LORD KINLOCH—The substantial question to be decided by us is, Whether, in the disposition by the defender to the pursuer, by which is to be carried out the agreement of sale by the former to the latter, there is to be inserted not merely the personal obligation undertaken by the pursuer (the purchaser) to build workmen's houses on the ground, and to keep it unemployed for any other purpose for ten years; but a further clause declaring that, if this obligation is not fulfilled, any deeds to the contrary should be null and void, and the right to the subjects should be irritated, and revert to the disponer.

I am clearly of opinion that the seller has no right to have this clause inserted in the disposition. In adjusting a disposition to follow on a minute of sale the exact terms of the agreement are to be embodied, together with all the usual clauses proper to a disposition. Very clearly an irritant and resolutive clause like what is proposed is not a usual clause, but requires a special contract for its insertion. On the face of the minute of agreement there is nothing but a personal obligation on the disponee to build the houses, and to keep the ground unoccupied for ten years in any other way. To insert a clause irritating the right if the obligation is not fulfilled, is to insert something not contained in the agreement, and *prima facie* going far beyond its scope. It would therefore be making the disposition not the same thing with, but something different from, the agreement, and doing for the parties what they have not done for themselves. This the Court cannot do.

It is said that to insert this clause is the only sure method of rendering the obligation effectual against singular successors. I will not pronounce on this question. I am not called on to do so. Supposing that this was the case, it would be no good ground for inserting the clause, but emphatically the reverse. It would be simply giving to the disponer something beyond what he stipulated for. We are not authorised to insert in dispositions clauses executorial, or the best clauses we can conceive for making the obligations effectual. If the parties did not contract for such clauses, we are not warranted to insert them. For this reason, I cannot sanction the insertion of the proposed clause. But I desire distinctly to be understood as not thereby pronouncing on any question of right, connected either with the omission or the insertion of the clause. I do not say that the obligation is ineffectual without the clause, either against one party or another; neither do I say what extent of right the clause would give if inserted. I say no more than that I do not think the clause ought to be inserted in the disposition as a matter of right on which the disponer can insist, leaving to the disposition all its legal effects without this express insertion.

The case was continued to enable the parties to make some alterations on the draft disposition.

Agents for Pursuer—Maconochie & Hare, W.S.
Agents for Defender—J. & R. Macandrew, W.S.

Wednesday, January 17.

AINSLIE *v.* TAINSH.

Parish—Schoolhouse—Right of Minister to Vote at Meetings of Heritors—Statutes 1696, *c.* 26, 43 *Geo. III. c.* 54.

In a process of suspension and interdict at the instance of one of the qualified heritors of a parish against the minister of the parish—*held* (diss. Lord Deas) that the minister is not entitled to attend and vote at any meeting of the qualified heritors of the parish for the purpose of considering the state or condition of the existing parish schoolhouse, or any motion, proposal, or resolution for the repair, alteration, or renovation of the same; but *held* that the minister is entitled to attend and vote at a meeting of the qualified heritors for the purpose of considering any motion, proposal, or resolution relating to the alteration of the site of the schoolhouse.

This was a note of suspension and interdict presented by Mrs Mary Ainslie of Moreham Mains, wife of Robert Ainslie, Esquire of Elvingstone, with consent of her husband, and by Robert Ainslie for his own right and interest, against the Rev. John Grant Tainsh, minister of the parish of Moreham.

Mrs Ainslie is one of the heritors of the parish of Moreham entitled to vote at meetings of heritors in relation to the parish schoolhouse, under the Acts 1696, c. 26, and 43 Geo. III. c. 54. There is only one other qualified heritor in the parish, the Earl of Wemyss.

On the 20th June 1870 a meeting of heritors of the parish of Moreham was intimated as follows:—

"*Moreham*, 20*th June* 1870.

"*Notice of Meeting.*

"There will be a meeting of the qualified landed heritors, and others, of this parish, held in the schoolhouse on Thursday, the 21st day of July next, at 12 o'clock noon, for the purpose of proceeding with the erection of a new schoolhouse, arranging as to tradesmen, imposing an assessment for the purpose, and such other business as may be brought before the meeting.

