I must say that I cannot help feeling that this is a very inconsistent kind of reference, but of course if it is abused the party who is injured is not without redress, because if a party decides manifestly against the law or the facts in favour of himself his award would be liable to reduction on the same ground as the award of a third party would be who had identified himself with one of the interests in the subject of dispute.

LORD KINNEAR—I concur.

The Court pronounced this interlocutor—

"Find in terms of the findings in fact and in law in the interlocutors of the Sheriff-Substitute dated 11th March and 14th June 1901: Refuse the appeal: Of new dismiss the action: Find the respondent, defender, entitled to the expenses of the appeal," &c.

Counsel for the Appellant — Campbell, K.C.—T. B. Morison. Agents—Mackay & Young, W.S.

Counsel for the Respondent—Jameson, K.C.—Crole. Agent—W. B. Rainnie, S.S.C.

Friday, February 28.

FIRST DIVISION.

THE SCOTCH EDUCATION DEPARTMENT *v.* THE SCHOOL BOARD OF THE BURGH OF PORT-GLASGOW.

School—Parliamentary Grant—Additional Grant—School Rate—Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 67—*Education (Scotland) Act* 1897 (60 *and* 61 *Vict. c.* 62), *sec.* 1.

In a question between the Scotch Education Department and a School Board with reference to the amount payable to the school board as additional grant under section 1 of the Education (Scotland) Act 1897, *held* that the "school rate" upon which that amount fell to be calculated was not, as maintained by the Education Department, such rate per pound as when multiplied by the amount of the valuation roll in pounds would give the amount demanded by the School Board from the rates to make good their deficiency, but, as maintained by the School Board, the slightly larger rate per pound which owing to the exemption of certain property from occupiers' rates had to be actually levied as the nominal rate in order to produce the sum required by the School Board.

This was a special case to which the parties were (1) The Scotch Education Department, constituted under the Education (Scotland) Act 1872 and the Secretary for Scotland Act 1885, and (2) The School Board of the Burgh of Port-Glasgow.

The question at issue between the parties was as to the sum at which the "school rate" fell to be taken for the purpose of calculating the additional grant under section 1 of the Education (Scotland) Act 1897.

The Education (Scotland) Act 1872 (35 and 36 Vict. c. 62) enacts as follows:—Section 44—"The school board of each parish and burgh shall annually . . . certify to the parochial board or other authority charged with the duty of levying the assessment for relief of the poor in such parish or burgh the amount of the deficiency in the school fund required to be provided by means of a local rate, and the said parochial board or other authority is hereby authorised and required to add the same under the name of 'school rate' to the next assessment for relief of the poor, and to lay on and assess the same, one-half upon the owners and the other half on the occupiers of all lands and heritages, and to levy and collect the same along with the assessment for relief of the poor when that assessment is so imposed and levied, and to pay over the amount to the school board; and where any burgh, parish, or school district with a school board under this Act shall include two or more parishes or parts of two or more parishes having separate parochial boards under the Act of the eighth and ninth years of the reign of Her present Majesty, cap. 83, the school board shall certify to the parochial boards of such parishes respectively the amount of the rate on each pound of rental which they shall lay on and collect as 'school rate' along with their several assessments for the relief of the poor within such burgh, parish, or school district for which the school board acts, . . . and the school rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school rate." Section 67—"Where in any parish or burgh a school rate of not less than threepence in the pound on the rateable value of such parish or burgh shall be levied, and the whole produce of such rate is less than twenty pounds or than seven shillings and sixpence per child of the number of children in average attendance at the public schools provided by the school board in such parish or burgh, such school board shall be entitled, in addition to the parliamentary grant in aid of the public schools provided by them, to such further sum out of moneys provided by Parliament as will, together with the produce of the rate, make up the sum of twenty pounds, or seven shillings and sixpence for each such child."

