with your Lordship in doing—that both societies are liable and not within the exemption, it is not necessary to consider whether one is more liable than the other.

Lord Mure—I concur with your Lordships that the Commissioners have pronounced a correct deliverance in this case, and on the grounds explained by your Lordship in the chair.

The Court affirmed the judgment of the Commissioners.

Counsel for the Appellants—Dean of Faculty (Clark) and Balfour. Agent—James Mylne, W.S.

Counsel for the Crown—Solicitor-General (Watson) and Rutherfurd. Agent—Angus Fletcher, Solicitor of Inland Revenue.

Friday, February 5.

FIRST DIVISION.

[Lord Young, Ordinary.

ROBB *v.* SCHOOL BOARD OF LOGIEALMOND.

School — Schoolmaster — Removal — Fault — Education (Scotland) Act, 1872, § 60—*Parochial and Burgh Schoolmasters Act*, 1861, § 19.

Held that a parish schoolmaster appointed previous to the passing of the Education Act, 1872, and removed by the School Board in terms of the 60th section of the said Act, is entitled to demand a retiring allowance as provided by the 19th section of the Parochial and Burgh Schoolmasters Act, 1861, unless the cause of his removal was occasioned by his own fault.

Schoolmaster—Dismissal—Fault—Proof.

A parish schoolmaster appointed previous to the passing of the Education Act, 1872, having been removed by the School Board on a report by one of Her Majesty's Inspectors of Schools that the school had "not been efficiently conducted," and that the schoolmaster, "however he might succeed elsewhere, is unfit for the post of schoolmaster in the said school," brought an action against the School Board for a retiring allowance. The Court allowed the pursuer to amend his record to the effect of showing that he was not dismissed for fault.

Opinion (*per* Lord Deas) that the proper course would have been to remit to the School Board to explain the reasons of the pursuer's dismissal.

This was an action at the instance of Alexander Robb, teacher of the Side Parochial School at Logiealmond, against the School Board of that parish, for declarator that the defenders were bound to pay to the pursuer, whom they had removed from office, a retiring allowance.

The parish of Logiealmond was a *quoad sacra* parish composed of parts of the parishes of Monzie, Fowlis Wester, Methven, and Redgorton, and the pursuer was appointed teacher of the school of that parish in 1858. In 1873 the School Board of the parish obtained a special report from Her Majesty's Inspector of Schools for the district, and thereafter removed the pursuer from his office.

The report of the Inspector was as follows:—"According to the instructions received from the Scotch Education Department, of date 22d July 1873, I visited Logiealmond Side Parochial School on 14th August 1873 with a view of inspecting and reporting upon it, pursuant to section 60 (2) of the Education Act (Scotland), 1872.

"The premises are very fair, sufficiently lighted, drained, warmed, ventilated, and supplied with playground and offices. The playground is covered with the grass, and one of the privies is turned into a hen-house. The desk, furniture, and apparatus are sufficient. Mr Alexander Robb, the schoolmaster, seems to be in good health and, with the drawback of a want of a leg, lost in childhood, physically qualified for the due performance of the duties of the school. There are no pupils in attendance, only 6 have been enrolled during the school year, 3 in December, and 3 in January, and no scholar since March. According to lists of names on loose copy leaves, kept mostly in pencil—the only school registers for the last seven years—the number enrolled in 1871–1872, was 9; in 1870-1871, 9; in 1869–1870, 27; in 1868–1869, 14; in 1867–1868, 25; in 1866–1867, 32. In these loose leaves no record of attendance has been kept; but so far as the fact can be ascertained from jottings of fees, the attendance has always been small compared with the number on the roll. According to last census there are in the district 82 children receiving instruction; with the exception of 10 or 12 in outlying parts, they go to school either at Hametfield, about a mile west of Logiealmond school, or to Millhaugh, about a mile east of it. The former school is kept in premises much inferior to those of Logiealmond, and has had nine teachers in the last eight years. It has at times had as many as 90 scholars, while Mr Robb had none; and on 4th August, when I looked in, it had 33 present. The support of it has, according to the statement of the U. P. minister, been always felt to be a burden upon the managers, and it would have been discontinued long before this but for the state of the Side Parish School. The other school at Millhaugh is an adventure school kept in a room in a cottage unsuited for the purpose, by a mistress who has had no special training. It was in vacation at the time of my visit; but had had during the year an attendance reaching a maximum of 23.

