COURT OF SESSION.

Tuesday, December 15.

EXTRA DIVISION.

DALZIEL SCHOOL BOARD *v.* SCOTCH EDUCATION DEPARTMENT.

School—Board Schools—Education Department—Delegation—Dismissal of School Teacher—Education (Scotland) Act 1908 (8 *Edw. VII, cap.* 63), *sec.* 21.

Held that the power given by the Education (Scotland) Act 1908, sec. 21, to the Scotch Education Department to inquire into the dismissal of a school teacher need not be exercised by the whole Department but may be delegated to a member; such delegation need not be express, may be tacit, inferred from the practice of the Department.

Held, by Lord Hunter, Ordinary, and not reclaimed against, that the section applied to all cases of dismissal, and was not excluded by there being express provisions in the contract of employment for the termination of the employment.

Proof — Government Department — Statement as to Method of Transacting Business—Admissibility without Further Evidence.

Where a Government department make a specific averment on record as to their practice, which their counsel endorses at the bar, in the absence of specific denial the Court are bound to accept the statement without proof.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), section 65, enacts—"All orders, minutes, certificates, notices, requisitions, and documents of the Scotch Education Department, if purporting to be signed by a Secretary or Assistant Secretary of the said Department, or by any officer of the Department in Scotland performing the duties of a secretary or assistant secretary, shall, unless the contrary is proved, be deemed to have been so signed and to have been made by the Scotch Education Department."

The Education (Scotland) Act 1908 (8 Edw. VII, cap. 63), section 21, enacts—"If at any time within six weeks after the adoption of a resolution for the dismissal of a teacher in terms of section 3 of the Public Schools (Scotland) Teachers Act 1882, a petition shall be presented to the Department by the said teacher praying for an inquiry into the reasons for the dismissal, the Department shall make such inquiry as they see fit, and if as the result of such inquiry they are of opinion that the dismissal is not reasonably justifiable, they shall communicate such opinion to the school board with a view to reconsideration of the resolution, and in the event of the school board not departing from the resolution within six weeks thereafter may attach to the resolution the condition that the school board shall pay to the teacher such sum, not exceeding one year's salary, as the Department may determine; and any sum so determined may be recovered by the teacher as a debt from the school board; provided that nothing herein contained shall affect the power of a school board summarily to suspend any teacher from the performance of his duties."

The School Board of the Parish of Dalziel, *pursuers*, brought an action against the Scotch Education Department, *defenders*, to have it declared that certain letters from the secretary and assistant secretary of the Department purporting to proceed upon resolutions or decisions of the Department did not so proceed, that there were no such resolutions or decisions, and that the said letters were null and void and of no force and effect, and in particular that a letter of 10th September 1912 was ineffectual to attach to a resolution of the School Board dismissing a teacher (Miss Marshall) a condition of payment of three months' salary; alternatively, that any decision purporting to attach any such condition to the resolution of dismissal was *ultra vires* of the Department.

The pursuers pleaded, *inter alia*—"The alleged decisions complained of not being the decisions of the defenders the pursuers are entitled to decree of declarator in terms of the first four declaratory conclusions of the summons, and to decree of reduction as concluded for. 3. *Separatim*, the decisions foresaid being *ultra vires* of the defenders, the pursuers are entitled to decree of declarator and reduction in terms of the alternative conclusions of the summons."

The following *narrative* is taken from the opinion of Lord Hunter—"On 18th March 1912 the School Board of the Parish of Dalziel dismissed from service Miss Marshall, an assistant teacher in the Knowetop Public School, Motherwell, the dismissal to take effect on 30th April 1912. The reason for this action on the part of the School Board was that Miss Marshall, shortly before had, in their opinion, on account of her having been admitted to the membership of the Roman Catholic Church, become unsuited to discharge the whole duties which her position as assistant teacher entailed, and which included the giving of religious instruction. Against this decision Miss Marshall appealed to the Scotch Education Department under section 21 of the Education (Scotland) Act 1908 (8 Edw. VII, c. 63). Following upon this appeal certain communications were sent by the Secretary and Assistant Secretary of the Department to the School Board. On 20th July 1912 the Secretary intimated that, as a result of inquiries made, the Department were of opinion that the dismissal of Miss Marshall was not reasonably justifiable, and that it was their intention, in the event of further action on their part being necessary, to attach to the resolution of dismissal the condition that the Board pay Miss Marshall a sum equivalent to three months' salary at the rate of remuneration due to her while in the service of the Board. In reply to this communication the Board intimated that they adhered to their resolution of 18th March 1912 dismissing Miss Marshall,

