sufficient salary, an objection might be taken to such an application of the Trust funds as inconsistent with the objects of the Trust and with the provisions of the Act. As regards pensions, the Act provides (section 13) that compensation shall be made for the vested interests of any individual holding any pension at the date of the Act, but (section 14) that any such interest acquired after the passing of the Act should be subject to the provisions of the scheme framed under the Act. Section 18, which deals with the tenure of office of officers in the employment of the governing body, gives no power to permit retiring allowances, and there is no case, so far as I have been able to learn, of a scheme framed under the Act containing such a power. Further, the Act provides (section 15) that the Trust funds shall continue to be applied for the *educational* benefit of the class favoured by the founder. Should, however, your Lordships be of opinion that this addition is not contrary to anything contained in the Act, I would humbly report that I think it would be for the advantage of the Trust, and would tend to its more efficient, and possibly more economical, management were such a power to be granted. At the same time, I would respectfully suggest that the section should be limited so that the pensions should be on no higher scale than those provided for permanent civil servants by the Superannuation Acts 1834 to 1892."

The Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59), sec. 14, enacts—"Every interest, right, privilege, or preference which any person may acquire after the passing of this Act, in or relative to any educational endowment . . . or in or relative to any office, place, employment, pension, compensation allowance, bursary, or emolument in the gift of any such governing body, shall be subject to the provisions of any scheme made under this Act."

The petitioners argued that the proposed alteration was not contrary to anything contained in the Act of 1882, and that the application of the *Governors of Dollar Institution*, November 28, 1890, 18 R. 174, had been refused because the proposal there was, not to institute a general pension scheme, but to make payments to certain named persons.

At advising—

The LORD PRESIDENT delivered the judgment of the Court:—In exercising its jurisdiction under this Act, the Court has not to consider for itself what are the best proposals which might be made for increasing the usefulness of the foundation, but whether the proposals actually made by the governing body, in the petition before it, may be sanctioned with or without modification. The initiative necessarily rests with the governing body, and the Court can only deal with proposals submitted to it with the consent of the Education Department.

Dealing *seriatim* with the points to which attention has been called by the reporter and the petitioners' counsel, our decision is as follows:—*Proposed rule* 26 *as to retiring allowances.*—We think this may be approved as it stands.

The scheme can go back to Mr Fleming for adjustment.

The Court approved of rule 26 proposed in the petition as to retiring allowances, as in substitution for rule 26 in the scheme, and remitted to Mr Fleming to adjust the scheme.

Counsel for the Petitioners — Dundas, Q.C.—Cook. Agent—Peter Macnaughton, S.S.C.

Counsel for the Respondents—(The Merchant Company Endowments Board)—R. V. Campbell. Agent — Alexander Heron, S.S.C.

Thursday, November 4.

SECOND DIVISION.

[Sheriff-Substitute of Inverness, &c.

GUILD *v.* M'LEAN.

Lease—Condition—Public-House—Power to Terminate in Event of Tenant Endangering Licence.

By sub-tack between the lessee of a public-house and his sub-tenant, it was provided that in the event of the sub-tenant misconducting himself or neglecting the business, or in the opinion of the lessee so misconducting himself or neglecting the business as to endanger the licence, the lessee should have power to terminate the sub-lease on giving one month's notice. The lessee gave the sub-tenant notice in terms of the clause above quoted, and as the sub-tenant refused to quit the premises, he brought the present action of removing against him, averring that in his opinion the sub-tenant was neglecting the business so as to endanger the licence. The sub-tenant denied that this was the pursuer's opinion, and averred that the pursuer's real reason for desiring to get rid of him as his tenant was that the pursuer, who was a brewer, had taken offence at the defender getting beer from another brewer.

Held that there was no relevant averment of *mala fides* on the part of the pursuer, that apart from this his opinion was final, and that accordingly the pursuer was entitled to decree of removing.