"Mr Robb's explanation that the absence of pupils from his school is due to party feeling, clerical squabbles, and sectarian differences in the district, is to a certain extent corroborated by the fact that of 34 names adhibited to a petition against him (of which I send a copy herewith) presented to the School Board on the day of my visit, only two are those of adherents of the Church of Scotland, to which Mr Robb belongs.

"However this may be, the state of the school gives evidence that it has not been efficiently conducted, and that Mr Alexander Robb, however he might succeed elsewhere, is unfit for the post of schoolmaster at Logiealmond."

The defenders denied that the said school was properly a parish school, and averred that the pursuer had not been properly elected, was careless and indolent, and neglected his duties, took no trouble to teach the scholars, and was of intemperate habits.

The pursuer pleaded—"The pursuer's removal

from the office of teacher of a parish school not having been occasioned by any fault on his part, the defender is bound to provide him with a retiring allowance, and he is entitled to decree of declarator and payment."

The defenders *inter alia* pleaded—"(2) The pursuer, as teacher of the school at Logiealmond, which is not a parish school, is not entitled to a retiring allowance. (3) The pursuer not having been legally appointed to the office of parochial schoolmaster, the defenders are not liable to the pursuer for the sums concluded for. (4) The pursuer never having been examined by the Presbytery, or complied with the other statutory requisites to entitle him to hold the office of a parochial schoolmaster, the action cannot be maintained. (5) The pursuer having been removed from his position as teacher in respect of inefficiency, caused by his fault, the defenders are not in the circumstances liable in a retiring allowance."

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"18*th November* 1874.—The Lord Ordinary having heard parties' procurators, assoilzies the defenders from the conclusions of the summons, and decerns."

His Lordship gave the following Opinion:—

"The validity of the removal of the pursuer from his office under clause 60 (2) of the Education Act 1872, is not questioned, and must be assumed.

"The questions in the case are—first, Whether he was teacher of a parish school within the meaning of the Act? and second, Whether the cause of his removal was such that he might, under section 19 of the Schoolmasters Act 1861, have been required to resign or been dismissed therefor, 'as therein provided;' but with right to a retiring allowance by the provisions of that Act, applicable to resignation or dismissal for such cause.

"On the first question my opinion is with the pursuer, and I should accordingly be prepared to repel the 2d, 3d, and 4th pleas for the defenders, were it possible thereby to reach a result favourable to the pursuer. It is unnecessary to express the grounds of this opinion, because the pursuer has no case unless the second question also shall be answered in his favour, and upon this question my opinion is against him, for the reasons which I proceed to explain.

"The provisions of section 60 (2) of the Act of 1872, with respect to the grounds on which a teacher may be removed, are in marked contrast to those of section 19 of the Act of 1861. In the former the grounds are that the teacher is 'incompetent, unfit, or inefficient,' no matter from what cause. In the latter the grounds are—first, that the teacher 'is *disqualified because of infirmity or old age* for the due performance of the duties of his office;' and second, 'that *from negligence or inattention* he has failed efficiently to discharge such duties.' The former statute (1872) permits the removal of a teacher who is in fact incompetent, unfit or inefficient, taking no account (so far as concerns the removal) of the cause of the incompetency or inefficiency. The latter (1861) on the contrary, takes such account of the cause that removal is thereby permitted only with reference to the cause, which must be either disqualification '*because* of infirmity or old age,' or failure in duty '*from* negligence or inattention.' The law as it stood on the Act of 1861 was defective (at least the Legislature of 1872 thought so), inasmuch as it made no provision for the removal of an incompetent, unfit, or inefficient schoolmaster unless his incompetency, unfitness, or inefficiency was attributable to the natural disqualification of 'infirmity or old age,' or to 'negligence or inattention.' Hence the more comprehensive provision of the Act 1872.

"But the latter Act (1872), while providing absolutely, as the interests of the community seemed to require, for the removal of incompetent, unfit, or inefficient teachers, preserved the rights to retiring allowances conferred by the Act of 1861 upon teachers removed 'as therein provided,' and it is to these accordingly that the pursuer appeals in support of his demand. The question is whether they apply to his case? Now, although the provision (sec. 19 of Act 1861) is in the passage principally relied on expressed in general terms thus:—'that when *such* resignation shall not be occasioned by *any fault* on the part of the schoolmaster, the heritors shall grant a retiring allowance,' the expression 'any fault' must, I think, be read and construed with reference to the premises or preceding part of the clause, which specifies the cases in which alone resignation can be required or permitted under the Act. These are, as I have observed, exactly these two, viz., first, disqualification 'because of infirmity or old age;' and, second, failure in duty 'from negligence or inattention.' I must therefore limit and confine the words 'shall not be occasioned by any fault on the part of the schoolmaster' to cases of disqualification because of infirmity (not occasioned by the man's own fault) or old age, for in no other case is removal or forced resignation, without fault on the teacher's part, permitted by the Act.