On 10th September 1912 the Assistant Secretary of the Department wrote to the Board that the Department, in virtue of their powers under section 21 of the Education (Scotland) Act 1908 and otherwise 'attach to the resolution dismissing Miss Marshall the condition that the School Board shall pay to her a sum equivalent to three months' salary at the rate of remuneration due to her while in the service of the Board.' The Dalziel School Board have now brought an action against the Scotch Education Department to have it found and declared that the communications from the Secretary and Assistant Secretary of the Department did not in fact emanate from the Department, and in particular that the letter of 10th September 1912 was and is ineffectual to attach the condition of payment of three months' salary to the resolution of dismissal, and that all proceedings that have followed or may follow thereon are null and void and in no way binding upon the pursuers. Alternatively the pursuers maintain that any decision or resolution or finding or direction of the defenders to attach to the resolution of the pursuers dated 18th March 1912 dismissing Miss Marshall from her post as assistant teacher in their service the condition that the pursuers shall pay to Miss Marshall a sum equivalent to three months' salary at the rate of remuneration due to her while in the service of the pursuers, was *ultra vires* of the defenders, and that any alleged decision or resolution or finding or direction of the defenders to the effect foresaid, and the letter dated 10th September 1912 from an official of the defenders to the clerk of the pursuers, purporting to intimate such alleged decision or resolution or finding or direction are null and void and not binding upon the pursuers."

The pursuers, *inter alia*, averred—"(Cond. 9) Under the said section 21 of the Education (Scotland) Act 1908 the duty of ordering an inquiry in cases of appeal against dismissal, and of deciding thereupon, is a duty of a judicial character which falls to be discharged by the defenders, and the statute does not contemplate or authorise the delegation of any of the duties thereby imposed to the Secretary of the defenders, or to any committee or official thereof. The pursuers believe and aver that the petition of Miss Marshall against the decision of the pursuers and the matters arising thereunder were not deliberated upon or decided by the members of the Committee above set forth, and that the pretended decisions of the defenders, as communicated in the letters dated 15th May, 20th July, and 10th September 1912, were not in fact decisions of the defenders but were decisions of the Secretary or other official of the defenders."

The defenders, *inter alia*, averred—"(Stat. 2) The duties of the Department are to administer education in Scotland under the Education (Scotland) Acts 1872 to 1908, and in accordance with the practice invariably followed since 1885 the business of the Department is conducted by the Secretary of the Department acting by and under the directions of the Vice-President. The letters mentioned in the condescendence were written by the directions and under the authority of the Vice-President, and the decisions taken in the case of Miss Marshall were taken by the Vice-President, and were intimated to the pursuers in accordance with the directions of the Vice-President."

On 10th May 1913 the Lord Ordinary (HUNTER) assoilzied the defenders from the conclusions of the summons.

Opinion. — "[*After the narrative above quoted*] — By section 65 of the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62) it is provided—'. . . [*quotes, v. sup.*] . . .' On behalf of the Department it was contended that 'unless the contrary is proved' refers only to signing, and that once it is admitted that an order, &c., has been signed by the Secretary or Assistant Secretary it is to be deemed to have been made by the Scotch Education Department, and it is incompetent to prove the contrary. As a matter of construction of the clause I am unable to accept this view. It appears to me that a person challenging an order admittedly signed by the Secretary or Assistant Secretary may show that it was not approved of and not made by the Department. I think, however, it would be very difficult for a pursuer to succeed when the Department, as here, approve and adopt as their own the action of their Secretary. That question does not arise in this case. In answer to the pursuers' allegation that the communications complained of were not in fact decisions of the defenders, but were decisions of their Secretary or other official, the defenders have stated specifically that the letters mentioned in the condescendence were written by the directions and under the authority of the Vice-President, and the decisions taken in the case of Miss Marshall were taken by the Vice-President, and were intimated to the pursuers in accordance with the directions of the Vice-President. This statement, although it is not admitted by the pursuers, is not denied by them, and as it was made to me by the responsible representatives of a Government Department I accept it as a fact. The pursuers, however, maintained—and that is the matter which was principally argued to me—that the decision of the Vice-President was not the decision of the Department within the meaning of the Education Acts.

"The Scotch Education Department was constituted under the Education (Scotland) Act 1872, which by section 1 provides—'Scotch Education Department' shall mean the Lords of any committee 'of the Privy Council appointed by Her Majesty on Education in Scotland.' By the Secretary for Scotland Act 1885 (48 and 49 Vict. cap. 61) it was provided by section 6 that the Queen might appoint the Secretary for Scotland to be Vice-President of the Scotch Education Department. The members of the Committee of the Privy Council constituting the Scotch Education Department for the period referred to in this action were the Lord President of the Council, the Secretary for Scotland (Vice-President), the First Lord of the Treasury, the Lord Advocate,

Lord Haldane, Lord Shaw, Lord Reay, and Lord Elgin. The said Committee was appointed by Order of His late Majesty in Council of date 2nd March 1909. The present Secretary for Scotland was appointed Vice-President by a similar order of date 29th February 1912.

