cumstances that the alleged ignorance of the results of the admission affects in any way the admission itself.

The second case before us is that of Alexander Knox. But it is, I think, *a fortiori* of the present, because Knox did state his desire to have the proceedings in the Court below reviewed by the presiding Judge, who held that he had presented no grounds for this being done, and sentenced him accordingly.

In conclusion I should add that I think it well the Court should warn Sheriffs and Sheriff Court procurators that where there is an ancillary charge of habitual criminality, it is their duty to make it clear to the accused person, as I am satisfied was done here, that he is charged with two different things under the same indictment, that he can only plead guilty to both and not to one only if he desires to take advantage of the 31st section of the Act of 1887, and that the two separate charges involve different and separate sentences.

LORD SKERRINGTON—I agree that both these appeals should be dismissed.

The Court dismissed both appeals.

Counsel for the Appellants—Haldane. Agents—W. Leslie Christie, W.S.—A. J. F. Mitchell, S.S.C.

Counsel for the Crown—The Lord Advocate (Munro, K.C.)—Mitchell, A.-D. Agent—Sir William Haldane, W.S., Crown Agent.

COURT OF SESSION.

Tuesday, January 20.

SECOND DIVISION.

[Lord Hunter, Ordinary.

MORRISON *v.* ST ANDREWS SCHOOL BOARD.

Trust — Charitable and Educational Bequests—School—Transference of Endowed School to School Board Included in a Scheme Framed by Educational Endowments Commissioners—Destination-over of Bequest — Educational Endowments (Scotland) Act 1882, *secs.* 32 *and* 35.

The Educational Endowments (Scotland) Act 1882 enacts — Section 32 — ". . . A scheme when approved by Her Majesty in Council shall have full operation and effect from the date of such Order in Council, in the same manner as if it had been enacted in this Act; and thereupon every Act of Parliament, letters-patent, statute, deed, instrument, trust, or direction relating to the subject-matter of the scheme, so far as inconsistent with the provisions thereof, shall be repealed and abrogated." Section 35—"The Order in Council approving a scheme shall be conclusive evidence that such scheme was within the scope of and made in conformity with this Act, and the validity of such scheme and order shall not be questioned in any legal proceedings whatever."

A truster disposed certain heritable subjects to trustees in trust for the perpetuation of a particular system of education in an infant school, and on the discontinuance of the system to his own heirs. The system having been discontinued the trustees arranged with a school board to transfer the trust property to them, and a clause vesting the subjects in the school board was inserted in a scheme, dealing with another endowment, framed under the Educational Endowments (Scotland) Act 1882, which was duly approved by an Order in Council. The truster's heir brought an action against the school board for declarator that the primary trust purpose had now come to an end, that the destination-over in favour of the pursuer had not been evacuated by the clause, and that the subjects now belonged to him. The defenders pleaded that the clause in itself constituted a scheme under the Act, dealing with the infant school endowment, which abrogated the destination-over, and that the action was incompetent in respect that it involved an alteration of the scheme.

The Court *granted* decree, *holding* that the clause did not constitute a scheme under the Act, but was a mere conveyancing expedient which had the effect of vesting the defenders in the subjects to the same extent and effect as they had been vested in the trustees.

Alexander Morrison, residing at Dunesslin, St Andrews, *pursuer*, brought an action against the School Board of the Burgh of St Andrews, *defenders*, in which the conclusions were for a decree of declarator (first) that the trust purposes contained in a disposition of certain heritable subjects situated in South Street, St Andrews, and instrument of sasine following thereon, "whereby the said subjects were disponed in trust for the use and behoof of the Infant School of St Andrews, and with a view to maintain and perpetuate the Madras system of mutual instruction and moral discipline there, but on failure of that school, or on the discontinuance of that system of education therein [*then to certain persons, whom failing*] then for the use and behoof of the Very Reverend Andrew Bell, Doctor of Divinity, sometime Master of Sherburn Hospital, Durham, and Prebendary of Westminster, and of his heirs and successors whomsoever, have now come to an end, except in so far as the destination-over to the heirs and successors of the said Andrew Bell is concerned; (second) that the destination-over of the said subjects as contained in the foresaid disposition and instrument of sasine in favour of the said Andrew Bell and of his heirs and successors whomsoever, was not affected, evacuated, qualified, or discharged by clause twenty-three of the scheme for the administration and management of the Madras College, St Andrews, made by the Commissioners under the provisions of the Educational Endowments (Scotland) Act 1882, dated third May Eighteen hundred and

eighty-eight, and that the said destination-over in favour of the said Andrew Bell and his heirs and successors whomsoever still subsists and is of good force and effect; (third) that the said subjects situate in South Street, St Andrews, and described as aforesaid, belong heritably in property to the heirs and successors of the said Andrew Bell, and in particular to the extent of one-fourth thereof to the pursuer in virtue of his rights and titles as one of the heirs-portioners of the said deceased Andrew Bell;" and for a decree ordaining the defenders to denude of the said subjects and to convey them to the pursuer and the other heirs-portioners of the said Dr Bell.

