intents and purposes pursuers in the process of interdict. There may, no doubt, be cases in which the complainer in a suspension may be considered as in substance the defender in the action instituted by such suspension; and the best illustration of such cases is the old practice, which is now disused, of turning a charge which might be suspended into a libel, for that merely meant that the Court held the charge complained of to be equivalent to citation on a summons, so that the complainer was required to proffer all his defences against the debt *tanquam in libello*, in the same manner as if he had been cited in an ordinary action. But it is quite impossible to apply that doctrine or practice to the case of an interdict against a trespass or an encroachment upon property. No doubt the complainer in such a case alleges that he has reason to apprehend that his property will be interfered with either from the conduct or the expressed intention of his opponent, but you cannot turn the threats or conduct of the opponent into a libel so as to make him pursuer of an action which he has not raised.

I have no doubt therefore that the present pursuers really stand in the position of pursuers in the former action, and are entitled to the benefit of the doctrine that such a pursuer is entitled to bring a new action upon a different ground. That the grounds in fact are different your Lordship has conclusively shown. The question raised in the present action was not raised, and therefore could not be decided in the previous interdict. The validity of a plea of *res judicata* must necessarily depend upon the pleadings and decision in the previous action, and not upon any rights or equities which may have arisen antecedent to the pleadings, or from any extra-judicial communications between the parties. The question always is, what was litigated and what was decided. I think the defenders have in this case stated perfectly distinctly and quite accurately the reason why the judgment in the previous case cannot be pleaded as *res judicata* in this. For they say in their sixth statement of facts—"The pursuer did not either aver or plead in said action that they had any right of support for either of their lines of pipes such as is now put forward relative to the Crawley pipe." That means that they neither averred facts nor pleaded law which would have enabled the Court to decide the question raised in this action. I think that is quite an accurate statement of the result of a comparison of the two cases, and therefore that the plea of *res judicata* is not good.

The Court repelled the defenders' plea of *res judicata* and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—Clyde. Agent—J. Gordon Mason, S.S.C.

Wednesday, June 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DUNDEE SCHOOL BOARD *v.* GILROY, SONS, & COMPANY.

School—School Books—Half-Timers—Factory and Workshops Act 1878 (41 *Vict. cap.* 16), *secs.* 23 *and* 25.

The Factory and Workshops Act 1878 by section 25 empowers school boards to recover directly from the employers of "half-timers" a payment not exceeding 3d. per week from each "half-timer," and empowers the employer to deduct the sum so paid by him from that "half-timer's" wages.

Held that a school board accepting the Free Education grant was not entitled under the above section to recover from the employers of a "half-timer" a sum of 2d. a-week representing the cost of supplying the child with school books.

An action was raised by the School Board of the burgh of Dundee against Gilroy, Sons, & Company, jute spinners and manufacturers, Dundee, concluding for payment of the sum of £166, 3s. 11d. The sum concluded for was claimed by the pursuers in respect of a charge of 2d. per head per week for school books, stationery, &c., furnished to half-time children in the employment of the defenders and attending the pursuers' schools, for the period from 23rd March 1894 to July 1897.

The pursuers averred that in 1878 they had sent a circular to certain employers in Dundee, including the defenders' predecessors, Gilroy, Brothers, & Company, inviting them to say whether, in the event of the pursuers opening a school in the western quarter of the town, they would be willing to send their half-time children to the school at the ordinary rate of fees for half-time scholars, viz., 4d. per week, which included the furnishing of school books and stationery; that the manager of the said firm had agreed to this, and that accordingly the half-timers had attended the school on these terms; that in 1889 the pursuers had resolved to abolish school fees, but that in respect it was still proposed to furnish school books, stationery, &c., the pursuers sent a circular to the defenders' predecessors intimating that they proposed to charge 2d. per head per week for half-timers; that this proposal was accepted by the defenders' predecessors, and that the defenders on acquiring the works adopted and acted upon it.

The pursuers further averred that the defenders duly and regularly paid this charge down to March 1894, but that they had refused to pay it from that date down to July 1897, though their half-timers had attended the school, and had been regularly supplied with books and stationery by the pursuers.