"The Education Act 1908, under the provisions of which Miss Marshall appealed to the Department against her dismissal by the pursuers, provides (section 34) that the Department means the Scotch Education Department. According to the pursuers' contention the consideration of an appeal by a dismissed teacher is in the nature of a judicial act, and can only be exercised by the Committee of the Privy Council itself, who by the Acts of 1872 and 1885 form the Education Department, and not by any individual member thereof. They contend that there is no statutory warrant for the Secretary for Scotland discharging a duty entrusted to the Department and not to the Vice-President. Although they admit that many acts of the Department must be done by officials or by some individual member of the Department, they say that the nature of the duty to be performed in the case of an appeal from a resolution of dismissal excludes delegation. For the Department it was pointed out that Parliament in entrusting certain duties to the Scotch Education Department has not specified in what form action is to be taken, and it was contended that in such circumstances a court of law has no power to interfere with the internal administration of a Government department. I think that this contention is sound. A Government department is frequently a party to an action. Contracts are enforced or damages for breach of contract are assessed against a department, and the Court will ordain a department to fulfil a duty imposed upon it by Act of Parliament, reduce what has been done in excess of statutory powers, or put right what has been done in a wrong way. No instance, however, was cited to me of the Court having set aside the action of a department on the ground that it had been taken by the responsible head of the department without consulting the other members of the department.

"According to constitutional usage the decision of a responsible minister at the head of a Government department is equivalent to the decision of a department, and the responsibility of the department is to Parliament and not to the Court. Well-known writers on the constitutional history of the country have made statements to this effect in their works—see Hearn's Government of England, p. 179, &c. ; Maitland on the Constitutional History of England, at pp. 412 and 413, as to the Board of Trade and Local Government Board; Anson on the Law and Custom of the Constitution, vol. ii, 194, &c. ; Todd's Parliamentary Government in England (2nd ed.), vol. ii, 689. Illustrations of this practice are to be found in the every-day decisions of the different Government departments.

"It is, however, said by the pursuers that the Scotch Education Department is of recent origin, that the action challenged is of a judicial character, and that a teacher appealing from the action of a school board is entitled to have the minds of those constituting the Department applied to the appeal. It is not easy perhaps to distinguish between what is a judicial act and what is an administrative act. The consideration of an appeal by a teacher from a resolution of a school board dismissing him is not more judicial in character than many of the duties which are every day discharged by the heads of Government departments. Apart from that, the fact of its being judicial in character does not necessitate its being discharged in a different way from an administrative act. As regards the statutory provisions dealing with the constitution of the Scotch Education Department, it has to be remembered that the English Education Department which existed in 1872 was similarly constituted. In 1839 a Committee of the Privy Council was appointed with authority to provide 'for the general management and superintendence of education' in England. In 1853 an Education Department was organised, and was placed under the supervision of the Lord President of the Privy Council, with a secretary, two assistant secretaries, and numerous clerks. In 1856 a Vice-President was appointed by order in Council, under authority of an Act of Parliament passed in that year. The ordinary members of the Education Committee had no administrative responsibility, which rested entirely with the Lord President and Vice-President conjointly. In 1865 a Select Committee was appointed by the House of Commons to inquire into the constitution of the Committee of Council on Education, and the system under which the business of the office is conducted, &c. A large number of witnesses, including several eminent statesmen who had held the office of Lord President or Vice-President of the Council on Education, were examined. At the debate I was referred in detail to some of the evidence given as contained in volume VI of the House of Commons Session-Papers for 1865. Lord Granville, who had about ten to twelve years' experience of the working of the education of the country as administered by the Department, explained that as Lord President of the Council he never by any chance consulted the Committee of Council upon any question of administration. He considered that absolute responsibility rested with the President of the Department, and that if faults were committed, either by himself or by any of his subordinates in any grade in the office, he was the person responsible to Parliament to the greatest extent. His Lordship further explained that a very large proportion of the business was transacted by the Vice-President. Among the witnesses examined there was a difference of opinion as to the importance of the position of the Vice-President, but all were agreed that the Committee of the Privy Council, who along with the President and the Vice-President constituted the Department, were merely consulted in connection with matters of policy. At that time the Committee of the

Council on Education were usually (with the exception of the Vice-President) members of the Cabinet. The Scotch Committee has always been differently composed, but the duties discharged have been similar and the method of discharging those duties the same. In his work on Parliamentary Government in England (2nd ed., p. 692), Mr Todd, after referring to the constitution of the Scotch Education Department of the Privy Council, says—'The Lord President and (Secretary for Scotland) Vice-President of the Education Committee also act as principal members of the Scotch Education Department. It is not ordinarily considered to be necessary or in accordance with usage to assemble together the other members of the Scotch Board, but they are consulted on details with which they are specially conversant, and upon questions of general policy touching education in Scotland.'