The following narrative of the *facts* is taken from the opinion of the Lord Ordinary (*infra*)—"In this action the pursuer as one of the heirs of the late Dr Bell, who died about the year 1832, seeks to vindicate for the benefit of those heirs certain property situated in South Street, St Andrews, now vested in the defenders the School Board of St Andrews.

"Upon 10th May 1831 Andrew Bousie, writer in St Andrews, trustee on the sequestrated estate of Archibald Wallace, in consideration of the sum of £530 paid to him by the late Dr Bell, disponed the subjects in question to the then Provost of St Andrews and others therein named, and to their respective successors in office or assignees, as trustees for the purposes therein defined. The title of the said trustees was duly completed by recording an instrument of sasine in their favour dated 21st May 1831.

"In terms of the trust so created the subjects were conveyed 'for the use and behoof of the Infant School of St Andrews, and with a view to maintain and perpetuate the Madras system of mutual instruction and moral discipline there, but on failure of that school, or on the discontinuance of that system of education therein, then to and for the use and for behoof of the Provost and Magistrates, Town Council, and ministers of the Established Church for the time being of Cupar in Fife, and the clergymen of the Episcopal Chapel there, for similar purposes, and their respective successors in office, and on failure of them, or on the discontinuance of that system there, then for the use and behoof of the said Dr Andrew Bell himself and of his heirs and successors whomsoever.'

"The Madras system of education, also known as the mutual or monitorial system, is a system by which the more advanced pupils in schools are employed in the instruction of younger pupils. It is admitted by both parties to this action that this system of education has for many years been in abeyance, and is no longer in operation in the Infant School of St Andrews or in any school or institution in the burgh of Cupar. The Provost and Magistrates of Cupar, &c., were called for their interest, but they have not lodged defences. According to the averments of the defenders, the infant school was transferred to Market Street, St Andrews, about the year 1844, and has for a number of years past been known as the West Infant School. From an excerpt from a minute of the defenders' Board it appears that in 1874 the infant school was, with the consent of the Board of Education, transferred from the trustees of the school to the defenders. As regards the endowment which forms the subject of the present litigation, the trustees of the infant school seem to have resolved to authorise 'the School Board to receive the rent of said house and garden, and to apply same towards the support of the infant school in St Andrews on condition that the School Board shall maintain the property in good repair to the satisfaction of the trustees, and defray the usual rates and taxes connected with the property, and the cost of fire insurance.' The gift was accepted by the defenders upon these terms.

"Upon 3rd May 1888 a scheme of the Commissioners under the Educational Endowments (Scotland) Act 1882, relating to the Madras College, St Andrews, received the approval of the Crown by Order in Council. The endowment of the infant school had nothing to do with the Madras College."

The *scheme*, *inter alia*, provided:—Clause 23—"The house in South Street, St Andrews, presently held under disposition to William Haig and others for the use and behoof of the infant school, St Andrews, under disposition dated 10th May 1831 and instrument of sasine in favour of the said William Haig and others, recorded in the Burgh Register of Sasines at St Andrews, 21st May 1831, shall be transferred to and vested in the Burgh School Board of St Andrews without the necessity of any new conveyance or instrument." Clause 47—"It shall be in the power of the Court of Session to alter the provisions of this scheme upon application made to them, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in the Educational Endowments (Scotland) Act 1882."

The pursuer averred, *inter alia*—"(Cond. 6) The pursuer has made inquiry but has failed to ascertain how the said clause, which relates to the subjects presently in dispute, came to be inserted in the said scheme for the administration and management of the Madras College, St Andrews. The trust created by the disposition of 1831 did not relate in any way to the Madras College, St Andrews, and the heritable subjects conveyed by the said disposition have never been used in connection with, nor the income therefrom applied to the use of, the Madras College either before or since the date of said scheme. No intimation of the intention to deal with the said subjects in South Street was made to the pursuer or to any of the heirs and successors of the said Andrew Bell, or to the then trustees, and so far as these subjects are concerned no scheme was framed by the Educational Commissioners for altering the conditions and provisions relating to the said subjects as defined in the disposition and instrument of sasine above narrated. The statutes mentioned and the Order in Council are referred to for their terms. *Quoad ultra* the statements in answer are denied."