The defenders averred that they were no

party to any agreement such as that alleged by the pursuers, and that they had only paid the charge up to 1894 *per incuriam*. They maintained that the pursuers had no power to exact fees from scholars between three and fifteen years of age; that it was optional on the part of half-timers to use their own books in place of those supplied by the pursuers; and pleaded—"(1) The pursuers' averments are irrelevant and insufficient in law to support the conclusions of the summons. (2) The pursuers being bound to provide the scholars in the said schools with necessary books and furnishings free of charge, the defenders are entitled to absolvitor, with expenses. (3) *Separatim*. The defenders having no power to deduct the price of the said alleged furnishings from the wages of the said children, they are entitled to absolvitor, with expenses."

Section 23 of the Factory and Workshop Act 1878 (41 Vict. cap. 16) provides that "The parent of a child employed in a factory or in a workshop shall cause that child to attend some recognised efficient school (which school may be selected by such parent), as follows—(1) The child when employed in the morning or afternoon set shall in every week, during any part of which he is so employed, be caused to attend on each work day for at least one attendance; and (2) the child, when employed on the alternate day system, shall on each work day preceding each day of employment in the factory or workshop be caused to attend for at least two attendances; (3) an attendance for the purposes of this section shall be an attendance as defined for the time being by a Secretary of State, with the consent of the Education Department, and be between the hours of eight in the morning and six in the evening."

Section 25 provides—"The board, authority, or persons who manage a recognised efficient school attended by a child employed in a factory or workshop, or some person authorised by such board, authority, or person, may apply in writing to the occupier of the factory or workshop to pay a weekly sum specified in the application, not exceeding threepence, and not exceeding one-twelfth part of the wages of the child, and after that application, the occupier, so long as he employs the child, shall be liable to pay to the applicants, while the child attends their school, the said weekly sum, and the sum may be recovered as a debt, and the occupier may deduct the sum so paid by him from the wages payable for the services of the child."

The Lord Ordinary (KYLLACHY) on 13th July 1898 pronounced the following interlocutor:—"Sustains the first plea-in-law for the defenders, and assoilzies them from the conclusions of the action, and decerns: Finds the defenders entitled to expenses."

Opinion.—"In this case it is a little difficult to ascertain from the record the exact point at issue. The pursuers' statement contains a great deal of matter which bears only on a plea of bar, which was not pressed in argument. On the other hand, while the defenders have a plea of irrelevancy which may perhaps cover everything, their only special plea is one which they admit is now foreclosed by the recent judgment of the First Division in the case of *Haddow* v. *S. B. of Glasgow*, 35 S.L.R. 736, 25 R. 988.

"At the same time the case, as presented at the debate, raises a quite precise issue, and one which does not appear to be at all affected by the judgment referred to. It is simply this—Whether the School Board of Dundee being debarred by the code under which they receive and accept certain Government grants from exacting fees from scholars who are between three and fifteen years of age, are nevertheless entitled to exact from a certain class of scholars—viz., half-timers—a certain weekly charge in respect of school books and stationery. It is now settled that the Board are not bound to supply such school books and stationery, but, in fact, they voluntarily do so; and the question is, whether, in respect of doing so, they are entitled to make the charge in dispute? I say that is the question, because it does not seem material that the charge is made (under an Act which I shall presently notice) against the half-timers' employers, and is by them deducted from the half-timers' wages. If by accepting the Government grant the School Board have debarred themselves from exacting such payments from the half-timers directly, it can hardly I think be maintained that they may still exact them indirectly through the employers.

"Let us first see how the matter stands with respect to ordinary scholars. Of course prior to 1890—when, speaking popularly, 'Free Education' was introduced—there could have been no question. The School Boards had right to charge such fees as they thought fit, subject only, speaking generally, to a limit of 9d. per week—a limit imposed as a condition of the then parliamentary grant. There was therefore, I apprehend, nothing to prevent them from providing (as indeed many Boards did) books and stationery, and from including that item—separately or otherwise—in the fee charged. All that has to be noted is that in applying the 9d. per week limit, it was provided by the Code (see present Code, section 6) that 'compulsory payments for books or material must be included in reckoning the fee.'

"In 1890, however, a new set of conditions were introduced. In that year an additional grant, commonly called the 'Free Education Grant,' was made by Parliament, and that grant was made upon a particular footing expressed (by the authority of Parliament) in the Code of that year and subsequent years. The section is 133, and it runs thus:—'The following condition shall be observed by the managers of all State-aided schools sharing in the grant, in respect of such schools, and by the school boards in respect of the school provision in the public schools of their district: No fees shall be exacted from scholars who are between three and fifteen years of age.'