"To sustain the pursuers' contention would amount practically to a condemnation of the working of the Scotch Education Department since its institution in 1872, and also of the working of the English Education Department and other Government Departments. The pursuers did not say what procedure, whether by way of meeting or minute circulating among the members of the Department, ought to have been followed in order to afford evidence that the appeal by Miss Marshall had been considered by the members of the Department. I think that if it had been the intention of the Legislature that the distinguished members of the Privy Council who compose the Scotch Education Department should not merely act as a consultative body advising as to questions of educational policy in Scotland, but should apply their minds to questions of detail whether of an administrative or judicial character, some provision upon the matter of procedure would have been made. In the absence of such express provision I think that in construing section 21 of the Act of 1908 the appeal given to the Department must be interpreted under reference to existing constitutional practice and recognised convention. I hold that the decision of the Secretary for Scotland as Vice-President of the Department is the decision of the Department, and that this part of the pursuers' case fails.

"The pursuers also maintain that the action of the Department was *ultra vires*, as Miss Marshall had entered into a contract of service with them under the following condition—'One month's notice to be given by either party desirous of terminating the engagement.' Their contention is that section 21 of the 1908 Act was only intended to cover cases where teachers have no express contract providing for the termination of their contract, and that the Department have no power to vary the express terms of a contract. I do not think that this argument is well founded. The right of appeal to the Department is given in all cases where a school board has passed a resolution for the dismissal of a teacher, and the right of the Department to attach to the resolution a condition entitling the teacher to a sum not exceeding a year's salary applies to all appeals. The presence of a clause as to notice to be given on either side in the actual contract entered into between a board and a teacher does not appear to me to be material. In the absence of any clause as to notice, the teacher, as has been decided in the case of *Morrison*, 1876, 3 R. 945, 13 S.L.R. 611, is entitled, like all other persons who hold their situations at the pleasure of their employers, to due notice of their dismissal, or such compensation as is reasonable in lieu thereof. The right given to the Department under the Act of 1908 appears to me to be independent of the terms express or implied in the contract, and in the interests of teachers to allow of a limited interference with freedom of contract. I propose to repel the pleas-in-law for the pursuers, and to assoilzie the defenders from the conclusions of the action."

The pursuers reclaimed, and argued—The decisions here were not the decisions of the Scotch Education Department, but of the Secretary of the Department. The Department's powers were different, and the pursuers were not bound to accept the acts of one member of the Department as being the acts of the Department. That this distinction was recognised by the Legislature was clear from the statutes—the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62); Parochial and Burgh Schoolmasters (Scotland) Act 1861 (24 and 25 Vict. cap. 107), sec. 13; the Education (Scotland) Act 1908 (8 Edw. VII, cap. 63), sec. 21. In particular, the Secretary for Scotland Act 1885 (48 and 49 Vict. cap. 61), secs. 5, 6, and 7, showed the distinction, for it specifically transferred to the Secretary for Scotland various powers which on the defenders' argument he could have exercised as Vice-President of the Education Department. Assuming, then, that the Department was not the same as the Vice-President or the Secretary, the question arose whether the Department could delegate their powers. There was no authority for delegation in the statutes. In all other boards where the president or other member exercised the powers of the board there was express power of delegation in the Act constituting it—Local Government Board Act 1871 (34 and 35 Vict. cap. 70), secs. 3 and 4; the Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), secs. 4 and 5; Contagious Diseases Animals Act 1867 (30 and 31 Vict. cap. 125), sec. 4; Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 4; English Education Act 1899 (62 and 63 Vict. cap. 33), secs. 1 (2) 4 and 7 (4); Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 71. The rules of common law were equally adverse to the powers of delegation here claimed—*Thomson* v. *Dundee Police*, December 8, 1887, 15 R. 164, 25 S.L.R. 137; *Cook* v. *Ward*, (1877) 2 C.P.D. 255; *Freen* v. *Beveridge*, June 28, 1832, 10 S. 727; M'Laren on Wills and Succession (3rd ed.), vol. ii, p. 904; Warwick's Law of Municipal Elections, p. 238; *Rice* v. *Board of Education*, [1910] 2 K.B. 165, and [1911] A.C. 179, *per* Lord Loreburn, p. 183; *Lord Advocate* v. *School Board of Stow*, February 19,

1876, 3 R. 469, 13 S.L.R. 305; *Duncan* v. *Crighton*, March 10, 1892, 19 R. 594, 29 S.L.R. 448; *Somerville* v. *Assembly Rooms*, July 7, 1899, 1 F. 1091, 36 S.L.R. 866; *Rex* v. *Local Government Board*, [1914] 1 K.B. 160, *per* Vaughan Williams, L.J., at 173, and Hamilton, L.J., at 191; *Bowles* v. *Bank of England*, [1913] 1 Ch. 57; *Leach* v. *Money*, 1765, 19 St. Tr. 1002; *Enlick* v. *Carrington*, 1765, 19 St. Tr. 1030. It was suggested that it was inexpedient that a Department composed of such prominent persons should have to meet over so unimportant a question, but the Crown was entitled to appoint men who had time to consider an appeal like this. The practice of the Department could not be held to alter the powers given by statute.