This was an action brought in the Sheriff Court at Inverness by James Lyon Guild, brewer, Inverness, against Donald M'Lean, innkeeper there.

The pursuer craved warrant to summarily eject and remove the defender from certain premises occupied by him under a sub-tack from the pursuer, and

further prayed the Court "to ordain the defender forthwith to endorse and deliver to the pursuer the magistrates' certificate for the sale of exciseable liquors and the Excise licence."

The pursuer's material averments, with the answers made thereto for the defender, so far as of importance, were as follows:—"(Cond. 1) The pursuer is tenant of the dwelling-house, No. 3 Duff Street, Inverness, with the shop and other licensed premises underneath the same, No. 19 Celt Street, Inverness. . . . The pursuer, in virtue of the powers conferred upon him in lease entered into between Duncan Macrae, 11 Davis Square, Inverness, of the first part, and the said pursuer of the second part, dated the 21st and 23rd September 1895, sub-let the said subjects to the defender, by sub-tack entered into between the pursuer and defender, dated the 23rd and 27th days of September 1895, and the defender has been in possession since that time. (Ans. 1) Admitted that the pursuer sub-let the said subjects to the defender by sub-tack, dated 23rd and 27th September 1895, and that the defender has been in possession since that time. *Quoad ultra* not known but believed to be true. (Cond. 2) It is provided in the said sub-tack that 'in the event of the said Donald M'Lean misconducting himself or neglecting the business, or in the opinion of the said James Lyon Guild, or his heirs and successors, so misconducting himself or neglecting the business as to endanger the licence, the said James Lyon Guild, and his heirs and successors, shall have it in their power to terminate this lease on giving one month's notice by registered letter addressed to the last known address of the said Donald M'Lean, of his or their intention to do so,' subject to compensation for improvements executed by defender, and approved of by the said pursuer, and to the proportion of goodwill, which the pursuer is willing to settle by arbitration as fixed therein. (Ans. 2) Admitted under reference to statement of facts for defender. (Cond. 3) In the opinion of the pursuer the defender is neglecting the business so as to endanger the licence. (Ans. 3) Denied that the defender is neglecting the business so as to endanger the licence, or otherwise; also denied that this is the opinion of the pursuer, and reference made to statement of facts for defender. (Cond. 4) The pursuer, in terms of said sub-tack, gave to the defender on the 12th day of March 1897 one month's notice of the termination of said tenancy, thus terminating the same on the 12th day of April 1897. . . . . (Ans. 4) Admitted that the notice referred to was sent to and received by the defender. Denied that said notice had the effect of terminating the said tenancy. (Cond. 5) The defender refuses or delays to remove from the said subjects, and having no title to the said subjects and others, his possession is vicious. . . . (Ans. 5) Admitted that the defender refuses to remove from the said subjects, and explained that he has a good title to the possession thereof, in terms of the said sub-tack."

The defender in his separate statement of facts also averred as follows:—"(Stat. 1) The pursuer is a brewer, carrying on business at the Thornbush Brewery, Inverness, and the defender is an innkeeper, and conducts the inn and public-house, No. 19 Celt Street, Inverness. (Stat. 3) From the time of his entry to the said subjects under said sub-tack, until about the end of the year 1896, the defender regularly got his supplies of beer and porter for the said inn and public-house from the pursuer. About that time, however, an uncle of the defender's, who had helped him greatly in the acquiring of said premises, had a meeting with Pattisons Limited, distillers, Leith, and, unknown to the defender, ordered a supply of beer and porter to be sent to the defender by Messrs Pattisons. When said supply arrived, the defender's premises were already fully stocked with beer and porter obtained from the pursuer, and the barrels which had arrived from Messrs Pattisons were stored at the Thornbush Brewery for several weeks, before the defender had room to take them into his premises. (Stat. 4) The pursuer having thus learned that the defender had obtained supplies of beer and porter from Messrs Pattisons, appears to have taken offence, and since then has repeatedly refused to fulfil orders for the defender. He appears also to have been under the impression that he had power, under the sub-tack, to compel the defender to deal only with him. Since the said supplies were obtained from Messrs Pattisons, it is believed that he has been constantly endeavouring to discover some means to bring the said sub-tack to a termination. (Stat. 5) The defender has all along conducted the said licensed premises in a most careful manner, and has given and is giving his whole time and attention to the proper conducting of the business. There has never been any complaint whatever in regard to the manner in which the defender has conducted himself and his business. Immediately after the raising of the present action by the pursuer, and in the same week, the defender's licence was renewed, without even the most trivial objection having been put forward against it. It is believed, and it is positively averred, that the only objection which the pursuer has to make against the defender, is that the defender has stopped dealing with the Thornbush Brewery. It is distinctly denied that the defender has done anything whatever to endanger the licence."