The defenders averred, *inter alia*—"(Ans. 6) The said scheme and the said disposition are referred to for their terms. Denied that the conditions and provisions relating to the subjects in question contained in the disposition and instrument of sasine referred to were not altered by the said scheme. *Quoad ultra* not known and not admitted. The said conditions and provisions were abrogated by the said scheme, which was framed by the Educational Endowments Commissioners in accordance with the provisions of the Educational Endowments (Scotland) Act 1882, and submitted to the Scotch Education Department, by whom it was approved after the statutory procedure in regard to intimation and publication had been followed, in pursuance of the said Act, and after full opportunity of stating objections or making representations had been given to all parties claiming to be interested in or affected by its clauses. No objections were lodged against the scheme by anyone. The scheme was duly approved by an Order in Council of Her Majesty Queen Victoria. The trust purposes of the said disposition, in so far as they provided for maintaining and perpetuating the Madras system of education, had ceased to be capable of being fulfilled for many years prior to the promulgation of the said scheme. No school board since 1872 could adopt the Madras system consistently with the Education Code administered under the Education (Scotland) Act 1872 and amending Acts. The pursuer was residing in St Andrews or its vicinity in 1888."

The defenders pleaded, *inter alia*—"(1) The action being incompetent, in respect that the pursuer is attempting by its means to alter the provisions of the scheme founded upon without adopting the procedure provided for in the said scheme, the defenders are entitled to have the action dismissed. (2) The scheme in question having been approved by an Order in Council, the present action is excluded by force of the 35th section of the Educational Endowments (Scotland) Act 1882, and the same ought to be dismissed. (6) Upon a sound construction of clause 23 of the scheme in question, and of the 32nd section of the said Act of 1882, the trust purposes contained in the disposition founded upon of the heritable subjects described in the summons must be deemed to have been abrogated, and the destination-over contained in the said disposition must be deemed to have been evacuated as from the date of the Order in Council approving of the said scheme, and the defenders are accordingly entitled to decree of absolvitor from the whole conclusions of the summons. (7) Alternatively, upon a sound construction of the said scheme and of the said section, the defenders, being trustees of the said heritable subjects for the purposes of the infant school under their management, without any obligation upon them to maintain the said Madras system, are entitled to absolvitor."

On 19th November 1913 the Lord Ordinary (HUNTER) granted decree of declarator in terms of the first three conclusions of the summons, and *quoad ultra* continued the cause and granted leave to reclaim.

Opinion.—"[*After the narrative, supra*]—In the argument submitted to me by the defenders' counsel reliance was placed upon two defences as entitling his clients to absolvitor—*first*, that the primary purpose of the trust was the benefit of the infant school of St Andrews, and not the maintenance and perpetuation of the Madras system of education, and, *second*, that the statutory conveyance to the defenders in 1888 precluded any claim being now made by a beneficiary founding on the terms of the original destination.

"As regards the first of these defences, it does not appear to me to be possible to give effect to the defenders' contention. The express language of the trust makes it clear that on the discontinuance of the system of education favoured by the truster at St Andrews and Cupar the property should revert to himself and his heirs and successors.

"The second defence is attended with much more difficulty. Section 32 of the Educational Endowments (Scotland) Act 1882 provides—'. . . [*quotes, v. sup. in rubric*]. . .' That Act was passed 'to extend the usefulness of educational endowments in Scotland, and to carry out more fully than is done at present the spirit of the founders' intentions, and so far as may be to make an adequate portion of such endowments available for affording to boys and girls of promise opportunities for obtaining higher education of the kind best suited to aid their advancement in life.' Elaborate provision is made in the Act for the preparation of a draft scheme, the steps to be taken to ensure its approval, the powers of the governing body entrusted with the administration of the revenues of the endowment, and the procedure to be adopted by them in the course of such administration. There is nothing in the Act to lead me to suppose that a conveyance of funds or property to a school board in relief of rates sanctioned by the Commissioners would constitute such a scheme as is contemplated by the statute. No doubt the school board would have to administer the subject of the conveyance in accordance with their statutory powers, and a study of such powers would enable those interested to know what was proposed with regard to many, if not all, of the matters which by the Act of 1882 must be provided for; but the statutory provisions appear to me to contemplate express and not implied schemes. On a careful study of the scheme relating to Madras College I think that the conveyance to the defenders in section 23 although in the scheme is not of the scheme. The provisions which one expects to find in a statutory scheme under the Act of 1882 are all to be found in the scheme, but they affect the endowment which is known as Madras College and not the subjects conveyed to the defenders. I do not think, therefore, that the defenders can succeed in virtue of the provisions of section 32 of the 1882 Act. They maintain, however, that in any event they have got a statutory convey-