Argued for the defenders—The Scotch Education Department was a Committee of the Privy Council—Craik on the State in Relation to Education (1914 ed.) p. 178; Interpretation Act 1889 (52 and 53 Vict. cap. 63), sec. 12 (7). Accordingly the Department were simply bound by the conventions binding on the Privy Council, and if one member acted then that member was the Department. The signature of the Secretary made it the act of the Department within the meaning of section 65 of the Education Act 1872 (*cit.*). Even if the pursuers' averments were relevant, they were displaced if the Court hold as true the defenders' averments in stat. 2. This the Court was bound to do without further proof—*Poll* v. *Lord Advocate*, November 5, 1897, 1 F. 823, 35 S.L.R. 637 (O.H.); *Buron* v. *Denman*, 1848, 2 Ex. (W., H., & G.) 167; Documentary Evidence Act 1868 (31 and 32 Vict. cap. 37), secs. 2 and 5. The practice here adopted was warranted by the statutes, and was the only natural and practicable way of conducting the business of the Department. In any event, there was nothing so illegal in the practice of the Department as to entitle the pursuers to go to the law Courts. The Department was only responsible to Parliament.

At advising—

LORD DUNDAS—We had the benefit of a full debate in this interesting case, but the grounds on which my own opinion is based can be stated within comparatively brief limits.

Since the case was before the Lord Ordinary two changes have been made as regards the conditions of the pleadings. In the first place, the pursuers definitely abandoned at our bar the alternative conclusion of their summons, with the relative averments (cond. 10) and plea-in-law (3), founded upon alleged *ultra vires* acting by the Department. In the second place, it appeared to us at an early stage in the debate that there might be an awkwardness, to put it no higher, in our deciding the case while the only person, viz., the teacher, Miss Marshall, referred to on record, whose individual rights and interests were liable to be affected by our decision was no party to the cause, and so far as appeared might be in ignorance of its dependence. The pursuers' counsel, following a suggestion from the Bench, asked and obtained leave to amend his record by adding Miss Marshall as a party defender. The action was accordingly served upon that lady—now Mrs Graham—and her husband. They have not, I understand, entered appearance.

The facts of the case are sufficiently summarised by the Lord Ordinary and I need not resume them. By their summons the pursuers ask for declarator that three letters libelled, signed by the Secretary and Assistant Secretary respectively of the Department, did not proceed upon and were not authorised by any decision or resolution of the Department; that the Department had not deliberated or formed any opinion upon the subject-matter of the letters, or made any finding, resolution, or decision thereanent; and that the letters were therefore not binding upon the pursuers, but are null and void, and they conclude for reduction accordingly. The substantive counter-case made on record by the Department is thus stated—"... [*quotes statement 2 of the defenders, v. sup.*] ..." We must decide, in the first place, whether or not the averments quoted, assuming them to be true, form a relevant defence to the pursuers' case. I have come to the conclusion that they do.

One must look at the principal statutory enactments relating to the Scotch Education Department. By section 1 of the Education (Scotland) Act 1872, "'Scotch Education Department' shall mean the Lords of any Committee of the Privy Council appointed by Her Majesty on Education in Scotland"—a definition which was verbally altered by the Interpretation Act 1889, section 12 (7), to "the Lords of the Committee for the time being of the Privy Council appointed for Education in Scotland." In 1885 the Secretary for Scotland Act (48 and 49 Vict. cap. 61) was passed. By section 5 various statutory powers and duties were transferred to, vested in, and imposed upon the Secretary for Scotland, who by section 6 was appointed Vice-President of the Scotch Education Department, and by section 7 the whole powers and duties of that Department constituted under the Education (Scotland) Act 1872, were, from and after the appointment of the Vice-President, transferred to, vested in, and imposed upon the Scotch Education Department constituted under the Act of 1885. It is common ground between the parties that the members of the Committee of the Privy Council appointed by the King and forming the Scotch Education Department during the period referred to in this action were the Lord President of the Council, the Secretary for Scotland (Vice-President), the First Lord of the Treasury, the Lord Advocate, Lord Haldane, Lord Shaw, Lord Reay, and Lord Elgin. It is plain from the tenor of the Education (Scotland) Act 1872 that the policy of Parliament was to leave to the Department a very free hand indeed as to the methods by which they might think fit to conduct their business. The Department is made directly responsible to Parliament, *e.g.* (by section 75) it is bound to lay before both Houses in each year a report of its proceedings during the preceding year, containing a special report upon each school

