighteen years ago. That proposition, which is very wonderful, proceeds upon a misconception as to what the Government grant is. It is money voted by Parliament, which is under no obligation to vote it. It has been voted annually for several years upon the proposal of the Government of the day, but it may stop being voted any day, and it is only for the year that any such vote for the purposes of education is made by Parliament. The administration of the money, if voted, is by statute entrusted to a Committee of the Privy Council, but if the money is not voted there is nothing to administer. The Committee makes grants from the money, if voted, from time to time, not to school boards alone, but also to managers of any schools which are efficiently carrying on the education of the country. For what purpose is that grant made? To be applied according as the managers or the school board thinks best. They are free, upon complying with the conditions attached to accept the grant, or they may reject it. They generally comply with the conditions, and accept because of the money value, which saves the rates. What becomes of the grant when the conditions have been complied with and it has been given? If given to a school board, it is by direction of the statute to be paid into the school fund. The 67th clause of the Education Act provides that the school fund is, *inter alia*, to include the Government grant. But how can the Government grant go into the school fund and be applied by the school board for schools under their management if it is the subject of a contract to last, as here, for twenty years, under which it goes to the schoolmaster? Again, the school fund into which the Government grant is to be paid may under section 45 be used as a security fund upon which money may in certain circumstances be borrowed, but here, according to the argument, there has been no school fund, so far as the Government grant is concerned, since 1873.

But further, it would not have appeared to me that contract was before the minds of the parties when the minute founded upon was prepared. There was no occasion for a contract. The schoolmaster was not proposing to resign. There was nothing to contract about. The School Board might be as liberal to him as they liked consistently with their duty to their constituents, but there was no room for contract. The master was not proposing, as in the case of *Somers*, to give up anything. Look at the language employed which is said to be the language of contract. The School Board say they are "disposed to give the Government grant." It may have been thought advisable to give the grant to the schoolmaster in 1873—that would depend upon its amount and the state of the school, and upon public opinion. It could only be subject to these considerations that they felt disposed to give it. How could that determine that the School Board in 1891, in altered circumstances, should feel similarly disposed? The discretion of the present School Board is not to be displaced by what the first School Board felt disposed to do. I think it would have been altogether beyond the School Board's power to have entered into any such contract, and further, I do not think they meant any such thing, or that the language they used implies any such thing. The only thing that gives to the minute the complexion of contract is the schoolmaster's assent. But I take it he merely expresses his assent to their then disposition. How far is the argument on the other side to carry us? Might a school board have entered into a contract with regard to the rates which come into their hands also for the purpose of administration? If so, it might depend upon the will of some old schoolmaster what rates were levied. Or might a school board have contracted to give a schoolmaster for his life all bequests which might be received because they could, if so disposed, give the bequests in any one year? That would be quite out of the question, but not more so than to contract to give him the Government grants for life.

It is also clear that school boards could not make contracts with old schoolmasters which they could not make with new ones. No doubt the rights of old schoolmasters were preserved by the Education Act, but it was not in the power of any school board to increase these rights so as to fetter future school boards. For example, provision was made for retiring allowances, but suppose a school board had resolved that an old schoolmaster's retiring allowance when he came to retire was to be doubled, could that fetter succeeding school boards? Certainly not.

On the whole matter my opinion is that there was no contract whatever between the School Board and the schoolmaster in 1873 binding upon the School Board now existing. It is in their power to assign to the schoolmaster what they think right and fitting out of the Government grant up to the whole amount, but that is a question for their discretion at the time, and considering the circumstances of the time, not because of any arrangement in 1873.

LORD RUTHERFURD CLARK—The first question is, whether there is a contract binding upon the present School Board, and the second question is as to its meaning if it exists.

I take the case as the parties state it. On the first question it was scarcely disputed that there was a contract, and little was said as to its being legal. I think the case of *Somers* puts the question of its legality beyond dispute. On the second question I agree with the Lord Ordinary, and am of opinion with your Lordship that his interlocutor should be affirmed.

LORD TRAYNER—At their meeting held on 23rd October 1873 the School Board of Inveraray and Glenaray, as then constituted, resolved to allow the pursuer a certain salary, and added that they were "disposed to agree to give" (that is, to the pursuer) "all the Government grants without any deductions except the salary or salaries of a pupil teacher or pupil teachers." The minute of that meeting, expressed in the language I have quoted, was apparently communicated to the pursuer, who wrote thereon, "I hereby agree to the foregoing arrangement." From the date of that minute down to the month of August 1887—that is, a period of nearly fourteen years—the arrangement or agreement constituted by the resolution in the minute and its acceptance was acted on by the parties. The pursuer is now asking nothing more than that that agreement should be fulfilled. It was not maintained at the bar in the course of the discussion that the minute and acceptance did not constitute an agreement or contract between the parties, and indeed when it was suggested to the defenders that such an argument might be maintained on the somewhat peculiar words of the minute—that the School Board was "disposed to agree"—that suggestion was not adopted. Both parties represented that there was a contract between them, but the defenders maintained that it was *ultra vires* of the then School Board to enter into the agreement in so far as it related to the Government grants, at least to the effect of binding their successors, and that the agreement, even if still in force, did not entitle the pursuer to the particular Government grant now in question. On both these points my judgment is against the defenders.

That such an agreement or contract was one which the School Board had power to make so as to be binding on them and their successors, has already been decided by the case of *Somers*. I feel the very great force of the observations made by Lord Young upon that decision, but I am prepared in this case to follow it. Even if so disposed, I should not think it desirable to question the authority of that decision now, because since its date agreements may have been entered into on the footing that the law as there determined is sound, and because future agreements between school boards and schoolmasters who held office prior to 1872 are in the nature of things likely to be very few. It is only with reference to agreements made with such schoolmasters that the case of *Somers* is of any great importance.

As to whether the Government grant which was more directly in question, is one which the pursuer can claim under his agreement, I agree with the Lord Ordinary. I think this grant is not a new grant, either in character or purpose, but is merely the enlargement or increase of a grant existing at the time the agreement was made.

The Court adhered.

Counsel for the Pursuer—Comrie Thomson—W. C. Smith. Agent—Adam W. Gifford, W.S.

Counsel for the Defenders—Shaw—C. S. Dickson. Agents—Carmichael & Miller, W.S.

Tuesday, December 8.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* M'BRIDE.

Railway — Reparation — Railway Clauses Consolidation (Scotland) Act 1845, *sec.* 6—*Glasgow Central Railway Act* 1888, *sec.* 41, *Sub-sec.* (*L*) *and* (*O*)—*Glasgow Police Act* 1866, *sec.* 328.

Section 328 of the Glasgow Police Act 1866 authorises the Glasgow Corporation to carry sewers through any lands or heritages within the city "provided that they make reasonable compensation to the proprietors of such lands and heritages for any damage" they may suffer.

By section 41 of the Glasgow Central