The Education (Scotland) Act 1897 (60 and 61 Vict. c. 62), sec. 1, *inter alia*, enacts—"Section 67 of the Education (Scotland) Act 1872 shall have effect as if the sum of seven shillings and sixpence therein mentioned were increased by the sum of fourpence for every complete penny by which the school rate exceeded threepence, but not beyond a maximum of sixteen shillings and sixpence."

In 1897 the second parties, in terms of section 44 of the Education (Scotland) Act 1872, certified to the Parish Council of Port-Glasgow that the amount of deficiency in the school fund for the year from Whitsunday 1897 to Whitsunday 1898 required to be

provided by means of a local rate was £1600, and required the Parish Council to add the same under the name of school rate to the next assessment for relief of the poor. The certificate from the second parties to this effect was submitted to a meeting of the said Parish Council, who thereupon resolved to levy a school rate of 9d. per £, to be imposed on all lands and heritages within the parliamentary burgh of Port-Glasgow, and laid on and assessed the said school rate accordingly. The said Parish Council further resolved that one-half of said deficiency be imposed upon the owners and the other half upon the tenants or occupants; that the said school rate of 9d. per £ be levied by a rate of 4½d. per £ upon the owners, and 4½d. per £ upon the occupiers, and that the said sum of £1600 be paid over to the second parties' treasurer.

The total assessable valuation of the burgh of Port-Glasgow for the year 1897-98, deducting the proportion effeiring to the landward district of the parish, amounting to £628, 1s. 6d., was £47,375, 5s. That sum was made up as follows:—

Class 1. Property occupied by others than owners -	£28,573	19	2
Class 2. Property occupied by owners (in which is included the railway and tramway property within the burgh) - - - -	17,909	10	0
Class 3. Unlet property -	891	15	10
	£47,375	5	0

As regards Class 1, owners were rated at 4½d. per £ and occupiers at 4¾d. per £. As regards Class 2, owners were rated at 4½d. per £ in respect of ownership and 4¾d. per £ in respect of occupancy. As regards Class 3 owners were rated at 4½d. per £.

The product of the school rate for the year 1897-98 was £1558 made up as follows: —

Class 1. On property occupied by others than owners -	£991	17	8
Class 2. On property occupied by owners - - -	550	6	6
Class 3. On unlet property -	15	15	10
	£1558	0	0

The second parties were entitled to an additional grant under the Education (Scotland) Act 1872 and the Education (Scotland) Act 1897, and accordingly in September 1898 they lodged a claim with the first parties for such grant in respect of the year ended Whitsunday 1898. The particulars of the said claim were duly specified in the form No. 110 provided for the purpose by the first parties. In addition to a sum of £94, 4s. 11d. claimed under section 67 of the Education (Scotland) Act 1872, and not disputed, the second parties claimed the sum of £163, 12s. (subject to the statutory deduction of one-third for the then current year) under section 1 of the Education (Scotland) Act 1897. That sum represented two shillings per child on an average attendance of 1636 children, or 4d. per child for every complete penny by which a rate of 9d. exceeds a rate of 3d. in the £.

The certificate by the rating authority required to be produced with the claim upon form 110 was as follows: — "*Port-Glasgow, 23rd September* 1898.—I, Henry Nixon, Inspector of Poor and Collector of Poor Rates for the Parish Council of Port-Glasgow, hereby certify—(*First*) that the net assessable valuation of the burgh of Port-Glasgow (as extended), which is the district of the School Board of Port-Glasgow, for the year ended 15th May 1898 was £47,375; (*Second*) that on the basis of the actual product of the rate of 9d. per £ for last year the net product of a rate of 3d. per £ would be £519, 5s. 1d.; and (*Third*) that the difference between the gross product of a rate of 3d. per £ on the valuation of Port-Glasgow and the actual product is owing partly to relief from rates granted in terms of the statutes to persons who are unable to pay, there being over 400 poor females occupiers of rented houses besides the male householders unable to pay, and to non-payment of rates by large numbers of workmen who occupy monthly houses, and who leave the district or remove to other parts of the town during the financial year, and cannot be traced, and also to unlet property included in the sum of £47,375 stg., which yields no occupiers' rate. Every exertion is made to collect the rates as fully as possible. Further, that the whole product of the rate levied for the year ended Whitsunday 1898 was £1557, 15s. 5d., which, with the sum of £47, 12s. 11d. left over in the hands of the rating authority from the previous year, and the sum of £60, 5s. 11d. arrears recovered for previous years, and a subvention of 8s. 5d., made a total sum of £1666, 2s. 8d., of which £1600 was paid over to the School Board, and a balance of £66, 2s. 8d. remained in the hands of the rating authority."