erected after the passing of the Act not being a public school which in the opinion of the Department is entitled to receive Parliamentary grant. On the other hand, there is nowhere any provision as to the holding of meetings, or as to the chairmanship, or the quorum, or any rules of procedure to be followed if a meeting were held. We were told that it is not the practice of the Department to hold formal meetings, and it is averred by the pursuers, and not denied, that no meeting has in fact been held since 1909, when the Committee above named was appointed. The duties of the Department involve, no doubt, the consideration and decision of important matters of various kinds. The Department are, of course, bound to act honestly and fairly in dealing with all such matters, but I think that they are entitled to deal with them in such manner as they may consider best, not only as regards formal procedure but in regard to the whole conduct of their business; and that their methods are not subject to challenge and investigation in the law courts provided they are not contrary to the statutory powers of the Department or to the inherent principles of justice and fair dealing. It seems to me, therefore, to be reasonably clear that the Department might, if they thought fit, competently leave the general conduct of their business to their secretary acting by and under the direction and authority of the Vice-President, and, if this had been formally done, *e.g.* by a minute or resolution of the whole members, I do not think such a step could have been challenged as being contrary to the intent or the letter of the statutes. The defenders aver that, in accordance with their uniform practice since 1885, the business of the Department has been conducted in this way. The pursuers' counsel argued, and I agree, that no practice could make that legal which was illegal as being contrary to the statutes; but I do not see that this method of conducting the business, if it might competently have been authorised by a formal resolution, could not with equal competency be sanctioned informally by the tacit practice of the Board. I think that the defender's averments in stat. 2 form a relevant defence to the action.

The pursuers, however, contend that, assuming the relevancy of the defence, there must be a proof as to its accuracy in fact. I think it is out of the question to allow such a proof. The Department, appearing as defenders, make a deliberate statement on record as to their "practice invariably followed since 1885," and the learned Solicitor-General, appearing for them at our bar, endorsed that statement. I think it is one which, in the absence of specific denial, we are bound to accept. For the rest the averments by the Department in stat. 2 may not be absolutely clear and unambiguous as matter of verbal composition; but the Solicitor-General expressly stated on behalf of the Department that they are intended to mean (as I think they may reasonably be read to mean) that the Vice-President did apply his mind to and did duly consider and decide upon the subject-matter of the three letters, and that these express the results of his decision, and were written and intimated to the pursuers by his authority and direction. If the statement thus made and supported were not to be accepted, it could, I think, only be in respect of very distinct and specific counter averments on record. I do not say that a case might not be figured where such averments were so precise and specific as to be entitled to probation. But I am clear that the present pursuers' record is quite insufficient in these respects. It does not meet and counter the defenders' statement that the letters express the result of consideration and decision by the Vice-President, and it amounts to no more than that the pursuers "believe and aver" that the alleged decisions were those of "the secretary only or of some other official." The defenders' statements therefore seem to me to stand practically uncontradicted, and must in the absence of any relevant counter averment be accepted as true.

If these views are correct they afford sufficient grounds for pronouncing decree of absolvitor, and it is unnecessary to determine as to the meaning and effect of section 65 of the Act of 1872. I confess that as at present advised I am not clear that the Lord Ordinary's view of that matter is the right one, or that there may not be substance in the defenders' arguments to the effect (1) that the words "and to have been made by the Department" have the same import and meaning as if they had read "and therefore" (or "and so") "to have been made," &c.; and (2) that unless the clause were so read the words I have quoted would be unnecessary and meaningless. But I desire to reserve my opinion until it becomes necessary to decide upon the construction of this or some similar section.

On the whole matter I have come to the same conclusion as the Lord Ordinary, though not precisely and at all points upon the same grounds, and I am for adhering to his interlocutor.

LORD MACKENZIE—The pursuers are the School Board of Dalziel, and the defenders the Scotch Education Department. The object of the action is to have it found that certain decisions which purport to have been pronounced by the defenders under section 21 of the Education (Scotland) Act 1908 are not decisions of the Department.

The main question argued upon the reclaiming note and before the Lord Ordinary was whether the decision of the Vice-President of the Board is or is not the decision of the Department within the meaning of the Education Acts. It was also contended by the defenders that the terms of section 65 of the Education (Scotland) Act 1872 are such that once it is admitted (as here) that the orders complained of were signed by the secretary or assistant secretary it is incompetent to prove they were not made by the Department.