ance to the subject, and the validity of this conveyance was not challenged by the pursuer. His position is that the statutory conveyance under section 23 of the scheme, assuming it to be valid—and I pronounce no opinion upon that question—was granted under burden of the trust created by the original conveyance of 1831, or alternatively, that the destination-over contained in that deed has neither been evacuated nor discharged. I have come to be of opinion that the pursuer's contention is well founded. It is not maintained that the conveyance to the defenders was to them absolutely. I think that it merely avoided the necessity of a separate deed, and had the effect of vesting the defenders in the subjects to the same extent and effect as they were vested in the special body of trustees appointed to administer the trust in terms of the original conveyance. There is an express reference in section 23 of the scheme of 1888 to the disposition of 1831, and nothing to indicate that the terms of the original trust were being altered, or the rights that might emerge to beneficiaries in the events contemplated by the truster were being impaired. The defenders say that 'No school board since 1872 could adopt the Madras system consistently with the education code administered under the Education (Scotland) Act 1872 and amending Acts.' This circumstance does not appear to me to avail the defenders. By section 47 of the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62) it is provided—'Every school board shall be at liberty to receive any property or funds which may from time to time be conveyed, bequeathed, or gifted to such board for behoof of any school or schools under the management thereof, whether generally or for the promotion of any particular branch or branches of education or instruction, or for increasing the income of any teacher; and it shall be the duty of the board to administer such property, funds, or money according to the wishes and intentions of the donors, and in such manner as to raise the standard of education, and otherwise increase the educational efficiency of the school or schools intended to be benefited.' That section imposes an obligation upon a school board receiving a gift to respect the wishes of the donor, and I do not see that the obligation is affected by the fact that the gift is obtained from the trustees of the original donor. The defenders knew that the property which they were receiving was being administered under a trust, and ought either to have satisfied themselves that they were in a position to implement the trust or to have refused the gift. If the reasoning in the previous part of my opinion be sound, they did not improve their position by getting a simple statutory title instead of making up a title in the ordinary way. Their obligation to administer the trust by which the property was affected remained undischarged.

"The defenders maintained that the pursuer could only get redress against the existing state of matters by going to Parliament or by getting the scheme of 1888 amended either by an application to the Commissioners under the 1882 Act or by petition to the Court of Session. I think that the pursuer's answer to this is sound. His action is brought to have the effect of section 23 of the scheme of 1888 determined in the light of the provisions of the Act of 1882, and no question of his having lost his rights under the conveyance of 1831 arises.

"I shall therefore pronounce an interlocutor giving effect to the first three conclusions of the summons, which are declaratory, and grant leave to reclaim. Meantime I cannot deal with the conclusion for a conveyance until the heirs of the late Dr Bell have made up a title."

The defenders reclaimed, and argued—Clause 23 of the Madras College scheme contained a separate scheme for the administration of the Infant School Endowment. It was not necessary that the scheme should specify its purposes, since the body who were to administer it, viz., the School Board, were a statutory body with statutory powers and duties. The scheme vested the property of the endowment in the School Board and gave the School Board one or other of two rights. It either gave the School Board (1) the right to administer the endowment in accordance with the original trust purposes, so far as these were not inconsistent with school board administration, or else it gave the School Board (2) an unqualified right to administer the endowment, except in so far as the right was controlled by the provisions of the School Board Acts. But either of these rights excluded the claim of the pursuer. The Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59), sec. 32, abrogated the provisions of the trust in so far as these were inconsistent with the scheme, and accordingly it abrogated the destination-over to the pursuer. A statutory title such as that conferred by the scheme was the highest form of title—*Blackwood* v. *London Chartered Bank of Australia*, 1874, L.R., 5 P.C. 92, *per* Lord Selborne, L.C., at 110. If a mistake had been made, the Legislature alone could correct it—*Labrador Company* v. *The Queen*, [1893] A.C. 104. In the present case it was not said that the statutory requirements had not been complied with in framing the scheme, as was said in *Metcalfe* v. *Cox*, April 8, 1895, 22 R. (H.L.) 13, 33 S.L.R. 405. An Act of Parliament might by implication take away private rights without compensation—*Musselburgh Real Estate Company* v. *Magistrates of Musselburgh*, July 31, 1905, 7 F. (H.L.) 113. Section 5 gave the Commissioners wide powers in framing schemes—*Donaldson's Hospital* v. *Commissioners on Educational Endowments*, October 31, 1885, 13 R. 101, 23 S.L.R. 70; *Ferguson Bequest Fund* v. *Commissioners on Educational Endowments*, March 15, 1887, 14 R. 624, *per* Lord Mure at 631, 24 S.L.R. 441—and the Order in Council applying the scheme was conclusive evidence of its scope—section 35. Moreover, if the bequest had failed, it could not benefit the pursuer, because in that case it must be held to have lapsed—*Burgess' Trustees* v. *Crawford*, 1912 S.C. 387, 49 S.L.R. 294. The School Board were admittedly

