to two bonds, the first for £100, and the second for £130, placed on the property in Haddington Place, which the widow maintains should be paid otherwise than by deduction from her half share of the value of these subjects. Now, what came to her was a gift from her husband, and not only was she bound to take that gift subject to the burdens which were on it when she got it, but her husband was quite entitled to take back again what he had given in whole or in part. I have therefore no doubt that the widow is not entitled to decree as regards the first and second items under question 2. As to the other items under that question, I think she is well entitled to obtain what she asks.

LORD YOUNG—I entirely agree that the widow must take the subject which was gifted to her subject to the burdens which were upon it at the date of his death. He was entitled to put any burdens he pleased on the property during his life. This disposes of the second bond, and the first bond is in a stronger position even than the second. The husband gave his wife a gift with the burdens which were on it, but I do not think it was intended that her share should suffer deduction in respect of all expenses connected with the property. I am therefore of opinion that she is entitled to receive payment of one-half of the price of the property, less one-half of the two bonds for £100 and £130 respectively.

LORD TRAYNER—I agree. About the first bond I think there can be little question. It was a burden on the property when the husband made the donation. As regards the second bond there is perhaps more room for argument, but I think no room for doubt. The husband, in the exercise of the power which he unquestionably had over what was virtually his own property, burdened it with a further sum of £130. The wife must take the gift subject to the burdens put upon it by him during his life. With regard to the other items, they were personal debts of the husband, and I do not think they can be made chargeable against the wife.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Answer the second question by declaring that the second party is entitled to her share of the proceeds of the subjects in Haddington Place subject to one-half of the principal sums due under the bonds for £100 and £130 and the expenses of discharging the same: Find and declare accordingly, and decern."

Counsel for the First and Third Parties—Craigie—W. Harvey. Agent—John Elder, S.S.C.

Counsel for the Second Party—A. S. D. Thomson—Abel. Agents—W. & J. L. Officer, W.S.

Thursday, February 27.

SECOND DIVISION.

[Lord Moncreiff, Ordinary.

SCHOOL BOARD OF CABRACH *v.* MACDONALD.

School—School Board—Declinature by Person Nominated to Fill Vacancy—Right of Board to Nominate after Elapse of Eight Weeks—Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 13—*Education (Scotland) Act* 1878 (41 *and* 42 *Vict. c.* 78), *sec.* 15.

A person nominated to fill a vacancy on a school board, in terms of the Education (Scotland) Act 1872, section 13, and the Education (Scotland) Act 1878, section 15, is entitled to decline office, and if he does so he is never at any time a member of the board and does not require to resign.

The elapse of the period of eight weeks without a nomination by a school board to fill a vacancy, after which the Education Department is entitled, in terms of the Education (Scotland) Act 1878, section 15, to nominate a person to supply such vacancy, does not deprive the school board of their right of nomination if exercised before the Department exercise theirs. A person so nominated, after the elapse of eight weeks, by a school board, is legally a member of the board, and in any view it is not open to a schoolmaster contesting the validity of his dismissal to object to the legality of such a nomination, when the objection has not been taken by the Education Department.

By letter dated 30th April 1894 Mr W. M. Skinner, a member of the School Board of Cabrach, resigned office. On 19th July 1894 the Board proceeded, in terms of the Education (Scotland) Act 1878, section 15, and the Education (Scotland) Act 1872, section 13, to nominate the Rev. G. G. MacMillan, minister of Cabrach, to fill the vacancy. On 6th August he wrote to the clerk a letter in the following terms:—"Dear Sir—I am in receipt of yours of 1st August, and in reply beg to state that I shall on no consideration accept office in the Cabrach School Board. . . ." The Board thereupon, assuming that in view of this letter, which they regarded as a declinature, their nomination of Mr MacMillan had been of no effect, proceeded on 16th August to nominate William Beattie to fill the vacancy. He accepted office on 20th August. On 29th August Mr Gordon, a member of the Board, gave notice that at the meeting of the Board to be held on 27th September he would move that the defender, who was schoolmaster at Upper Cabrach Public School, be dismissed from his office. The defender was a certificated schoolmaster, and in accordance with the Public Schools (Scotland) Teachers Act 1882, section 3, notice of this motion was sent to the four original members of the Board, to Mr

Beattie, and to the defender, but no notice was sent to Mr MacMillan. On 27th September the defender was unanimously dismissed by the Board consisting of the four original members and Mr Beattie. A new teacher was appointed on 17th November and entered upon his duties on 7th January 1895, but the defender refused to leave the schoolhouse. The School Board then brought an action in the Sheriff Court at Banff, craving for interdict against the defender entering the school or pertinents thereof. By interlocutor dated 20th March the Sheriff-Substitute (GRANT) refused the prayer of the petition, proceeding on the view that, when the statutory procedure for the defender's dismissal was initiated, the Rev. G. G. MacMillan was a member of the Board, and that consequently the defender's dismissal was invalid in respect that no notice of the motion for his dismissal was sent to Mr MacMillan in terms of the statute.