The first parties declined to admit the validity of the claim of the second parties under the Education (Scotland) Act 1897 as set forth. They were prepared, however, to sanction a grant under that Act, amounting to £90, 17s. 10d., and representing 1s. 8d. per child on an average attendance of 1636, or 4d. per child for every complete penny by which a rate of 8d. exceeds a rate of 3d. in the £, after making the statutory deduction of one-third for the year ending Whitsunday 1898. A similar difficulty arose with respect to the grant due for the year ending Whitsunday 1899. It therefore became necessary to have these questions settled, and accordingly the present special case was presented for the opinion and judgment of the Court.

The first party contended that the rateable value of a parish or burgh, in the sense of section 67 of the Education (Scotland) Act 1872, was the owners' rateable value, which alone was exhaustive; that the only stable factor in calculating the school rate was the rate imposed on owners; that the school rate must therefore be taken to be the double of the rate imposed on owners; that the rate imposed on owners in Port-Glasgow being 4½d., the total school rate must be taken to be 8½d.; and that consequently the second parties were entitled, under section 1 of the Education (Scotland) Act 1897, to no more than a

grant representing 1s. 8d. per child, being at the rate of 4d. for every complete penny by which the school rate exceeded threepence in the £ on the rateable value of the burgh.

The second parties disputed these contentions and contended that the Education Department in endeavouring to apply such contentions had erroneously proposed to substitute for the school rate of Port-Glasgow another figure which was not the school rate. They thereby erroneously restricted the right arising to the second parties under the Education (Scotland) Act 1897. Under section 1 of that Act the expression "school rate" simply meant the school rate actually imposed, which in this case, as the minute of the Parish Council showed, was 9d., and not any other figure. The incidence of this rate upon owners as a class, or occupiers as a class, did not alter the "school rate." A simple test was to take the case of occupying ownership. These ratepayers undoubtedly paid 9d. per £, and they did so, in terms of their assessment, for nothing else than the school rate. There was nothing in the Education Acts or elsewhere to indicate that the expression "school rate" when used with reference to additional grants was to be used in any peculiar sense. The expression was to be satisfied by reference to the actual fact, as verified by the minute of the Parish Council imposing the rate.

The question of law for the opinion and judgment of the Court was—"Does the school rate levied by the Parish Council of Port-Glasgow for the year from Whitsunday 1897 to Whitsunday 1898 fall to be taken for the purposes of section 67 of the Education (Scotland) Act 1872, and section 1 of the Education (Scotland) Act 1897, as a rate of 8½d. in the £? Or does it fall to be taken as a rate of 9d. in the £?"