applying the income of the endowment in relief of the rates, but the endowment was an endowment for primary education, and therefore it was *sua natura* an endowment in relief of the rates. Such an endowment was not invalid — *Trustees of Anderson Female School*, 1911 S.C. 1035, 48 S.L.R. 839. A statutory title such as was conferred on the School Board by the scheme could not be reduced, nor could the scheme be altered except in the way provided by clause 47. But the declarator sought by the pursuer really involved an alteration of the scheme, and it was incompetent to alter a scheme by an action of declarator—section 35. *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531, *per* Lord Halsbury, L.C., at 543, was referred to in support of a contention by the reclaimers that it was competent to refer to the preamble of an Act of Parliament in order to assist in its interpretation.

Argued for the respondent—The pursuer was not impugning the validity of the scheme or seeking to alter it. He merely proposed to construe it. The scheme fell to be construed under the Educational Endowments (Scotland) Act 1882, which defined its limits. The transference to the School Board by clause 23 was a transference in trust. The clause vested the property of the trust in the School Board without affecting the trust purposes. The clause itself contained no trust purposes. The Education Code made no provision for the administration of endowments, except administration in accordance with the wishes of the donor. Moreover, the trust said to be implied was really a trust for the relief of the rates, and that was an extremely improbable sort of trust and one which the Court would not approve of—*Governors of Jonathan Anderson Trust*, March 12, 1896, 23 R. 592, 33 S.L.R. 430. The pursuer's rights could only be taken away expressly or by necessary implication. There was a presumption against an Act of Parliament's taking away individual rights, especially in a case like the present where the pursuer's rights were founded on a written instrument—Maxwell, Interpretation of Statutes, 5th ed. p. 461; *Mansfield* v. *Mansfield*, 1889, 43 Ch. D. 12, *per* Bowen, L.J., at 17; *Western Counties Railway Company* v. *Windsor and Annapolis Railway Company*, 1882, 7 A.C. 178; *Wells* v. *London, Tilbury, and Southend Railway Company*, 1876, 5 Ch. D. 126; *Morris* v. *Mellin*, 1827, 6 B. and C. 446; *Walsh* v. *Secretary of State for India*, 1863, 10 H.L. 367, *per* Lord Chelmsford at 400.

At advising—

LORD DUNDAS—I have come to the conclusion, substantially upon the same grounds as those expressed by the Lord Ordinary in his opinion, that the interlocutor reclaimed against is right.

The compearing defenders object *in limine* that the action is excluded by force of section 35 of the Educational Endowments (Scotland) Act 1882, which provides that "the Order in Council approving a scheme shall be conclusive evidence that such scheme was within the scope of and made in conformity with this Act, and the validity of such scheme and Order shall not be questioned in any legal proceedings whatever." I think this plea is bad, because the pursuer does not here seek to question or impugn the competency or validity of the scheme or Order in Council, but only asks, as he is entitled to do, that the Court shall construe a certain clause in the scheme and declare its true meaning and effect. The defenders also plead that the action is incompetent, because the pursuer is attempting to alter the provisions of the scheme without adopting the procedure thereby provided (clause 47) viz., a petition to the Court by "any party interested" (with consent of the Scotch Education Department) for alteration of the provisions. In my opinion this plea also fails. The pursuer does not desire to have the scheme altered; he asks that one of its clauses should be construed, and effect given to it according to its true meaning.

The merits of the case turn upon the proper construction to be put upon, and the proper effect to be given to, clause 23 of the scheme. It seems clear that that clause, though embodied in the scheme, truly forms no proper part of it. The scheme is one for the administration of the endowment known as the Madras College in St Andrews, and constitutes a governing body with full powers for that purpose. The subject-matter of clause 23 forms no part of the endowment of the Madras College; it is a property absolutely separate and distinct, held upon a separate title, and devoted to quite different purposes, though the original benefactor was in both cases the same person. The property dealt with in clause 23 is not thereby vested in the governing body but in quite a different body, the Burgh School Board of St Andrews. We have no information as to how this clause came to be inserted in the scheme at all, though we were told that the insertion was apparently made at a late period in the formation of the scheme after the evidence before the Commissioners had been taken. But the defenders' counsel contended that clause 23 must be regarded as in effect a separate scheme within a scheme—a scheme, namely, for the administration of Dr Bell's endowment constituted by the trust-disposition of 10th May 1831 for the use and behoof of the infant school. I am unable so to regard it. A "scheme" in conformity with the Act of 1882 for the future government and administration of an endowment contemplates (section 5) provision being made for altering the conditions and provisions of the endowment, including its powers of investment and the like, or altering the constitution of its governing body, or establishing a new governing body, with such powers as shall seem necessary. Clause 23 does no more than barely declare a transfer of *title* to the school board. It in no way indicates for what purposes or in what manner the school board are to administer the revenues of the property. Further, it is admitted that at all events in 1888, the date of the scheme, the prior purposes of Dr Bell's trust-disposition of 10th May 1831 had in fact become inoperative, and the destination had