"Now it is not pretended that the pursuer was removed by the School Board because of infirmity, or old age, or unfitness, or inefficiency thence arising, and his counsel declined to put an averment to this effect on record. The only averment on the subject is (Art. 5) that his removal was not occasioned by any fault on his part, but was due to other causes for which he was not responsible. But, in my opinion, such generality of averment cannot be taken as sufficient to support a case laid upon the provisions of the Act of 1861 as imported into the Act of 1872. For this purpose it is, I think, clearly necessary to aver a cause of removal which might have led to removal or resignation under the Act of 1861, and removal for which, 'as therein provided,' would have entitled the teacher to a pension by the provisions of that Act.

"It was not intended to give pensions to teachers who should be removed under the Act of 1872 for *any* cause which would not have warranted removal under the older law, but only to teachers removed for a cause which would have warranted removal or resignation with a pension under the Act of 1861; and this is in my opinion clear on the language of the Act. Thus (to put a conceivable case) such singular natural stupidity or inaptitude for teaching that the school was totally deserted for years on account of the incompetency of the teacher, was no case for removal prior to the Act of 1872—certainly not under section 19 of the Act 1861. The law with respect to such a clamant case was amended by the Act 1872, but without giving right to a pension, unless indeedit can be held to be given by reference to section 19 of the Act 1861, which does not contemplate or

provide for such a case at all. It is true that all cases to which section 19 of the Act 1861 was formerly applicable now pass under section 60 (2) of the Act 1872, with the rights of pension, as therein provided, preserved. But these rights are not extended to cases to which the statutory provision on which they stand were inapplicable. In short, the result, as I read the provisions of the Act of 1872, is, that a teacher appointed prior to the Act, who is subsequently removed for incompetency, &c., arising from disqualification because of infirmity (without fault) or old age, is entitled to a retiring allowance exactly as if he had been removed under section 19 of the Act 1861, 'as therein provided,' but that such right does not attach to any other case of removal under section 60 of the later Act, there being no other possible case of removal, without fault under the former. I ought perhaps to notice—though it is apparent on the face of the Act—that section 55, which reserves the rights of teachers in office prior to the passing of the Act (1872), does so subject to the provisions of section 60 regarding their removal from office.

"I may observe, in conclusion, that were I able to adopt the view on which the pursuer relies—viz., that a teacher removed for incompetency not occasioned by his own fault, but 'due to other causes for which he was not (I presume morally) responsible,' is entitled to a pension—I should still think that the case here presented is defective in substance. Not one child has been attracted to the school for a very considerable period of time, although there are plenty of children of school age in the district for which it exists. The School Board have signified their opinion that the pursuer's removal, confirmed by the Board of Education, is due to his own fault. He rests his action on a simple averment of the negative, without condescending on any tangible fact capable of being sent to proof to account for the deplorable state of matters which the proper authorities have by deliberate statutory judgment attributed to his incompetency and unfitness. The validity and propriety of the removal must be assumed, and also, *prima facie*, the refusal of a pension. The pursuer, who by action appeals to this Court to correct the judgment and resolution of the proper public authority in the matter, is in my opinion required, as a condition of having his case entertained, to state distinctly, and in such form as to admit of investigation (if thought relevant), to what his incompetency, unfitness, or inefficiency (which led to the total desertion of his school) was attributable. But he only says that it was due to 'causes for which he was not responsible,' pointing, as was explained, to unpopularity arising from ecclesiastical jealousies and discord. I do not think such a case can be entertained.

"I have said nothing about expenses, meaning to give none in the circumstances of the case.

The pursuer reclaimed.

At advising—

Lord President—The pursuer is schoolmaster of the parish school of Logiealmond, and he was removed by the School Board in August 1873 under the 60th section of the Education Act of 1872. His removal was preceded by a report by the Inspector of Schools to the effect that the school has not been efficiently conducted, and that the pursuer is unfit for the post. In these circumstances the pursuer brings this action, claiming a retiring allowance as a matter of right, and the defence of the School Board is—(1) That the pursuer is not, properly speaking, within the class of teachers entitled to a retiring allowance, and (2) even if he were so, he is not entitled to a retiring allowance, because he was removed in respect of his own fault. The Lord Ordinary has repelled the first of these pleas. He has not, however, disposed of the second, but he has decided the case against the schoolmaster on a particular construction of the 60th section of the Education Act of 1872, taken in connection with the 19th section of the Schoolmasters Act of 1861.