The School Board did not appeal against this decision, but to obviate any difficulty proceeded *de novo*, obtained from Mr MacMillan a formal notice of resignation dated 12th April 1895, and on the expiry of the statutory period of one month on 13th May of new appointed Mr Beattie to fill his place. Mr Beattie duly accepted office. On 6th June notice was given of a motion for defender's dismissal to be moved on 29th June, and duly intimated in terms of the statute to the members and the defender. On 29th June it was unanimously resolved —all the members being present—that three months after 2nd July 1895 the defender's services would be no longer required, and this was intimated to the defender by registered letter. On 2nd October the period of three months expired, but the defender still refused to remove from the schoolhouse.

In these circumstances the present action was brought by the School Board, concluding (1) for declarator that the defender had been validly dismissed, and that his tenure of office came to an end not later than 2nd October 1895; (2) for removing; (3) for interdict; and (4) for reduction of the Sheriff-Substitute's decree.

The Education (Scotland) Act 1878 (41 and 42 Vict. cap. 78), sec. 15, provides—"A member of a school board may resign on giving to the board one month's previous notice in writing of his intention so to do. The vacancy so caused shall, where a quorum remains, be supplied by the school board in the manner provided in section 13 of the principal Act, and if the school board fail for eight weeks to fill up the vacancy the Scotch Education Department may nominate a person to fill the vacancy at such time and place and in such manner as the said Department shall determine."

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62) (the principal Act referred to), sec. 13, provides—"Should a vacancy occur in any board during the currency of its period of office, such vacancy shall be supplied by the board itself nominating a person to supply such vacancy, and every person so nominated shall go out of office at the same date as the school board." And Schedule B, sec. 1—"The number of members of the school board shall be such number not less than five, nor more than fifteen, as may be determined by the Scotch Education Department with respect to each parish and burgh."

The Public Schools (Scotland) Teachers Act 1882 (45 and 46 Vict. cap. 18), sec. 3 (1) provides—"No resolution of a school board for the dismissal of a certificated teacher shall be valid unless adopted at a meeting called not less than three weeks previously by circular sent to each member intimating that such dismissal is to be considered, and unless notice of the motion for his dismissal shall have been sent to the teacher not less than three weeks previous to the meeting."

The position taken up by the defender sufficiently appears from the opinion of the Lord Ordinary (MONCREIFF), who on 15th January issued the following interlocutor:—"Finds and declares in terms of the declaratory conclusions of the summons and of the conclusions for removing and interdict, and decerns: Finds it unnecessary to dispose of the reductive conclusions of the summons: Finds the pursuers entitled to expenses," &c.

Opinion. — "The defender, who was a teacher of Upper Cabrach Public School, was twice dismissed from his office by the unanimous vote of the School Board, or what professed to be the School Board of the Parish of Cabrach, the first resolution to dismiss being dated 27th September 1894 and the second 29th June 1895; the dismissal in the former case to take effect on 27th December 1894, and in the latter upon 2nd October 1895.

"The pursuers, the School Board of the Parish of Cabrach, have been obliged to raise this action in order to compel the defender to remove from the school and dwelling-house attached to it. The defender, who from the first has thrown every obstacle that ingenuity could devise in the way of the pursuers' effecting his removal, defends this action on highly technical pleas.

"In the first place he pleads that the Board, as a Board, was never validly elected and constituted. That is now admitted to be a mistake.

"It is next objected that the first dismissal was invalid because notice of motion, as required by the statute, was not given to one of the members of the Board, the Rev. Mr MacMillan, minister of Cabrach. It appears that Mr Skinner, a member of the Board, having resigned office on 13th April 1894, the remaining members, as empowered by the 13th section of the Education Act of 1872, nominated Mr MacMillan for the vacancy. Mr MacMillan, however, by letter dated 6th August 1894, refused to accept office, and the Board proceeded forthwith, on 16th August, to elect William Beattie to fill the vacancy. Thereafter on 29th August Mr Alexander Gordon, one of the members of the Board, gave notice that at the meeting of the Board to be held on 27th September he would move that the defender be dismissed from his office; and upon the 27th of September it was unanimously resolved that he be dismissed accordingly.