opened in favour of his heirs. It would seem, therefore, at least doubtful whether the property in question was at that date an "educational endowment" at all, within the meaning of section 1 of the Act, for it was not then "dedicated to charitable uses," but truly held in trust for Dr Bell's heirs, the prior charitable or educational purposes having failed; and it is not to be presumed that the Commissioners intended to confiscate private property under colour of the Act. But however this may be—and it is unnecessary to pursue the topic further—I cannot read clause 23 as defeating the otherwise undoubted right of Dr Bell's heirs to this property. It is well-settled law that in construing an Act of Parliament—and I treat clause 23 as being in effect a statutory enactment—the presumption is that the Legislature does not intend to take away existing private rights without compensation unless it does so in express terms or by clear implication. The right of the heirs is not expressly abrogated by clause 23; but the defenders relied strongly upon the language of clause 32 of the Act of 1882, as amounting, when read along with the clause, to an abrogation by clear implication. I think the contention fails, because I do not see that the ultimate destination in the trust-deed of 1831 is necessarily—or, as a matter of fair construction, is truly—"inconsistent with the provisions" of clause 23. The clause seems to me to import merely that the then existing arrangement whereby the trustees allowed the School Board possession of the property, and to draw the rents and apply the proceeds towards their expenditure in connection with the infant school, should be put, as matter of title, upon a more convenient basis, by transferring the subjects to the the School Board "without the necessity of any new conveyance or instrument." In other words, I agree with the Lord Ordinary in thinking that clause 23 "had the effect of vesting the defenders in the subjects to the same extent and effect as they were vested in the special body of trustees appointed to administer the trust in terms of the original conveyance." It would, in my judgment, be a violent construction of the clause, and one at variance with the general principle of legal construction above referred to, if we were to hold that the emerging destination in the trust-deed has been impliedly "repealed and abrogated," as being "inconsistent with the provisions" of clause 23. The argument based upon the defender's fifth plea-in-law which was maintained before the Lord Ordinary was not insisted in at our bar. For the reasons stated, which are substantially the same as those more fully elaborated by his lordship, I am of opinion that all the defenders' pleas-in-law fail except indeed their ninth plea, which we are not in a position to determine, but which will, no doubt, be considered and dealt with when the case goes back to the Outer House. I am therefore for adhering to the interlocutor reclaimed against.

LORD SALVESEN—It is matter of concession that if the pursuer's rights fall to be regulated by Dr Bell's disposition of 10th May 1831, the event has now happened on the occurrence of which the subjects conveyed fall to be made over to the heirs of the disponer. The sole question therefore is whether clause 23 of the scheme issued in 1888 by the Commissioners acting under the provisions of the Educational Endowments (Scotland) Act 1882 has extinguished this right and transferred the property absolutely to the defenders.

This clause appears in a scheme which bears to be "for the administration of the endowment in the burgh of St Andrews and county of Fife known as the Madras College," and the disposition under which this endowment was made is said to bear date 14th July 1831. The heading therefore makes no reference to the separate endowment granted "for the use and behoof of the infant school of St Andrews" by a disposition of different date, and there is no other clause which has any reference to this endowment. How the clause found its way into the Madras College scheme it is difficult to understand; but as it is there, and has the same force as a clause in an Act of Parliament, it must receive effect according to its fair construction. It is, however, a rule in the construction of statutes that there is a presumption against the expropriation of private rights without compensation; and unless such confiscation is made by express words or is clearly implied from the language used, this presumption will receive effect. In clause 23 there are no words which expressly bear that the subjects of the endowment were thereby transferred to the defenders, freed of the trust conditions; and I cannot hold that this is implied from the mere fact that the defenders are a statutory body whose duty it is to devote the funds they administer to educational purposes. Had the Commissioners intended clause 23 to constitute a complete scheme for the administration of this small endowment, they would presumably have mentioned it in the title, and in any event it would have been their duty to have specified the purposes to which the income was to be applied; whereas if the defenders are right in their contention, I do not see any reason why the trust should not be at once extinguished by the defenders selling the subjects and applying the price to the erection of a new school, or to any similar purpose. One would also have expected that if the intention was to vest the property in the defenders absolutely, freed of the conditions under which it had been previously held, unambiguous words to this effect would be used; and the absence of such words, coupled with the improbability of the Commissioners confiscating private rights—of which they must be assumed to have been in knowledge—is, I think, conclusive against the defenders' contention.