"DAVID LOWDEN, *Heritors' Clerk.*"

As some dispute had already arisen between Mr Ainslie and Mr Tainsh as to the right of the latter to attend meetings of the heritors, and to vote in questions relating to the schoolhouse, Mr Ainslie on the 6th July wrote to Mr Tainsh to ask whether he intended to be present at the meeting to be held on the 21st, and to vote on the subjects to be brought under consideration of that meeting, adding, that in the event of Mr Tainsh having such intentions, he would be under the necessity of adopting measures to prevent him acting upon it.

Mr Tainsh replied:—

"*Moreham Manse, Haddington, 7th July* 1870.

"Dear Sir,—I do'nt know what I may do on the 21st; but I have been advised that I may act; and, as Lord Wemyss admits my right, it is likely that I may be present at the meeting, and vote, if necessary.—Yours truly,

"JOHN G. TAINSH."

The present note of suspension and interdict was then presented, in which the complainers prayed the Court "to interdict, prohibit, and discharge the respondent, the said Rev. John Grant Tainsh, from attending and voting at a meeting of the qualified landed heritors of the parish of Moreham, to be held in the schoolhouse of said parish on Thursday, the 21st day of July 1870, in so far as the said meeting is to be held for the purpose (as set forth in the circular calling said meeting) of proceeding with the erection of a new schoolhouse for said parish, arranging as to tradesmen, imposing an assessment for the purpose; and from attending

and voting at any meeting of the qualified heritors of said parish which may hereafter be called or held, in so far as the same may be called or held for the purpose of considering the state or condition of the existing schoolhouse of said parish, or any motion, proposal, or resolution relating to the alteration of the site of said schoolhouse, or the repair, alteration, or renovation of said schoolhouse; and in the meantime to grant interim interdict; or to do otherwise in the premises as to your Lordships shall seem proper."

The Lord Ordinary (MACKENZIE) granted interdict in terms of the prayer.

"*Note.*—The question whether the respondent, as minister of the parish of Moreham, is entitled to vote at meetings of the qualified heritors of that parish with reference to the state or condition of the present parish schoolhouse, the repair, alteration, or renovation of that schoolhouse, or the erection of a new schoolhouse in the place of the present schoolhouse, depends upon the provisions of the statute 43 Geo. III. c. 54. By that statute those heritors only who are proprietors of lands in the parish to the extent of at least £100 Scots of valued rent are entitled to attend or vote at any meeting held pursuant to that Act. There are various enactments in the statute for making better provision for parochial schoolmasters in Scotland. Some of these provisions are directed to be carried into effect by the qualified heritors alone, and others by the qualified heritors and the minister of the parish. The statute, which is free from ambiguity on this matter, makes a clear distinction between those acts which are to be done by the qualified heritors alone, and those which are to be done by the qualified heritors and the minister.

"The acts which are to be done by the qualified heritors and the minister of the parish are (§§ 2, 4, 6), the fixing and determining the amount of the schoolmaster's salary within certain specified limits; (sec. 11), the division of the salary among two or more teachers in the case of parishes which consist of districts detached from each other by the sea or otherwise, or where they are of great extent or population; (§§ 14, 16, 17), the election of a person to fill the office of schoolmaster when it is vacant, and (sec. 18), the fixing of the school-fees from time to time. The heritors, minister, or elders are also by the said statute empowered (sec. 21) to present a complaint to the presbytery charging the schoolmaster with neglect of duty, or immoral conduct, or cruel and improper treatment of the scholars—a provision which has been altered by the Act 24 and 25 Vict. c. 107, sec. 14. But no power is conferred by the statute 43 Geo. III. c. 54, upon the minister of the parish to act or vote with reference to providing a commodious school-house, or a dwelling-house for the residence of the school-master. These matters are regulated by the 8th section of the statute.