The pursuer pleaded—"(1) The defender's occupation of said subjects having been terminable in terms of said sub-tack by pursuer, on giving one month's notice thereof to the defender, and the defender having been duly warned to remove from said subjects, and having no title to possess the said subjects, and the pursuer being the legal possessor thereof, warrant and decree should be granted as craved. (2) The defender is bound at common law to endorse and deliver to the pursuer the magistrates' certificate and Excise licence for the sale of exciseable liquors in said premises."

The defender pleaded—"(1) In respect that the pursuer does not give any ground whatever for his alleged opinion, that the defender is neglecting the business so as to endanger the licence, the action is irrelevant, and should be dismissed with expenses. (2) The defender being legally entitled to the tenancy of the said subjects in virtue of the said sub-tack, should be assoilzied with expenses."

The original lease entered into between the pursuer and Mr Duncan Macrae contained the following stipulation—"And it is further provided that at the termination of this lease, either by break or natural termination or otherwise, the said James Lyon Guild or his foresaids shall transfer to the said Duncan Macrae or his foresaids, or to any person whom he or they may nominate, the certificate of licence held by him or his foresaids."

By the sub-tack between pursuer and defender the premises were sub-let to the defender "always with and under the several conditions particularly specified and contained" in the original lease; and the defender bound and obliged himself "to implement, fulfil, and perform the whole other stipulations, prestations, and obligations incumbent upon the tenant, specified and contained in the foresaid original tack between the said Duncan Macrae and the said James Lyon Guild.

The Sheriff-Substitute (SCOTT MONCRIEFF) on 24th May 1897 issued the following interlocutor:—"The Sheriff-Substitute having advised the closed record, finds it admitted that the defender is tenant of the subjects referred to in the prayer of the petition under the pursuer, in terms of the sub-tack: Finds, further, that by said sub-tack it is provided that if in the opinion of the pursuer the defender is misconducting himself, or neglecting the business so as to endanger the licence connected with the subjects let, the pursuer may terminate the lease on giving one month's notice by registered letter, addressed to the last known address of the defender: Finds that the pursuer now states that in his opinion the defender is neglecting the business so as to endanger the licence, and that it is admitted that one month's notice was given to the defender of the termination of the tack, but that the defender refuses to move from the subjects let: Finds in point of law that the pursuer is not bound to state any grounds for the opinion which he has expressed, and that, as the defender does not make any distinct averment or plea that the pursuer is acting in *mala fide* or fraudulently, the defence is irrelevant, and that the pursuer is now entitled to decree: Therefore decerns against the defender in favour of the pursuer, in terms of the prayer of the petition: Finds the defender liable to the pursuer in the expenses of this action," &c.