The Lord Ordinary's grounds of judgment are to the following effect:—"But the latter Act (1872) while providing absolutely, as the interests of the community seemed to require, for the removal of incompetent, unfit, or inefficient teachers, preserved the rights to retiring allowances conferred by the Act of 1861 upon teachers removed 'as therein provided,' and it is to these accordingly that the pursuer appeals in support of his demand. The question is whether they apply to his case? Now, although the provision (sec. 19 of Act 1861) is, in the passage principally relied on expressed in general terms thus: 'that when *such* resignation shall not be occasioned by *any fault* on the part of the schoolmaster, the heritors shall grant a retiring allowance,' the expression 'any fault' must, I think, be read and construed with reference to the premises or preceding part of the clause, which specifies the cases in which alone resignation can be required or permitted under the Act. These are, as I have observed, exactly these two, viz., 1*st*, disqualification 'because of infirmity or old age;' and, 2*d*, failure iu duty 'from negligence or inattention.' I must therefore limit and confine the words 'shall not be occasioned by any fault on the part of the schoolmaster' to cases of disqualification because of infirmity (not occasioned by the man's own fault) or old age, for in no other case is removal or forced resignation, without fault on the teacher's part, permitted by the Act."

The ground of judgment is not libelled in any of the pleas in law for the defenders, and it would have been desirable that such a plea should have been added before the finding of the Lord Ordinary. It is not, however, necessary to require that to be done now. The question raised is one of great importance, and fully to understand it, it is necessary to ascertain the history of the statutory law as to removing schoolmasters. Under the Act of 1803 no schoolmaster could be removed except by sentence of the presbytery of the bounds on a libel charging the schoolmaster with "neglect of duty, either from engaging in other occupations or from any other cause, or with immoral conduct, or cruel or improper treatment of scholars under his charge." On any of these grounds a libel might be brought and the schoolmaster removed. By the Act of 1861 the jurisdiction of the presbytery is abolished, and the power of removing for immorality, &c., is transferred to the Sheriff, and in place of a libel there is substituted a proceeding under the 19th section of the Act, which is in these terms:—"In case it shall be found, on a report by one of Her Majesty's inspectors of schools, made on the application of the heritors of the parish, and concurred in by the presbytery of the bounds, that the schoolmaster of any parish is disqualified because of infirmity or old age for the due performance of the duties of his office, or that from negligence or inattention he has failed efficiently to discharge such duties, it

shall be lawful for the heritors and minister, at any meeting called and held as aforesaid, to permit or require such schoolmaster to resign his said office, and in case of his refusal so to do, to dismiss or suspend such schoolmaster, and when necessary to declare the school vacant; and in every case of such resignation the heritors and minister may grant to such schoolmaster a retiring allowance payable during the remainder of his life; provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster the heritors shall grant a retiring allowance the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster; provided also that no schoolmaster shall be suspended for a longer period than three months, or be dismissed for neglect of duty excepting under the above provisions."

Thus it is clear that under this section there are only two grounds on which the heritors and minister are entitled to proceed,—1st, old age or infirmity; and 2d, inefficiency in the discharge of his duties on account of negligence or inattention—inattention being only another phrase for neglect of duty. It may be that the absolute right of a retiring schoolmaster to get a retiring allowance is confined to cases where he is discharged from office for old age or infirmity, for it would seem that these are the only cases under the 19th section where the cause of removal does not imply fault, although there may be some kinds of inattention which do not infer personal fault and yet do not fall under the head of infirmity. It is not, however, necessary to determine that point, for, as far as the present case is concerned, we may assume that the 19th section of the Act of 1861 only deals with two cases—1st, old age and infirmity, which involve no fault; and 2d, the other cases, in which fault is always present. So that while the minister and heritors were entitled to grant a retiring allowance in every case, the retiring schoolmaster could only demand it as a matter of right if he was removed for old age or infirmity.

Then the 60th section of the Education Act of 1872 provides:—"If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's Inspector charged with the duty of inspecting such school; and on receiving such report the school board may, if they see cause, remove such teacher from office; provided that before proceeding to give judgment on the matter they shall furnish to the teacher a copy of such report, and that a judgment removing the teacher shall not have effect until confirmed by the Board of Education: Provided also, that in the case of teachers of parish schools appointed previously to the passing of this Act who may be so removed, the school boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively by sections nineteen and twenty of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, in the case of parish schoolmasters permitted or required to resign, or dismissed or removed from office as therein provided."