Argued for the first party—The intention of the Legislature was not the relief of the individual ratepayer, and consequently what any man paid was beside the question. The intention was to relieve the rates in gross, and that was to be effected by calculating the amount of relief in a particular mode. Had it been otherwise it would have been easy to have undertaken to pay whatever was required beyond the amount brought in by such and such a rate. The mode was given in section 44 of the Education (Scotland) Act 1872, which stated that the deficiency required to be provided was to be added under the name of "school rate" to the next assessment for relief of the poor. Now assessment in that connection did not mean a payment per £ but the aggregate amount to be collected—*Galloway* v. *Nicolson*, March 19, 1875, 2 R. 650, 12 S.L.R. 437. "School rate" must therefore also mean the aggregate amount, and it must have this same meaning in the subsequent section, number 67, which was now in question. That section consequently ran—"Where in any parish or burgh an aggregate amount to be collected for the schools of not less than threepence in the £ on the rateable value of such parish or burgh shall be levied;" and the "rateable value of the parish" was the amount in the valuation roll less the statutory deduction under the Poor Law Act 1845. But a rate so calculated was in fact equivalent to double the owner's rate. It was therefore on that that the amount of the relief was to be calculated. The education authorities were not concerned with the amount taken from individuals, but only with the amount levied from the community as a whole. The "school rate" was simply the sum which if multiplied by the amount of the valuation in pounds would give the sum required by the school board to make up the deficiency. That sum in this case was 8½d. not 9d. The extra ½d. added to the occupier's rate was a sum which required to be added to the amount levied from owners because certain property was exempted from occupier's rates. The actual sum obtained by the school rate from the occupiers was just the same as the sum obtained from owners, and was equivalent to 4¼d. per £ of the valuation. This interpretation was supported by the fact (1) that the owner's rate was alone stable and exhaustive, (2) that it alone was compatible with the system of classification in parishes, (3) that if "school rate" in section 67 of the Act of 1862 meant a payment per £, then the words "on the rateable value of the parish or burgh" were unnecessary, and (4) that slackness in collection would be encouraged by taking the rate levied as a basis because there would be an inducement to increase the occupier's rate so as to get an increased grant from the Education Department. The rate here was 8½d.

Argued for the second party—The words "school rate" had a well-known signification. They meant a rate in fact actually levied and calculated on the rateable value, one-half on owners and one-half on occupiers. It was therefore unnecessary to search for some theoretical rate, and it was unlikely that a school board would be asked to go behind an actual rate and work out a theoretical rate in order to entitle it to a subvention. Besides, it was no part of the school board's duties to calculate the rate though it had to condescend upon it. The Parish Council fixed the rate and the School Board merely took it from the Council's minutes. That rate was the actual rate levied and assessed on the rateable value, and was the basis for calculating the grant. There was no difficulty in regard to classification, because classification was given effect to before you got the rateable value, and this must have been before Parliament and intended by it. The rate here was 9d.

At advising

LORD ADAM—The question which we are asked in this case is whether the school rate levied by the Parish Council of Port-Glasgow for the year from Whitsunday 1897 to Whitsunday 1898 falls to be taken for the purposes of section 67 of the Education (Scotland) Act 1872, and section 1 of the Education (Scotland) Act 1897, as a rate of 8½d. in the pound, or as a rate of 9d. in the pound.

The question arises in this way — The Education Act of 1872 provides that where in any parish a school rate of not less than 3d. in the pound on the rateable value of such parish shall be levied, and the whole produce of such rate is less than 7s. 6d. per child in average attendance at the public schools, such school board shall be entitled, in addition to the parliamentary grant in aid of the public schools provided by them, to such further sum out of moneys provided by Parliament as will together with the produce of the rate make up the sum of 7s. 6d. for each such child.

The Act of 1897 provides that section 67 of the Act 1872 shall have effect as if the sum of 7s. 6d. therein mentioned were increased by the sum of 4d. for every complete penny by which the school rate exceeded 3d.

It is not disputed that the deficiency in the school fund for the year in question amounted to £1600. The School Board, in terms of the 44th section of the Act of 1872, certified to the Parish Council the amount of this deficiency, and required them to add this sum under the name of school rate to the assessment for the relief of the poor. Thereupon the Parish Council resolved to levy a school rate of 9d. in the pound, to be imposed on all lands and heritages within the burgh, and laid on and assessed the school rate accordingly. That that was not an excessive rate is clear from the fact that it produced only a sum of £1558—the deficiency being made up from other sources.