Note.—"The ground of this action is a peculiar one, being based upon a peculiar clause in the lease to which the pursuer and defender are parties. The defender signed this lease, which, *inter alia*, declares 'that in the event of the said Donald M'Lean so misconducting himself or neglecting the business, or in the opinion of the said James Lyon Guild, or his heirs and successors, so misconducting himself or neglecting the business as to endanger the licence,' then the pursuer and his representatives are to have power to terminate the lease upon giving a certain notice, which has, in point of fact, been given. If the pursuer had merely averred that the defender was misconducting himself or neglecting the business, the case would have been one for proof. But he bases his action upon his own opinion, and the clause clearly gives him power to act upon that opinion. Now, such a clause is not illegal. It may and has been enforced. I need only refer to the case of *Houldsworth* v. *Brand's Trustees*, 2 R. 683, in proof of this. In that case the clause was to the effect that, if the landlord should at any time be dissatisfied with the working of a certain mineral field by the representatives of the original tenant the lease might be brought to an end. It seems to me that it was more vague in point of expression than the clause under consideration, seeing that a mere feeling of dissatisfaction is less definite than an expressed opinion, but that the landlord had a right to enforce the powers which this stipulation gave him was clearly admitted by all the Judges who took part in the decision. Has, then, a tenant who has accepted such a condition no remedy and no protection against unfair treatment. Upon the authority of *Houldsworth's* case I think he has, but only if he is prepared to aver and prove what is practically a charge of fraud on the part of his landlord. To insist, as he does here, that the landlord must give grounds for his opinion, is not relevant, nor is it relevant to aver and prove that the tenant is, in his own opinion and that of others, careful of his business and not likely to endanger his licence, for it is the opinion of the landlord that must prevail. In *Houldsworth's* case the Lord Ordinary had allowed a proof, but there the defenders had distinctly accused the pursuer of acting in bad faith and for the purpose of gain to himself. In the Inner House the late Lord Moncreiff seems to have doubted the relevancy of the proof. He says—'My opinion is, that where a condition is made to depend upon the opinion or conviction of one party to a mutual contract, his announcement of that opinion or conviction is meant to be conclusive. You cannot go behind it. It is controlled only by the conscience of the individual.' Lord Neaves gives an illustration of the kind of evidence which might overcome such a condition—to wit, proof by the pursuer's own writ that while he professed to be dissatisfied he was in reality quite satisfied with the defender. One could imagine also a case in which the defender undertook to prove by the verbal admission of the pursuer to others that the real ground of the action was not honest conviction but spite, or some unworthy motive. 'The landlord,' said Lord Gifford, 'must be proved to be merely pretending dissatisfaction without really feeling it;' and the same learned Judge was dis-

tinctly of opinion that the defender in such a case in order to be successful must establish fraud. Now, looking to the defence in the present case, it cannot be said to amount to a distinct charge of fraud. Assuming that the defender proves what he avers, and in questions of relevancy proof is, of course, assumed, does it really amount to more than this, that the defender does not neglect his business, but that the pursuer and he have fallen out over business transactions. The inference is then to be drawn that the pursuer is under cover of this clause, revenging himself upon the defender by bringing a false accusation against him. This is, no doubt, the inference which the defence suggests, but in such a case there must be generally more than an inference. The defender's plea is merely to the effect that the pursuer's case is irrelevant because he has not stated grounds for his alleged opinion. But the pursuer is not bound to state grounds merely to give his opinion. It seems to me that, were all the averments of the defender proved, they could not overcome the fact that the pursuer, who was entitled to have and express an opinion, has done so in a manner unfavourable to the defender. That opinion may be based upon grounds which might not satisfy the Court, but it is by the opinion of the pursuer, and not that of the Court, that this matter is to be decided. The defender's right to compensation and his claim for goodwill do not enter into the case, and they are reserved for arbitration."