"The defender's objection now is that on being nominated, Mr MacMillan became a member of the Board; that he could only escape from that position by resigning, the resignation not taking effect until one month after notice in writing had been given of his intention to do so. (The Education Act 1878, section 15.) That therefore notice of the motion for the dismissal of the defender should have been sent to Mr MacMillan in terms of section 3 of the Public Schools (Scotland) Teachers Act 1882, and that this not having been done the dismissal was invalid.

"This was not the ground upon which the defender relied in the proceedings before the Sheriff. I gather from the copy of the record in process that he then insisted that his dismissal was invalid in respect that Mr Beattie was not nominated within eight weeks of the date when the resignation of Mr Skinner took effect. He ignored altogether the nomination of Mr MacMillan. The Sheriff, however, did not adopt that view and assoilzied the defender on the ground that Mr MacMillan having been nominated, and being in consequence a member of the Board, should have received notice of the motion for the dismissal of the defender. For the purposes of his defence to this action the defender is ready to adopt the Sheriff's view.

"I do not find it necessary to decide whether the Sheriff was right or not, because I am prepared to hold that the defender was effectually dismissed in 1895, if not in 1894; but I do not wish to be understood as accepting the Sheriff's views. The Sheriff's judgment involves this—that a person who has been nominated without his knowledge or against his will, and who refuses to accept office and never acts, nevertheless becomes and must remain a member of the board unless he resigns in terms of the statute. The question must be tested by considering how matters would have stood if the question had arisen before the passing of the Education Act of 1878, under which, for the first time, members of the school board were empowered to resign office. In the case of a triennial election, a person nominated without his permission is given an opportunity of having his name withdrawn, because he is entitled to receive notice of his nomination. But in the case of a nomination by a quorum of the school board, under section 13 of the Act of 1872, no such opportunity is given under the statute to the person nominated to object; and therefore unless he is to be held bound to act against his will, the only thing he can do is to decline to accept. It would be strange if a person nominated by a school board were in this matter placed in a worse position than a candidate nominated at a triennial election. Indeed, it is a novel view to me that membership of a school board is a *munus publicum* which a citizen cannot decline to accept.

"But I do not pursue this further, because in my opinion the defender was well dismissed in 1895. The pursuers, acting on the view which the Sheriff took that Mr MacMillan became a member of the School Board in July 1894, in order to obviate any difficulty proceeded *de novo*, obtained from Mr MacMillan a formal notice of resignation of office, and on the expiry of the statutory period of one month, of new appointed Mr Beattie to fill his place. Thereafter, in due form, they again unanimously dismissed the defender. One would have thought that there would have been an end of the matter; but the defender, who had previously ignored the nomination of Mr MacMillan, in order to make out that there was an interval of more than eight weeks between Mr Skinner's resignation and the nomination of Mr Beattie in August 1894, now maintains not only that Mr MacMillan was duly elected, but that he resigned office in August or September 1894; and that as there was an interval of more than eight weeks from the time when his resignation took effect before the Board filled up the vacancy, the right of nomination devolved upon the Scotch Education Department under section 15 of the Education Act of 1878.

"It seems to me that there is a simple ground of decision which renders unnecessary consideration of that defence. The defender is in this dilemma. If Mr MacMillan never became a member of the Board the first dismissal was effectual. If, again, he became a member of the Board, he could *ex hypothesi* only demit office by resigning. This he did not do until April 1895, and if so, it cannot be disputed that the defender's objection to the second dismissal fails. Refusal to accept office and resignation are not the same thing. This ground of judgment may be technical, but it is scarcely for the defender to object to it on that ground. Holding this view, I shall only say a word or two on the remaining answers to the defence, which do not need to be considered if what I have stated is correct.

"As to the defender's contention that the right of nomination devolved upon the Scotch Education Department, the provision in section 15 of the Act of 1878 was introduced for the purpose of meeting the case of a school board refusing or delaying to fulfil their statutory duties. I doubt whether it applies at all to a case like the present, where the remaining members of the Board did not fail to nominate a new member within eight weeks of a vacancy occurring. The nomination may have been invalid on account of the omission of some statutory requisite, but there was a timeous nomination. I would only further observe that, so far as I know, the Scotch Education Department has not hitherto acted on the view that on the expiry of eight weeks the right of nomination passes entirely from the school board and devolves upon the Department, even where the Department is satisfied that there has been no wilful failure on the part of the school board, and raises no objection to the vacancy being filled up by the school board. (See the case of *Skene*, reported in Mr Sellars' Manual, 9th ed., p. 309, note).