"That is the condition in which the

pursuers and other school boards now participate in the Government grant. And that being so, the question at once arises, what is covered by the term 'fees?' Does it or does it not cover everything which the School Board can exact from scholars or scholars' parents in connection with the scholars' attendance? Or, to put it otherwise, is or is not the term 'fees,' as used in the 133rd section of the Code, used in the same sense as I have just pointed out attaches to it under the 6th section?

"Now, on this point, when it is once understood, I cannot say I have much doubt. Assuming—as I do assume—that it is in the power of the School Board to provide, as incidental or accessory to the tuition which they furnish, the necessary school books and necessary stationery, it appears to me that any charge which they exact or claim to exact in respect of that provision is, and must be, simply a charge of 'fees.' Except under the head of 'fees' there is not, and never was, any authority under the Education Acts to make any charge or to exact any payment from scholars or scholars' parents. Accordingly, if—as is not disputed—the pursuers are now debarred from exacting 'fees,' it appears to me to follow that they are equally debarred from making (at least as against ordinary scholars) a charge for school books and stationery.

"But if this is the position with respect to ordinary scholars, are 'half-timers' in any different position? In my opinion they are not. It is quite true that by an Act passed in 1878, and quoted on record, provision was made for school boards and other school authorities recovering directly from the employers of 'half-timers' a payment not exceeding 3d. per week from each half-timer, and for the employers deducting that payment from the half-timer's wages. But the charge so authorised was, it appears to me, simply a charge of 'fees.' It was not, and I apprehend could not, be anything else. Being so, it cannot, I think, be exacted so long as the pursuers receive and accept the grant for free education under the Act of 1890. It may be that the Act of 1878 is unrepealed, but so also are the fee-empowering clauses under the Act of 1872. School boards may, if they choose to forego the Government grant, still charge fees, and in particular charge fees against employers of half-timers under the Act of 1878; but if they accept the grant, they must, I apprehend, do so under the conditions attached.

"In point of fact, I rather take it that the powers conferred by the Act of 1878 were always subject to the provisions of the Act of 1872; and it has to be noted (although I do not think this was mentioned at the debate) that by the 87th section of the Local Government Act of 1889 the 53rd section of the Act of 1872 (being the section which empowers the exaction of fees) was amended so as to read thus:—'The school board shall, subject to the provisions hereinafter contained, with respect to higher class public schools, and subject to the provisions contained in the Scotch Education Code, or in any minute of the Scotch Education Department submitted to Parliament, fix the school fees to be paid for attendance at each school under its management.'

"It appears to me that this amounts—if that were needed—to an express statutory adoption of the condition expressed in the 133rd section of the Code.

"I have only to add that I did not understand it to be alleged that the exaction in question could be maintained if the supply of school books and stationery was a thing outside the powers of the board. In that case it might be true that the charge could not be reckoned as a charge of 'fees,' but then in that case the defenders' objection would be equally good on another ground. Because I do not suppose it would be contended that a school board could enforce under the Act of 1878 charges in respect of furnishings which they could not lawfully make. Charges for food, clothing, or for school treats would in that view be equally chargeable against half-timers and their employers.

"On the whole, I am of opinion that the action is irrelevant, and I shall accordingly sustain the first plea-in-law for the defenders and assoilzie them with expenses."

The pursuers reclaimed, and argued—The defenders' only real defence was founded upon the point decided adversely to them in *Haddow* v. *Glasgow School Board*, June 10, 1898, 25 R. 988. The pursuers' case here was founded upon special contract of which they had clear averments. Being under no obligation to supply books, they had agreed to do so on condition that the employers paid for them. They were entitled to a proof before answer of their averments. The Lord Ordinary had disposed of the case by holding that when the School Board's right to exact fees fell they were debarred from making a charge for school books. But however that might be, there was nothing to prevent the School Board from entering into a contract such as was averred here. And in point of fact the Lord Ordinary's reasoning was wrong, for it appeared from *Haddow* that the charge for books was not a "fee." That case further established that there was a legal obligation on parents to supply their children with books, and if the latter came to school without having them they could be refused admittance. Here the employers were directly liable as debtors to the School Board, though they might have a right of relief.