The defenders appealed to the Second Division of the Court of Session, and argued—*Houldsworth* v. *Brand's Trustees*, May 18, 1875, 2 R. 683, was distinguished. There were specialities peculiar to that case which had influence with the Court. See *per* Lord Ormidale at page 693. Moreover, there the clause in question provided that if the landlord was "dissatisfied" he might terminate the lease. Here the words were very different, and required that the landlord should not merely desire to get rid of the tenant, but that he should honestly and reasonably think that he was endangering the licence by misconduct or neglect. Under such a clause it was necessary that he should state his grounds for his opinion. It could not be maintained that in agreeing to such a stipulation the tenant was agreeing to what was really a tenancy at will, although it bore to be a lease for ten years, but that would be the result if the pursuer's contention was correct. The case of *Stewart* v. *Rutherford*, March 3, 1863, 35 J. 307, was not in point, for there the lease contained a clause that the landlord should be sole judge. But further, the case of *Houldsworth* was really in the defender's favour, for there a proof was allowed, which was all the defender desired here, and all the judges except L.J.-C. Moncreiff approved of the proof being allowed. See *per* Lord Neaves at page 692, *per* Lord Ormidale at page 694, and *per* Lord Gifford at page 696. The state of a man's mind was a question of fact, and if an averment made as to it was denied, it must be proved, or, at least, it was competent to disprove it—*Edgington* v. *Fitzmaurice* (1885), 28 Ch. D. 459, especially *per* Bowen, L.J., at page 483. When a matter of serious business was left to a man's discretion, he must arrive at his opinion not merely capriciously but honestly, and upon some tangible and reasonable grounds, and after due consideration—*In re Bell Brothers, Limited, ex parte Hodgson*, July 22, 1891, 7 T.L.R. 689, and *In re the Ceylon Land and Produce Company, Limited, Ex parte Anderson*, July 22, 1891, 7 T.L.R. 692. The pursuer had not arrived at any such honest and considered opinion, and, indeed, no grounds for his opinion were even suggested. It was plain that the landlord could aver nothing amounting to conduct endangering the licence—*Noble* v. *Hart*, November 24, 1896, 24 R. 174. On the other hand, the defender had averred the real reasons which had induced the pursuer to endeavour to get rid of the defender as a tenant. These averments amounted to a sufficiently specific charge of fraud and *mala fides* against the pursuer, and he was entitled to be allowed to prove them—See *Houldsworth, cit.* (2) The tenant was neither bound nor entitled to transfer the licence, which was personal. The provisions in the original lease could not avail the pursuer, for it did not come into operation till the end of Guild's own lease, a period which had not arrived. An obligation upon the sub-tenant to transfer his licence could not be inferred from the clause in the original lease, and the general clause in the subtack, but would have required special stipulation. Further, the landlord's plea on this point founded his claim, not on contract, but on the common law.

Argued for the pursuer—The pursuer was not bound to state his reasons for his opinion, still less was he bound to justify his opinion to the satisfaction of a Court. His opinion, whether honestly held or not, if expressed, was final, and his motives for stating it were not a proper subject of proof—*Houldsworth* v. *Brand's Trustees, cit., per* L.J.-C. Moncreiff at page 690; *Earl of Rosebery* v. *Brown*, March 7, 1811, F.C. In *Houldsworth* there was no decision of the Court to the effect that a proof ought to have been allowed in that case. Such a clause as this practically converted the lease into a tenancy at will—*Stewart* v. *Rutherford, cit.* It had been decided that where asignees were excluded, except with approval of the landlord, his disapproval was final, and he was not bound to give reasons — *Marquis of Breadalbane* v. *Whitehead & Sons*, November 16, 1893, 21 R. 138, and *Duke of Portland* v. *Baird & Company*, November 9, 1865, 4 Macph. 10. The case of *Noble* v. *Hart, cit.* had no bearing on the present. There the clause provided that it should be competent to the lessors to bring the lease to a termination if the tenant was doing anything which might endanger the licence, and the landlord failed to prove that the tenant had done anything to endanger the licence. In any view, the defender was not entitled to a proof of his averments unless he set forth

facts and circumstances which went to show the pursuer was *in mala fide* when he said he was of opinion that the defender was endangering the licence—*Houldsworth, cit.* There were no such averments here. (2) The defender was bound to transfer the licence. The provision in the original lease was made binding upon the defender by the general clause in the sub-tack. A licence was transferable on application to two justices of the peace. The defender had no interest to object to this conclusion; indeed, his interest was the other way, as the transfer of the licence would increase the sum payable for goodwill.