Now, the Lord Ordinary's view of this section is that no dismissed schoolmaster is entitled to a retiring allowance as a matter of right when he is not dismissed on account of old age or infirmity, these being the only cases in which, by the old law, he had such right. The Lord Ordinary thus holds that the right given by the old statute is not extended beyond the letter of that statute by the provisions of the 60th section of the Act of 1872. I can't help thinking that the Lord Ordinary has forgotten that this is a remedial statute, which is not to be strictly construed, for the construction of the Lord Ordinary is about the strictest I ever met with. A remedial statute is a benign and favourable enactment, and must often be extended to analagous cases. But it is not necessary to resort even to this consideration to get an opposite result from that arrived at by the Lord Ordinary, for the natural meaning of the words is against his view.

Here the School Board were empowered by the terms of the Inspector's report to dismiss the schoolmaster. The report says:—"The state of the school gives evidence that it has not been efficiently conducted, and that Mr Alexander Robb, however he might succeed elsewhere, is unfit for the post of schoolmaster of Logiealmond." Now, there may be cases in which a schoolmaster may be unfit and inefficient from no personal fault. It may be that the requirements of the School Board—requirements justified by statute—are such that the schoolmaster cannot satisfy them, although at the time of his appointment he was quite capable of conducting the work of the school efficiently. The Lord Ordinary has found that one object of the 60th section of the Education Act is to enable the School Board to get rid of a teacher in circumstances which would not have warranted them in doing so under the old law. Thus a schoolmaster may have been quite efficient when appointed, but by a change of the circumstances of the parish, or the improvements arising in the lapse of time, he may not be up to the mark as teacher of the school in the present day—but through no fault of his own. Yet, on his removal, the Lord Ordinary says he is not entitled to a retiring allowance because he is not dismissed for old age or infirmity.

Turn again to the 60th section of the Education Act. By it every schoolmaster who is reported by the inspector to be incompetent, unfit, or inefficient may be removed. But then comes this proviso—"Provided also that, in the case of teachers of parish schools appointed previously to the passing of this Act who may be so removed, the School Boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively by sections 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act, 1841." Now, what was the right vested in the schoolmaster by section 19 of that Act?—The right to demand a retiring allowance unless the cause of his dismissal was his own fault. It may be true that it was not possible under the old law to have any case of removal without fault except where the cause of removal was old age or infirmity. But the causes for which a schoolmaster may be removed having been increased by the Act of 1872, is it not plain that there must be a corresponding extension of the powers and rights as to retiring allowances as fixed by the previous statute? What the Act of 1861 says is this—You shall be entitled

to a retiring allowance if you are not removed for fault. That provision is introduced into the new Act, and applied *in terminis* to every cause of removal in the new Act, whether incompetency, unfitness, or inefficiency.

That, I think, is the proper construction of the statute according to the plain meaning of the words, apart from the fact that it is a remedial statute, which must receive a favourable interpretation. So I differ from the Lord Ordinary.

But his Lordship proceeds further to say that, apart from the construction of the statute, he looks upon the case of the pursuer as irrelevant. I am not prepared to give an opinion upon this point, for it is but fair to the pursuer to allow him to amend his record before disposing of this defence. The cause of his inefficiency is not specified in the report, and it is not condescended on by the pursuer; but as his right to demand a retiring allowance depends upon what that cause was, we cannot dispose of the case until we have information on that point. I am unwilling to say more in the meantime, or to consider how far the inspector's report gives a presumption against the pursuer; and I think that he should have an opportunity to amend his record.

Lord Deas—I entirely agree with your Lordship on the construction of the statute, and have nothing more to add upon that point.

The chief difficulty I have is, that I don't see that it is clear upon the face of the proceedings that the School Board have removed the pursuer for fault. He has been removed, but it doesn't appear that he was removed for fault. In these circumstances, the question is whether he is entitled to a retiring allowance, and it would have been satisfactory to have had a deliverance, framed by the School Board, shewing exactly the ground of removal. I do not say that it is necessary for the School Board to draw up any such statement at the time of removal, for that and the retiring allowance are different questions: and when they are asked for a retiring allowance may be the proper time for the School Board to find that the removal was for fault.