One of the difficulties in the case arises from the state of the record. The defenders maintained that the pursuers' averments are irrelevant. The argument of the Soli-

citor-General in support of this view was as follows —The Scotch Education Department means the Lords of any Committee of the Privy Council appointed by His Majesty on Education in Scotland (35 and 36 Vict. cap. 62, sec. 1; 48 and 49 Vict. cap. 61, sec. 6; 51 and 53 Vict. cap. 63, sec. 12 (7)); the Committee at present is composed of those persons whose names are set out on record, viz., Lord Morley (President), the Secretary for Scotland, the First Lord of the Treasury, the Lord Advocate, Lord Haldane, Lord Shaw, Lord Reay, and Lord Elgin; they were appointed in 1909; the pursuers' case, and their only case, is that the whole of the defenders did not adjudicate upon the matter in dispute, though the duty they had to discharge under section 21 of the Act of 1908 is of a judicial character. The Solicitor-General's comment upon this was that it was out of the question to maintain that it was necessary under the statute that all the members of the Department should be convened to pronounce a decision under section 21, and that unless the pursuers were prepared to put forward a tenable theory as to what constitutes a quorum of the Department their averments are irrelevant. In the view I take of the case it is not necessary to discuss the question raised by this contention. It is sufficient to note, before passing to the defenders' statement of facts, that the pursuers do not expressly aver that the Vice-President of the Department did not apply his mind to the matter in dispute and come to a decision upon it.

Coming to the defenders' statement of facts, their averment in stat. 2 is that "in accordance with the practice invariably followed since 1885, the business of the Department is conducted by the Secretary of the Department acting by and under the directions of the Vice-President." In 1885 the Secretary for Scotland Act was passed, under section 6 of which the Secretary for Scotland was appointed Vice-President of the Department. The same section enacted that the Scotch Education Department shall mean the Lords of any Committee of the Privy Council appointed by His Majesty on Education in Scotland. Section 7 provided for the transference of the powers and duties vested in or imposed on the Scotch Education Department constituted under the Education (Scotland) Act 1872 to the Scotch Education Department constituted under the Act of 1885. Stat. 2 then goes on—"The letters mentioned in the condescendence were written by the directions and under the authority of the Vice-President, and the decisions taken in the case of Miss Marshall were taken by the Vice-President and were intimated to the pursuers in accordance with the directions of the Vice-President." This averment is not unambiguous. It might mean that all the Vice-President had done was to put his hand to a minute prepared by the Secretary or other subordinate official without having gone into the matter himself. The Court were, however, informed by counsel for the Education Department that the meaning of the statement is that the Vice-President had applied his mind to all the facts of the case, and that the decisions are the result of his deliberation. This being the situation, it would, in my opinion, have needed some very specific averment in defence to have entitled the Court to inquire into the matter. All that the pursuers say in reply is "Not known and not admitted." The pursuers' side of the record being in such a position, both on their answer to stat. 2 and on the substantive averment in their own condescendence, there is enough, in my opinion, to warrant us in holding that the decision was that of the Vice-President.

The next and the important question is whether the act of the Vice-President alone is the act of the Department. The argument upon this (apart from the point founded on section 65 of the 1872 Act) was that the decision of the Vice-President as head of the Department is equivalent to the decision of the Department, and that the responsibility of the Department is to Parliament and not to the Court. This argument has been given effect to by the Lord Ordinary, and reference is made in his opinion to writers on constitutional history in support of it. For myself I am unable to find within the four corners of the record that a question of constitutional law is properly raised. The essential feature of a plea-in-law to formulate the legal proposition is wanting. The difficulty is to find out how upon record the defenders bridge over the hiatus between section 21, which speaks of the Department doing something, and uses such language as "if as the result of such inquiry they are of opinion that the dismissal is not reasonably justifiable, they shall communicate such opinion to the School Board," and the defenders' statement 2, which sets out that the opinion complained of is the result of the labours of a single individual.

I have come to the conclusion that the only feasible way, in this case, of getting over the difficulty, is to hold that there has been tacit delegation by the Department to one of their number. The defences are defences for the Department, and the statement as to the practice since 1885, is the statement of all its members. Counsel for the Department were careful to disclaim any intention of arguing the case on the ground of ratification. The act of the Department, according to their contention, being valid, requires no ratification. The Court, as it appears to me, is bound to accept the defenders' statement as to what the practice has been. The question is whether it is legal. In my opinion it would have been competent for the members of the Department to have delegated in express terms, by minute or otherwise, the duty entrusted to them by section 21 of the Act of 1908 to the Vice-President. If they could have done so expressly, then in my opinion they could by practice impliedly sanction such a delegation. As the practice must be taken to be in accordance with the defenders' averment, I am of opinion that the act of the Vice-President was, in this case, the act of the Department.