At advising—

LORD JUSTICE-CLERK — This is a very peculiar case. The pursuer desires to have the defender removed from the occupation of premises which he occupies as a licensed house. The defender defends himself on the ground that the pursuer is not entitled to turn him out in the circumstances. The stipulation to which the defender agreed by his lease was that if in the opinion of the said James Lyon Guild or his heirs and successors, the said Donald M'Lean has so misconducted himself or neglected the business as to endanger the licence, the said James Lyon Guild and his heirs and successors shall have it in their power to terminate this lease on giving a month's notice. Now, that seems to be an agreement very absolute and clear in its terms, that if Mr Guild is of that opinion he is entitled to have the defender removed on one month's notice. The defender, I do not think, has stated any relevant defence against the landlord, who averring that that is his opinion, desires to remove him, and I have come to the same conclusion as the Sheriff-Substitute, which he expresses very neatly in the latter part of his judgment, when he says—"It seems to me that were all the averments of the defender proved, they would not overcome the fact that the pursuer, who is entitled to have and express an opinion, has done so in a manner unfavourable to the defender." Therefore I am for adhering.

LORD YOUNG—I concur.

LORD TRAYNER—I concur, not only in the Sheriff's judgment, but on the grounds on which he has put it.

LORD MONCREIFF—I agree.

The Court pronounced the following interlocutor:—

"Dismiss the appeal, and affirm the interlocutor appealed against: Of new decern against the defender in favour of the pursuer in terms of the prayer of the petition: Find the defender liable in expenses in this Court, and remit the same, and the expenses found due in the Inferior Court, to the Auditor to tax and to report.

Counsel for the Pursuer and Respondent —G. Watt — P. J. Blair. Agent — John Macmillan, S.S.C.

Counsel for the Defender and Appellant —Salvesen — Hunter. Agents — Boyd, Jameson, & Kelly.

Tuesday, November 16.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROSS'S TRUSTEES *v.* ROSS.

Succession—Vesting—Destination to Persons Named, and whom Failing to their Issue.

By trust-disposition and settlement a testator directed his trustees to pay to his widow "the whole annual proceeds of the trust-estate," and they were also "required," if the annual proceeds should fall short of £150, "to apply as much of the principal of the trust-funds and estate" as would make up that amount; and it was further declared that if the widow should marry again, the provisions in her favour should be restricted to an annuity of £50, which the trustees were empowered, if they should think fit, to purchase from Government or from an insurance company.

By the seventh purpose the trustees were directed as follows:—"On the death or marriage of my said spouse, or on my death should she predecease me, my trustees shall with all convenient speed proceed to realise the residue and remainder of my estate." They were then directed to divide the residue of the estate into three shares, and to pay one share to Peter Ross, the truster's brother, another share to David Forbes Walker, otherwise called David Ross, and to divide the remaining third share equally among eight persons named, "declaring that in the event of any of the said several parties predeceasing me or the period of division and leaving lawful issue, such issue shall succeed equally to the portion of said share which their parent would have received had he or she survived." It was further declared that in the event of Peter Ross predeceasing the said period of division the trustees should divide "the share destined to him among the several parties to whom the third share is above provided," and in like manner it was declared that if David "shall predecease the said period of division, or die before he attains majority," the share destined to him shall be divided in like manner.

The testator was survived by his wife. All the persons named as entitled to the last-mentioned one-third share of residue predeceased her, some of them without issue, and the others leaving issue who survived her.

In a multiplepoinding brought after the death of the widow, the issue of legatees who died leaving issue maintained that vesting in that share was