It was, however, said with much force that there is a strong presumption against the Commissioners transferring the property to the defenders when it must be assumed to have been equally within their knowledge that the Madras system of education had been long previously discontinued, and that the event had thus arisen which entitled the heirs to call upon the owners-in-trust to

denude in their favour. The answer is to be found in the history of the endowment. At the date when clause 23 was embodied in the scheme for administering Madras College, and for twenty-four years before, the defenders had been actually receiving the rents of the property and applying the same towards the support of the Infant School of St Andrews. They did so under a minute of the original trustees, dated 20th February 1874, from which it also appears that these trustees would have made over the property to the defenders had they considered themselves entitled to do so. It may have seemed desirable to the Commissioners in these circumstances to transfer the property from the trustees to the defenders, as the latter were really administering the endowment and receiving the whole rents. It was doubtful whether any heirs of Dr Bell would ever claim the property, and so long as they did not do so there was no reason why the existing arrangement should not be continued. The clause therefore was a mere conveyancing expedient by which the expense of a separate deed was saved and the original trustees' doubts, which were no doubt well founded, set at rest. In short, the clause substituted for the body of trustees originally chosen by the testator, but who seemed unwilling to discharge their duties as such, the statutory body which was *de facto* administering the trust and expending the rents for educational purposes. I do not think that the destination-over contained in the deed itself was thereby evacuated, and that accordingly the pursuer's rights remained the same as if the statutory transfer had never taken place. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD GUTHRIE—I am of the same opinion. When the 1872 Education Act came into force, the infant school in St Andrews to which the subjects now in question were attached as an endowment, was transferred (I presume under sections 38 and 39 of the Act) to the School Board, and if there were provisions in the title to that school confining education to the "Madras system," these were thereby abrogated. In 1874, as appears from the minute of meeting of the Infant School Trustees (which should in form have been a minute of the Endowment Trustees, who were the same individuals as the Infant School Trustees), these trustees authorised the School Board, on certain conditions, to receive the proceeds of the endowment and to apply them towards the support of the infant school, and the School Board expressed their thanks for the so-called "gift." It is clear that this transaction, although evidently *bona fide* on both sides, was *ultra vires* both of the Infant School Trustees and of the Endowment Trustees. It does not appear at what precise date the Madras system was finally abandoned, whether before or after 1874. But it is admitted that it had ceased to be practised before the passing of the 1882 Act. Consequently before the passing of that Act the destination-over in favour of Dr Bell's heirs had become operative, and they had become entitled to a conveyance of the subjects. The transaction contained in the said minute could not affect the heirs' rights, and, indeed, without prescription on an *ex facie* unqualified title their rights could not have been affected even had the trustees conveyed the subjects to the School Board under section 47 of the 1872 Act. Therefore the subjects now in question had, in my opinion, ceased, at all events before the passing of the 1882 Act, to form an "educational endowment" in the sense of section 1 of that Act, and did not fall under its operation.

No doubt if the Educational Endowment Commissioners, notwithstanding, treated the subjects as forming an educational endowment by following the statutory procedure applicable to educational endowments, or, even without doing so, if they framed a scheme dealing with them in accordance with their statutory powers for dealing with educational endowments, such a scheme (having the force of statute, and under section 32 of the 1882 Act) could not now have been interfered with by Dr Bell's heirs except by a new Act of Parliament, even if it involved confiscation of property which unquestionably did not fall within the Commissioners' jurisdiction. I think clause 23 of the Madras College Scheme, which is alleged to set up a separate scheme for this entirely independent endowment, can be satisfactorily explained and given effect to without leading to a result which the Court will not easily reach, namely, that the Commissioners dealt with property as falling within their jurisdiction to frame schemes which in fact was outside that jurisdiction, and diverted it from its rightful owners.

So far as procedure is important, the statute of 1882 contemplates throughout that the Commissioners, in order to enable them to act with full consideration of the circumstances and of the interests involved, will make inquiry, public or private, in each case before framing a scheme. In this case it is admitted that, so far as the Commissioners' records show, no inquiry was made, and the defenders do not allege (answer 6) that any inquiry was made, nor do they assert that all inquiry was dispensed with in the case of any other funds or property dealt with by the Commissioners in framing schemes.

But if clause 23 contained the essential elements of a scheme, it would not matter to what extent the Commissioners failed to follow the procedure contemplated or prescribed by the statute. These essential elements, or some of them, seem to me awanting.