The only objection I have to the amendment of the record suggested by your Lordship is, that it seems to imply that it lies on the pursuer to show that he was not removed for fault. I do not think that he is bound to prove his innocence; and what occurred to me was to remit to the School Board to explain the grounds on which they dismissed the schoolmaster. If that were satisfactory, I would be inclined to give all possible weight to the deliverance of the School Board. But I cannot go the length of saying that the burden of proof lies on the dismissed schoolmaster. Removal of a schoolmaster is one thing, and removal for fault another; and if the removal was for fault it lies upon the School Board to say so, and not on the schoolmaster to prove the contrary.

Lord Ardmillan—The pursuer Mr Robb was appointed schoolmaster, in 1858, of the Parochial School of Logiealmond. Some years ago the pupils attending his school were numerous, and he states that besides teaching the school—I presume satisfactorily—he discharged the duties of Inspector of Poor-Rates, Registrar and Session Clerk. In August 1873 Mr Robb was removed from the office of parochial teacher in consequence of a report by the Inspector of Schools, dated 7th August 1873, in which the Inspector states that there were no pupils in attendance, that only six had been enrolled during the year, and not one between March and August, and yet that in one school a mile to the west there were 33 pupils on the day of inspection, and there had been frequently a much larger number; that in another school a mile to the east there had been during the year 25 pupils, though taught by a mistress only. The Inspector concludes the report by stating that the school has "not been efficiently conducted, and that Mr Alexander Robb, however he might do elsewhere, is unfit for the post of schoolmaster at Logiealmond. Accordingly Mr Robb was removed by the School Board. His removal was confirmed by the Board of Education in Edinburgh on 24th September 1873, and intimated to him; and on 31st October 1873 the School Board intimated to him that they declined giving him any annuity. So standing the facts, Mr Robb has brought an action concluding for decree ordaining the School Board to pay him a retiring allowance of not less than two thirds of his salary.

It is important to observe that no question is here raised in regard to the propriety, the legality, or the finality of the removal of the pursuer from the office of schoolmaster. He stands removed—regularly removed—and, as we must assume, rightly removed. The question is;—being thus removed, is he entitled, as the case stands, and without enquiry—for he is not demanding enquiry—to enforce a retiring allowance? The pursuer, accepting his removal as lawful and effectual, demands the retiring allowance as matter of right, and without further enquiry. The School Board who removed him, and whose act of removing was approved by the Board of Education, had the power, on removing him, to give a retiring allowance if they thought fit. They, knowing all the facts and circumstances of the case, have declined to do so. This action is raised concluding for judicial decree ordaining them to give the allowance. The pursuer craves decree on the case as it now stands.

But for the provision at the close of the 60th section of the Education Act of 1872 it is plain that the pursuer, being rightly removed, could not have any statutory claim to a retiring allowance. Of this there is, in my opinion, no doubt. The claim rests, and has in argument been urged, entirely on the provision in clause 60 of the Act of 1872, to the effect that "the teachers shall have the same rights to retiring allowances as were vested in parish schoolmasters by sections 19 and 20 of the Schoolmasters Act of 1861, in the case of parish schoolmasters permitted or required to resign, or dismissed or removed from office as therein provided." In order to ascertain the nature and measure of the right reserved by this 60th section of the Act of 1872, and now claimed by the pursuer, we must go back to the 19th and 20th sections of the Act of 1861.

I have carefully considered the construction and application of these sections of the Act of 1861 in order to see whether they support this claim of the pursuer; and in the construction of the Act of 1861, an Act repealed by the Act of 1872 except in so far as the 19th and 20th sections are introduced by the provision in section 60, I have arrived at the same conclusion as Lord Young; and on that part of the case I have really very little to add to the explanations given in his Lordship's note. By the

19th section of that Act of 1861 the heritors and minister, whose powers are now transferred to the School Board, are empowered to "permit or require" a schoolmaster to resign when "disqualified because of infirmity or old age," or when failing efficiently to discharge his duties "from negligence or inattention." In every case of such resignation the heritors and minister have power to grant a retiring allowance; and where the resignation, permitted or required, and therefore including removal, has not been occasioned "by any fault on the part of the schoolmaster," they were bound to grant a retiring allowance. Reading this Act of 1861, and construing it as it stands alone, I concur with Lord Young in opinion, that for inefficiency not caused by "negligence or inattention," and not caused by "infirmity or old age," the teacher being lawfully removed, could not have enforced a retiring allowance under that statute. The grounds of removal under the 19th section of that Act are Inefficiency from negligence or inattention—implying, as I think, fault—or disqualification because of infirmity or old age, not implying fault. As I read the 19th section of this statute of 1861 the teacher could not be removed without fault unless he was removed as disqualified because of infirmity or old age.