This is sufficient for the determination of the case, and it is therefore not necessary

to express an opinion upon the proper construction to be put upon section 65 of the Act of 1872. In my opinion the Lord Ordinary is clearly right in the view he takes.

Miss Marshall has now been added as a party to the case, which obviates any difficulty as to our giving judgment in the case.

I am of opinion the Lord Ordinary's interlocutor is right.

LORD CULLEN—I have had an opportunity of reading, and I concur in, the opinion of Lord Dundas. I desire entirely to reserve my opinion as to the construction of section 65 of the Act of 1872.

The Court adhered.

Counsel for the Pursuers — Macmillan, K.C.—T. G. Robertson. Agents—D. & J. H. Campbell, W.S.

Counsel for the Defenders—The Solicitor-General (Morison, K.C.) — J. H. Millar. Agent—George Inglis, S.S.C.

Thursday, December 17.

SECOND DIVISION.

[Sheriff Court at Glasgow.

JOHN HAIG & COMPANY, LIMITED *v.* BOSWALL PRESTON.

Landlord and Tenant—Lease—Sequestration for Rent—Retention of Rent.

A landlord let a workshop, office, and store to a firm of motor car agents from Candlemas 1911, by a lease, dated 28th March 1911, which contained an obligation on the landlord to do "needful repairs to the roof, which is presently leaking," and "to keep the premises wind and water tight." He died before signing, and by a supplementary minute of agreement executed in August 1911 heritable creditors of the landlord, who had become proprietors of the premises, homologated the lease. The tenants paid the rents until Martinmas 1912, but refused to pay the rent due at that term on the ground that the landlords had never implemented the obligation with regard to the roof, and in consequence the subjects were not and never had been fit for the purposes let. The heritable creditors brought an action for sequestration for rent. It was proved that no sufficient repair had ever been executed on the roof so as to remedy the defects existing at the beginning of the lease. The Court *dismissed* the action.

John Haig & Company, Limited, distillers, Markinch, who were heritably vested in certain subjects in Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against Gordon Houston Boswall Preston and Alistair Houston Boswall Preston, sole partners of and trading under the firm name of The Central Motor Engineering Company, 51 Pitt Street, Glasgow, *defenders*, for sequestration of defenders' effects within said above-described premises in security and for payment of rent, interest, and expenses, for payment of past due rents, for an order to replenish, and failing implement, for warrant to eject.

The defenders pleaded, *inter alia*—"(1) In respect that the defenders have not got possession of the entire subjects let to them under said lease they are entitled to retain the rent now sued for until such possession is given them. (2) The pursuers having failed to implement their obligations under the lease are not entitled to insist on the performance by the defenders of the counter part of these obligations. (3) The defenders being entitled to retain the half-year's rent until the pursuers have fulfilled their obligations under the lease by putting the premises into the condition in which the pursuers contracted to put them the defenders are entitled to absolvitor."

The *facts* are given in the *note* of the Sheriff-Substitute (BOYD), who on 22nd January 1913 allowed a proof before answer, and on 5th April 1913, after proof led, pronounced the following interlocutor:—"Finds the pursuers are owners and the defenders are tenants of premises, in terms of the minute of lease and minute of adoption, whereby the pursuers bound themselves to do 'needful repairs to the roof which is presently leaking,' and to keep the premises wind and water tight; that the pursuers failed to sufficiently perform this obligation in spite of reasonable complaints by the defenders, and the defenders retained the half-year's rent due at 11th November 1912 on the ground that full possession of the subjects let had not been given to them: Finds that the defenders were entitled so to do until the pursuers shall fulfil the obligation under the lease: Therefore assoilzies the defenders from the conclusion of the action."

Note. — "The pursuers are whisky distillers and owners of licensed premises in Glasgow and elsewhere. They are owners and the defenders are tenants of a workshop, office, and store in Pitt Street, Glasgow, which is used as a motor garage, and this is an action of sequestration for rent of the premises due 11th November 1912.

"The defence is that entire possession of the subjects was not given, and that the defenders were entitled to retain the rent sued for.

"The defenders entered into a minute of agreement with John Dove on 28th March and 22nd April 1911, and acquired the tenants' rights under the current lease of the subjects of this action from Candlemas 1911 till Whitsunday 1915, with a break to the defenders at Whitsunday 1912, which they did not exercise. The rent was £97, 10s. a year till Whitsunday 1912, and £80 a year for the three succeeding years. The minute was executed by the defenders, but not by John Dove, as he died on 10th April 1911. The minute provided, *inter alia*, that 'The second parties accept the premises let as in good tenantable repair subject to the first party repairing the broken glass and doing needful repairs to the roof which is presently leaking, and bind themselves to maintain and leave them in the like good