One approaches the question favourably to the pursuer, for the defenders propose to contradict the express terms of the Order in Council dated 3rd May 1888, and of the title of the scheme, in both of which the scope of the scheme as a scheme is confined to the Madras College Endowment, of which the subjects now in question form no part.

Does section 23 contain the essentials of a statutory scheme?

The Commissioners' powers in framing schemes were regulated by sections 5 and 7 of the Act. Under section 5 schemes were

to provide for "altering the conditions and provisions" of endowments—that is, I take it, by assigning them to certain other specific educational uses, not by handing them over to another educational body for application by that body to any of their educational uses which they thought best. Under section 7 the Commissioners were empowered to "reorganise" educational endowments, which again implied consideration by the Commissioners of what the new organisation was to be and to do, and not mere delegation of this function to another educational body. It appears to me that section 23 does not satisfy either clause 5 or clause 7 of the Act. The pursuer asserted—and I did not understand the defenders to deny—that in every other case of funds or estate handed over to school boards by the Commissioners the scheme contained definite instructions as to how the proceeds of the funds or estate were to be applied.

Further, the Legislature seems to me to have contemplated (1) objects more or less directly connected with higher education (preamble and section 7 of 1882 Act); (2) a governing body not composed solely of members of a school board (section 5 of said Act); and (3) conservation of capital, along with improved expenditure of income (section 5). But if section 23 contains a valid scheme, it not only effected a transfer of property specially destined, in a certain event which had already occurred, to a truster's heirs but without any appropriation to purposes of higher education, it did so to a body concerned primarily with elementary education, who would be entitled to spend not only the income but the capital in the relief of the School Board rate, and this at the hands of Commissioners constituted by Parliament (in the language of the preamble to the Act) "to carry out more fully than is done at present the spirit of the founders' intentions, and so far as may be to make an adequate portion of such endowments available for affording to boys and girls of promise opportunities for obtaining higher education of the kind best suited to aid their advancement in life." Such a result is not to be reached unless under the compulsion of express terms or reasonably necessary implication. I can find in section 23 no express constitution of a scheme, and no express exclusion of the rights of Dr Bell's heirs. If such constitution and such exclusion arise by necessary implication, that can only be because no other reasonable explanation of the intention and effect of the clause can be given. In my opinion the pursuer has given a reasonable explanation, derived from admitted facts.

In 1888 the School Board was in receipt, under the minute already referred to, of the annual proceeds of the subjects in question. Dr Bell's heirs had not intervened, and might not intervene within the years of prescription to claim their rights. The Infant School Trust having come to an end, the Endowment Trustees, the same individuals, naturally wished to wind up. A conveyance by them to the School Board might have been questioned by other persons than Dr Bell's heirs. So they arranged with the School Board to get a clause put into the Madras College Scheme, in which the School Board was substantially interested, giving the School Board a statutory title to the subjects which would at least exclude all questions other than under the destination-over in favour of Dr Bell's heirs. Looking to the fact that for fourteen years these heirs had taken no steps to vindicate their rights, these rights may either have been overlooked or it may have been assumed that any possible challenge by Dr Bell's heirs was too remote to be worth consideration.

On the other hand, suppose that in full knowledge and appreciation of the rights of Dr Bell's heirs, it was desired to exclude these rights, and suppose it was believed by all parties concerned other than the heirs that this result has been achieved by section 23, and particularly by the use of the word "vested," I am of opinion that this intention has failed and that this result has not been achieved.

The word "vest" is consistent with either view. The rights of Dr Bell's heirs could only have been excluded by section 23 had that section promulgated a scheme, which in my opinion it does not, or if in addition to transferring the subjects from the original trustees to the School Board and vesting them in the School Board, some such words had followed as were proposed in the defender's petition to this Court dated 29th January 1913, namely, "freed and discharged of the trust purposes contained in the said disposition and relative instrument of sasine."

I am accordingly of opinion, on the assumption that the pursuer's share of the subjects in question as one of Dr Bell's heirs is, as he avers, one fourth, that he is entitled to declarator in terms of the first three conclusions of the summons.

The LORD JUSTICE-CLERK was absent.

On the question of expenses counsel for the respondent referred to the following cases—*Milne* v. *Fraser*, November 25, 1859, 22 D. 33, *per* Lord Ordinary (Mackenzie) at 36; *Andrews* v. *Ewart's Trustees*, June 29, 1886, 13 R. (H.L.) 69, *per* Lord Watson at 73, 23 S.L.R. 822, at 825; *Davidson's Trustee* v. *Simmons*, July 19, 1896, 23 R. 1117, 33 S.L.R. 748; *Merrilees* v. *Leckie's Trustees*, 1908 S.C. 576, 45 S.L.R. 449.

The Court adhered, and found the respondent entitled to the expenses of the reclaiming note.

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