The statute of 1872 did, however, extend the power and multiply the causes or grounds of removal, so as to bring within the scope and reach of that power a number of cases where removal could not have been enforced under the Act of 1861, and perhaps among these cases there may be some where there is no fault on the part of the teacher.

The School Board—popularly elected, and viewed as representing to a large extent the parentage of the district,—have now power to remove a teacher in respect of ascertained actual incompetency, unfitness, or inefficiency, from whatever cause that may have proceeded. If is quite possible to conceive cases where such inefficiency, though not arising from infirmity or old age, may not have arisen from actual fault on the part of the teacher. Such cases are no doubt exceptional. But there may be such. For that inefficiency the teacher could not have been removed under the Act of 1861. It is only because of the extended scope and reach of the power of removal under the Act of 1872 that it takes effect in a case beyond the scope and reach of the Act of 1861. Now, it does appear to me that the protection given to the teacher against removal without fault under the limited scope of the Act of 1861 must in fairness be held to be extended under the Act of 1872, so as to be commensurate with the more extended and comprehensive scope of that Act.

Therefore, while I agree with Lord Young in his construction of the 19th section of the Act of 1861, I am disposed to think that the teacher's right to retiring allowance must be read with reference to the nature and measure of the power of removal, and that when, by the Act of 1872, other grounds of removal are introduced not implying fault on the part of the teacher, then the teacher's right to retiring allowance cannot justly be left under the limitation created with reference to the limited power of removal. Justice demands, in my opinion, that the teacher's right to retiring allowance shall, under the new Act, as it was under the former Act be commensurate with the power to remove without fault on his part. On this point I concur with your Lordship in the chair. If in this case it did appear that the teacher's inefficiency and unfitness was not occasioned by any fault on his part, that would be an exceptional case, and, in that case I think that he would have a good claim to a retiring allowance even though it did not arise from "infirmity or old age."

But, while I am of this opinion, I have been compelled, in the actual circumstances of this case, so far as ascertained, to arrive at a conclusion unfavourable to the pursuer.

I have no doubt that the pursuer was rightly removed. His continuance in the office of teacher, under the circumstances, would have been an abuse. He was pronounced inefficient and unfit by the inspector. He had no work and no pupils. That he is infirm or old is not alleged. He has failed as a teacher. The school is vacant. He has no pupils though there are plenty of children requiring education. He has had experience and practice in teaching and in other departments, and want of mental capability is not suggested. No cause whatever to explain the entire failure of the school has been stated by him on record, and he has not alleged or offered to instruct any facts tending to explain a result so unfavourable to him. The Inspector has reported him inefficient and unfit, and has reported the failure of the school; and the pursuer, who has been removed on that ground, has not suggested any reason in respect of which the fact can be explained apart from his own fault. Nothing like an exceptional case has been alleged. It was not the province of the Inspector to charge him with fault. But the report of the Inspector raises, in my opinion, a presumption that the failure of the school, and the unfitness and inefficiency of the teacher, have been occasioned by some fault on his part. Notwithstanding the report,—accepting it as accurate,—and not disputing the lawfulness of his removal—and not craving any inquiry,—the pursuer demands his retiring allowance, founding only on the Inspector's report and the absence from that report of reference to any fault. I think he is not entitled to do so. In the position in which he stands in relation to this report and to the deliverance by the School Board, confirmed by the Board of Education, I think that the pursuer must be considered as *in petitorio* bound to allege and instruct some explanation of the facts reported on by the Inspector, an explanation consistent with the absence of fault on his part. In the present state of the case, as presented to us by the pursuer, and on which, as it stands, the pursuer has called on us to pronounce judgment, I am of opinion that he is not entitled to the retiring allowance which he demands.

I do not say what might be the effect of distinct and relevant averment by the pursuer of special and exceptional facts tending to explain the failure of the school on grounds inferring no fault of his. We have no such averments at present. Lord Gifford, in the *Whitburn* case, appears to have been of opinion that an inquiry by proof in this Court might be permitted if relevant averment were made and proof demanded. I am not disposed to differ from his Lordship's view. But in the meantime no such averments have been made —no proof has been craved by the pursuer, and no inquiry into his conduct and character has been demanded by him.

Lord Mure—On the construction of the statutes I have no difficulty in agreeing with your Lordships.

The second point is one of greater nicety. I agree with Lord Deas that the report does not show actual fault, except by implication. But it bears that the school "has not been efficiently conducted," and that the pursuer "is unfit for the post;" and when, in such circumstances, the schoolmaster comes here and asks for a retiring allowance as a matter of right, he ought to have made more definite averments. I therefore agree with your Lordship in the chair.