Section 44 of the Act of 1872 directs the authority charged with the duty of levying the assessment for the relief of the poor to add the school rate to the next assessment for relief of the poor, and to assess the same, one half upon the owners and the other half upon the occupiers of all lands and heritages, and to levy and collect the same along with the assessment for relief of the poor, and it is declared that the school rate shall in all cases be levied and collected in the same manner as poor's assessment. The assessing authority has to prepare for each year an assessment roll, and as the rate has to be levied half from owners and half from occupiers, it is necessary that in that roll owners and occupiers should be separately specified, and the amount for which they are respectively assessable distinguished.

It soon appeared, however, when the rate levied was laid equally upon owners and occupiers, that while the rate laid upon owners was collected in full, there was, for the reasons stated by the collector Mr Nixon in his certificate, a leakage in the collection of the occupiers' rates, with the result that the owners as a class paid more than the occupiers as a class. That led to the case of *Galloway* (2 R. 650).

In that case it was decided that the rate was to be imposed on owners and occupiers so as to make the aggregate amounts recovered from each class approximately equal. It is, therefore, not one half of the rate levied, but one half of the sum required to be raised by assessment, that has to be paid by each class respectively, necessitating a higher rate upon occupiers as a class than upon owners as a class.

Now it appears from the assessment roll, to which no objection is stated, that the assessable valuation of the burgh amounts to the sum of £47,375, and with reference to what was argued to us at the discussion I may say in passing that the assessable valuation cannot be ascertained from the valuation roll, because by the 37th section of the Poor Law Act certain deductions on account of repairs, insurance, etc., have to be made from the gross value, which is that stated in the valuation roll, and which deductions have to be estimated and allowed for by the Poor Law Assessor.

Now in conformity with the case of *Galloway*, the owners and occupiers were assessed at the rate of 4¼d. and 4¾d. respectively, these being the rates which were estimated to produce approximately from each class one half of the sum which had to be levied.

So far no objection is taken to any of the proceedings of the Parish Council, their mode of assessment, or otherwise.

These being the facts, the question between the parties is, whether the additional grant to which the second party is admittedly entitled under the 67th section of the Act of 1872 and the 1st section of the Act of 1897 should be calculated on a school rate of 9d. in the pound or on a school rate of 8½d. Now it is not disputed that in point of fact a school rate at the rate of 9d. per pound has been assessed and levied in this case. But it is said that that was assessed on the occupiers' valuation as well as on the owners, whereas the first parties contend (to use their own words) that the rateable value of a parish in the sense of section 67 of the Act of 1872 is the owners' rateable value, which alone is exhaustive, that the only stable factor in calculating the school rate is the rate imposed on owners, and that the school rate must therefore be taken to be the double of the rate imposed on owners —that is, in this case 8½d. per pound. I think that this is an entire fallacy. The "rateable value" of a parish is no doubt the value on which rates may be levied. Now, seeing that the rate is imposed by Act of Parliament on occupiers as well as owners, the rateable value of a parish must necessarily include the occupiers' valuation as well as the owners'. It is quite a novelty to me that the rateable value of a parish should be taken as twice the owners' valuation.

I think that the school rate referred to in section 67 is simply the rate assessed and levied in the parish, and that rateable value means assessable value. In this case the rate was 9d. in the pound. It appears to me to have been properly imposed and levied; therefore I think the alternative question should be answered in the affirmative.

LORD M'LAREN—I am of the same opinion as Lord Adam, and I cannot usefully add anything except to say that we have here an example of the great utility of that comparatively modern form of procedure, the special case.

As this is not a question of contract or of legal right, but of the administration of a public grant, it is reasonably clear that the parish councils, if dissatisfied with the

opinion of the law officers, could not have obtained a decision under any form of ordinary action. But by the consent of the Scotch Education Department the parish councils have been enabled to obtain a judicial decision of the question of construction in which they are interested.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"The Lords having considered the Special Case and heard counsel for the parties, answer the alternative question in the case in the affirmative."