"Even if the Court were to hold that Mr Beattie was not validly nominated in May 1895, it does not follow that the acts of the

School Board while he acted as a member of it would be invalidated by reason of any judgment subsequently pronounced. (See section 44 of 53 & 54 Vict. cap. 55.) Further, if Mr Beattie's vote were left out of view, there remained more than a quorum of the Board who voted for the dismissal of the defender.

"On the whole matter, I am of opinion that the pursuers are entitled to decree of declarator, removing, and interdict, and I shall accordingly pronounce decree to that effect with expenses. It will be unnecessary to dispose of the reductive conclusions of the summons."

The defender reclaimed.

LORD JUSTICE-CLERK — The defender in this case maintains that at the date of his first dismissal Mr MacMillan was a member of the School Board, and that notice of the motion for defender's dismissal ought to have been sent to him. Mr MacMillan had been nominated by the School Board but he had refused to accept office. I see no ground for holding that a person who has been thus nominated is a member if he declines to accept office. The analogy which was attempted to be drawn between this case and the case of an elected member of Parliament is inadmissible, because the position of a member of Parliament is entirely different. He has no right to resign. Although it is common to speak of a member of Parliament resigning, that is not really what takes place. The member cannot resign. He must accept an office under the Crown, the acceptance of which by statute vacates his seat in Parliament. Here we have an entirely different state of circumstances. I have no doubt that Mr MacMillan could quite competently refuse to accept office. In that view the Board was bound to proceed to get someone else instead of him, and on 16th August 1894 William Beattie was nominated to fill the vacancy. Thereafter when the proper period of notice had elapsed which was necessary to enable such a motion to be dealt with, the defender was dismissed. I think this was all perfectly regular.

But it is not necessary to rely solely on this dismissal, as I think there can be no doubt that the defender's second dismissal was entirely free from exception. The defender maintains that Mr M'Millan's letter of refusal to act must be read as a resignation, and that as such it did not take effect till 9th September 1894; that consequently Mr Beattie's nomination on 16th August was inept, there being then no vacancy, and that no nomination by the Board to fill the vacancy was made till 16th May 1895. Accordingly he says that more than eight weeks elapsed before the Board proceeded to supply the vacancy, and that consequently the Board must be held to have lost their right of nomination, which, he submits, after the elapse of eight weeks, passed to the Scotch Education Department. It does not appear to me that the power given to the Scotch Education Department to fill vacancies after the elapse of eight weeks in any way puts an end to the right of school boards to make nominations after the expiry of that period. If the Education Department does not exercise the power given to it, I think the school board can at any time competently exercise the power conferred upon them. But in any view I am clear that it is not within the right of a third party to come forward and vindicate the rights of the Education Department, when the Education Department is not claiming any rights for itself.

I am therefore of opinion that Beattie was legally nominated in May 1895, and if that be so, then there is no doubt that whatever may have been the case with regard to the first dismissal, the defender was duly dismissed on 29th June 1895. I think the reclaiming-note should be refused, and the Lord Ordinary's interlocutor affirmed.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for Pursuers—M'Lennan. Agents—Dalgleish & Dobbie, S.S.C.

Counsel for Defender — Abel. Agent — Charles George, S.S.C.

Wednesday, March 4.

SECOND DIVISION.

JAMIESON *v.* WALKER.

Succession—Intestacy—Intestate Moveable Succession Act (18 *and* 19 *Vict. c.* 23), *secs.* 1 *and* 2—*Right of Heir who is not among the Next-of-Kin to Collate.*

The Intestate Moveable Succession Act, which introduces representation of predeceasing next-of-kin into moveable succession, enacts, section 1, "that no representation shall be admitted among collaterals after brothers and sisters' descendants, and section 2, that "where the person predeceasing would have been heir in heritage of an intestate, having heritable as well as moveable estate, had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone if there be no other issue of the predeceaser . . . . . the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate."

Held that an heir in heritage of an intestate, the only child of a predeceasing uncle, was entitled to collate the heritage, and to share the combined heritable and moveable estate equally with the intestate's aunt, who was the sole surviving next-of-kin.

Thomas Anderson, picture dealer, Glasgow, died on 29th July 1895, unmarried and in-