Counsel for the Pursuer — Scott and Young. Agent—George Begg, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark) and Keir. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, January 26.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

ALEXANDER WEBSTER AND OTHERS *v.* WILLIAM ROGER MORISON.

Proof—Writ.

Where a party who held a property by virtue of an *ex facie* absolute disposition qualified by a back letter, founded on these documents, but admitted on record that they did not give an accurate account of the transaction,—*held* that the other party was entitled to a proof *prout de jure.*

This was an action of suspension and interdict raised by Alexander Webster and others, marriage trustees of John Scott Grant, whereby they sought to prevent the respondent from selling certain subjects in Arbroath, described in the marriage contract. Mr Grant being desirous of buying the said premises, in which he carried on his business, the sum of £125 was advanced by the respondent, that being the price actually paid to the sellers, and a disposition and assignation in security was executed in the respondent's favour, which bore that £250 had been paid by him, and he at the same time granted a letter of reversion in the following terms:—"Sir—I, William Roger Morison, merchant in Dundee, Considering that, by disposition and assignation granted by you in my favour, dated the 15th day of June 1871, you, in consideration of the sum of £250 sterling, advanced by me to you, sold and disponed to me, my heirs and assignees whomsoever, heritably and irredeemably,—(*First*), All and Whole [*Here follows description of property*]. And whereas it was agreed on between you and me that although said disposition and assignation in my favour was conceived in an absolute form, yet the same should be held by me only as a security for the said sum of £250 sterling which was that day advanced and lent by me to you, the said John Scott Grant, and of any subsequent advances I might make to you or on your account, and interest thereof as aftermentioned, and that I should grant a letter of reversion in your favour in terms underwritten: Therefore, in case you shall repay to me, or my heirs, executors, or successors, the foresaid principal sum of £250 sterling, and of any subsequent advances made by me to you or on your behalf at the term of Martinmas 1871, or at any term of Martinmas or Whitsunday thereafter, previous to the term of Whitsunday 1872, and of the expense of the disposition by you in my favour before-mentioned, and of this letter, and also of all expenses I or my foresaids may necessarily incur in completing our title to the said subjects or otherwise, with interest until paid; together with the interest of the said principal sum from the date of said disposition in my favour, and of any subsequent advances as before-mentioned, from the date of advance at the legal rate until paid, at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first term's payment of the said interest at the said term of Martinmas next for what shall be due at that term, and the next term's payment thereof at Whitsunday thereafter, and so forth half-yearly, termly, and continually during the not payment of the said principal sum, subsequent advances, and others above-mentioned; and in case you shall at your own expense insure and continue to keep insured in some established insurance office to be approved of by me and my foresaids the said tenement and others against loss by fire to the extent of £100 at least, and shall repay to me and my foresaids at same time all advances and expenses we may have been put to in the premises, and shall also pay regularly, as the same become due, the public and parish burdens affecting the said subjects, and exhibit to me or my foresaids discharges therefor: Then I and my foresaids shall be bound and obliged, as I hereby bind and oblige myself and my foresaids, to redispone to you, the said John Scott Grant, and your heirs and successors, heritably and irredeemably in fee, All and Whole the foresaid subjects in usual form."

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 19th January* 1875.—The Lord Ordinary having heard counsel and considered the closed record, productions, and process, Sustains the fourth plea in law for the respondent, and appoints the cause to be put to the motion roll of Friday, 22d January, with a view to further procedure.

"*Note.*—The complainers aver that the *ex facie* absolute disposition by John Scott Grant in favour of the respondent was granted only in security of £125, and that the amount specified in this disposition, and also in the relative letter of reversion executed by the respondent and by Mr Grant, was stated at £250, in order also to secure the current balance on the account between Mr Grant and the respondent's firm of W. R. Morison & Company, which balance has been extinguished. They further aver that they are Mr Grant's marriage-contract trustees, and that by this contract Mr Grant conveyed to them his right, title, and interest under that letter of reversion: And they maintain that they are entitled to a proof at large for the purpose of establishing these averments, on the ground that where a party, founding on a deed, admits on record that it does not contain a true account of the agreement of parties, parole proof is competent.

"But the respondent does not, the Lord Ordinary thinks, admit that the said deeds do not truly carry out the agreement between Mr Grant and him. The respondent's averment is that Mr Grant came to him in 1871 and stated that the rope-work premises in Arbroath then held by him on lease were for sale and could be got a great bargain, but that he had no means wherewith to purchase them, and that if the respondent would purchase them, with the working plant, which could be done for