Counsel for the First Party—Lord Advocate (Graham Murray, K.C.)—J. H. Millar. Agent—George Inglis, S.S.C.

Counsel for the Second Party—Shaw, K.C.—A. S. D. Thomson. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 28.

FIRST DIVISION.

[Lord Low, Ordinary.

THE WALKER TRUSTEES *v.* HALDANE.

Superior and Vassal — Feu-Charter — Restriction on Building — Reference to Plans—"Level of Dining-Room Floor."

A feu-charter granted in 1825 of ground occupied by a dwelling-house in Edinburgh, with "back ground" and "stable ground" behind, contained a provision that "the coach-houses and stables to be erected by" the vassal and his successors on the stable ground thereby disponed should be in strict conformity with "the plans and elevations signed . . . . as relative hereto and not otherwise." No coach-houses or stables were in fact erected. There was a further provision that the vassal was to have liberty to "erect buildings on the back ground, provided they do not exceed the height of 1 foot above the level of the dining-room floor."

In an action raised, *inter alios*, by the superior of the subjects to interdict the vassal, *inter alia*, from erecting certain proposed buildings on the back ground and the stable ground, in respect that the buildings proposed to be erected on the stable ground were not stables, and were not conform to the plans and elevations referred to in the feu-charter, and that the building proposed to be erected on the back ground exceeded the prescribed height — *held* (1) that as the vassal was not taken bound to erect stables, or expressly prohibited from erecting any buildings except stables on the stable ground, the erection of the buildings proposed to be erected on the stable ground was not a contravention of the charter, and (2) that the expression "dining-room floor" meant, not as maintained by the vassal the dining-room flat, but the floor of the dining-room, and that consequently the vassal was prohibited by the feu-charter from erecting upon the back ground of the feu any building exceeding the height of 1 foot above that level.

By a feu-charter dated 11th July 1825 Sir Patrick Walker of Coates feued to James Buckham, builder, two areas of ground on the north side of Melville Street, Edinburgh, which were described as "All and Whole those two areas or pieces of ground on the north side of Melville Street, marked numbers 53 and 55 on the feuing-plan of said street, consisting of 28 feet in front, nett measure, with the dwelling-houses and other buildings erected (or to be erected) thereon, and stable ground behind the same after described . . . bounded as follows, *videlicet:*— On the north by the front wall of a range of stables and coach-houses to be erected between the said areas and the meuse lane (*then followed the other boundaries*), and which pieces of stable ground extend from front to back 33 feet each, and from centre to centre of gable 16 feet each, and lie contiguous, and are bounded as follows, *videlicet:* — (*then followed the boundaries*).

The ground thus disponed consisted of (1) the ground on which the houses were built, (2) the "back ground" behind the houses, and (3) the "stable ground" behind the "back ground."

The charter contained the following provision:—"Whereas it is hereby expressly provided and declared that the dwelling-houses built or to be built on the said areas must be erected and made in strict conformity to the plan and elevation adopted for said street (and the plans and elevations of the two houses erected or to be erected on the said area or pieces of ground hereby disponed, now signed by me and the said James Buckham as relative hereto) with balconies and iron railings in front thereof, conform to the pattern adopted for said street, it is hereby expressly provided and declared that it shall not be in the power of the said James Buckham or his foresaids to convert the said dwelling-houses into shops or warerooms for the sale of goods or merchandise of any kind, or to erect or make common stairs or separate tenements within the said houses, but to use the same as dwelling-houses only, or to make any deviation from or alteration upon the plans and elevations and pattern balconies and iron railings above mentioned: But declaring, and it is hereby declared, that the coach-houses and stables to be erected by the said James Buckham and his foresaids on the foresaid two areas of stable ground hereby disponed shall be in strict conformity to the plans and elevations of the same now signed by him and me as relative hereto, and not otherwise; and with liberty to erect buildings on the back ground, provided they do not exceed the height of 1 foot above the level of the dining-room floor, and that the same shall not be converted into shops or working-houses, or to any other pur-