Argued for respondents—There was no statutory obligation on the employer to provide books, the only obligation being to obtain certificates of attendance. The claim here simply was one for goods supplied, and did not depend on its being a charge for books. It was true that section 25 of the Factory Act had not been repealed, but it did not apply to the altered state of circumstances since the abolition of fees. There was here no averment of contract, at any rate against the present defenders. Nor could an employer enter

into a voluntary agreement, for that would not give him a right to relief from the child's parent.

At advising—

LORD PRESIDENT—The key to the present question is to be found in the fact that under the Factory and Workshop Act 1878 the employer is only liable for that for which the child or its parents are liable. The scheme of the enactment is that, up to the limit of 3d. a-week, the school managers have got a direct claim against the employer for the moneys due them by the child, and the employer can stop this amount off the child's wages. Unless, then, the child is due what is now asked, the employer cannot be. The simpler way, therefore, of testing the validity of the present claim is to drop the employer out of the case, and to consider whether this demand is good against the child.

Now, the pursuer's claim is for 2d. a-week, a charge made for books, &c. furnished to each child. I pause to notice that while the circular speaks of "books, stationery, &c.," it is explained in condescendence 8 that "the books, &c., to which the circular letter of the pursuers referred were school books, &c., furnished by the pursuers to, and taken home day by day by the children, and at no time claimed or received as the property of the pursuers, but used up by the children." This, therefore, is not a charge made for the use of the apparatus of the school; it is a charge for supplying the equipment of the individual child.

The case we have to deal with is free of any complication arising out of the pecuniary circumstances of the child. This being so, the law as laid down in *Haddow's* case is that the child is bound to find its own books; and the normal course for the School Board to take is to see that this is so done in each case. If the Board choose to waive the specific performance of this duty by the individual children or parents, it must be on one of two footings, either that the Board buy the children's books out of the rates, or that they buy the books as the mandatory of the children (or of course their parents). If the former be the case, there is no claim against the child. If the latter, the Board must prove their mandate, and the mere fact of the purchase of the books will not suffice—there must be evidence that the child or its parents instructed the Board to buy the books as their agent.

Apart from special arrangement, it is not to be presumed that the children or their parents authorised the Board to buy these books as their agent, and no special agreement is alleged. The Board relied solely on the supposed liability of the employer under the Factory Act, and never in this matter put themselves in relation with the children or parents at all.

Accordingly, I hold that the Board had no claim against children or parents for this charge for books, and by consequence that they had no claim under the Factory Act against the employers.

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Accordingly, I hold that the Board had no claim against children or parents for this charge for books, and by consequence that they had no claim under the Factory Act against the employers.

The pursuers attempted to represent their record as containing an averment of contract between the employers and the Board; but I am entirely unable to discover anything of the kind. There is nothing alleged to support the theory that between 23rd March 1894 and 16th July 1897 the pursuers supplied the children with books as the agents of the defenders, or that the defenders had in any way undertaken to pay for the books.

I think, therefore, that the defenders are entitled to hold their absolvitor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers—Sol.-Gen. Dickson, Q.C.—Salvesen. Agents—J. & D. Smith Clark, W.S.

Counsel for Defenders—Wm. Campbell, Q.C.—Hunter. Agents—Skene, Edwards, & Garson, W.S.

Saturday, June 10.

FIRST DIVISION.

KIRK SESSION OF LARGS *v.* SCHOOL BOARD OF LARGS.

Expenses — Charitable and Educational Trust — Administration — Right of Respondent to Expenses.

When a private individual or a public body appears and lodges answers in an application to fix a scheme of administration of an educational trust fund, the measure of the respondent's right to his expenses out of the trust fund is the extent to which his intervention has furthered the interests of the trust administration.

Circumstances in which, following the above principle, a school board, which appeared as respondent in an application to fix a scheme of administration of the funds of an endowed school within its district, *held* entitled to one-third of the expenses of its appearance out of the trust fund.

The Reverend John Keith and others, being the members of the Kirk Session of Largs, presented a petition to the Court for authority to sell the site and buildings of the Female School of Industry at Largs, and for directions as to the application of the price.

The petitioners set forth that the site had been conveyed to them for the erection of a school for the children of poor persons, the said school to be under the inspection of the Presbytery of Greenock, and to remain in perpetual connection with the Established Church of Scotland. The cost of the building was defrayed partly by a grant from Government, partly by private subscription. The school was managed and maintained by the Kirk Session down to 1893, when the establishment of a large public school at