"By the 8th section of the statute it is enacted, 'that in every parish where a commodious house for a school has not already been provided, pursuant to the directions in the above-recited Act' (1696, c. 26), 'and in every parish where a dwelling-house for the residence for the schoolmaster has not already been provided, together with a portion of ground for a garden to the extent hereafter mentioned, the heritors of every such parish shall provide a commodious house for a school, and also a house for the residence of the schoolmaster, such house not consisting of more than two apartments, including the kitchen, together with a portion of ground for a garden to such dwelling-house,' containing at least one-fourth of an acre Scots, it being provided that where the heritors shall determine that such garden cannot be allotted to the schoolmaster without great loss and inconvenience, it shall be optional to them, with the authority of the Quarter Sessions of the county or stewartry, to assign to the schoolmaster, in lieu of such garden, an addition to his salary at the rate of eight bolls of oatmeal per acre, to be computed according to the average ascertained in manner hereinbefore directed. By the 9th section of the statute it is further enacted, 'that in case the heritors shall neglect or refuse to provide the accommodations of house, school-house and garden, or additional salary in lieu thereof to schoolmasters, according to the provisions of this Act, or in case the schoolmaster shall not be satisfied with the accommodations afforded him, it shall be competent for him to bring the same by representation or petition before the Quarter Sessions,' whose judgment shall be final.

"The 8th section of the statute commits to the qualified heritors alone the duty of providing a commodious school-house, and a dwelling-house and garden for the parish schoolmaster, and its terms are so clear and distinct in themselves, as, in the opinion of the Lord Ordinary, to preclude the respondent, as minister of the parish of Moreham, from voting at meetings of the qualified heritors, called for the purpose of considering the state or condition of the present parish schoolhouse, the repair, alteration, or renovation thereof, or the erection of a new schoolhouse in its place.

"The respondent maintained that as by the Act 1696, c. 26, it was ordained 'that there be a school settled and established, and a schoolmaster appointed in every parish not already provided by advice of the heritors and minister of the parish,' he was entitled to vote at meetings of the heritors with reference to the schoolhouse. But a school has been settled and established, and a schoolmaster appointed in the parish of Moreham, and the Act 1696, c. 26, does not therefore apply. Further, it is provided by the Act 43 Geo. III. c. 54, sec. 23, 'that all former acts and statutes with regard to parish schools or schoolmasters are hereby ratified and confirmed in so far as they are not altered by the express provisions of this Act.' The argument of the respondent appears to the Lord Ordinary to be inconsistent with the express provisions of this last-mentioned act.

"The respondent also maintained that, according to universal practice since the passing of the statute 43 Geo. III. c. 54, the minister of the parish is entitled to vote at meetings of the heritors with reference to the schoolhouse. Even if such universal practice had existed since the passing of that statute, it could not, the Lord Ordinary thinks, confer any such right upon the minister of the parish, because the statute alone can regulate the matter, and under the statute the respondent has no such right. The whole matter is statutory, and must be regulated by the provisions of the statute.

"The Lord Ordinary has only further to observe that the subsequent statutes, 1 and 2 Vict. c. 87, and 24 and 25 Vict. c. 107, are also quite distinct as to the acts to be done by the heritors alone, and those to be done by the heritors and minister, and that there is no provision in either of these statutes which supports the respondent's claim."

Mr Tainsh reclaimed.

SOLICITOR-GENERAL and LEE, for him, argued that the Act 1696, c. 26, intrusted the "settling and establishing" of the school to the heritors and minister, and this must be held as giving the minister a voice in any question regarding the site and amount of accommodation to be provided; *Anderson* v. *Minister of Bourtrie*, Nov. 26, 1808, F.C., in which the Court rejected the argument that the Act 1696 had no application where a school had been already established. The statute 43 Geo. III, c. 54, in no way lessened the powers of the minister, and in some respects enlarged them.

MILLAR, Q.C., and MARSHALL in reply.

At advising—

LORD ARDMILLAN—It is to be regretted that this action has been raised; for it appears to me that, in the existing state of the law, and in a parish with so very few heritors, the presence, the assistance, and the vote of the reverend gentleman who is the respondent would have been natural, and might well have been supposed to be desirable.

But Mr Ainslie has thought fit to present a petition for interdict, in broad and comprehensive terms, against the respondent, as the parish minister of Moreham, praying for interdict against his attending or voting at any meeting of the heritors of the parish for consideration of questions in regard to the "state and condition" of the schoolhouse, the "repairs or alteration" of the schoolhouse, the "site" of the schoolhouse, or the "erection of a new schoolhouse."

After considering the provisions of the Act 1696, and the subsequent statutes, especially the Act 43 Geo. III. c. 54 (1803), and the Act 24 and 25 Vict. c. 107 (1861), I am of opinion that, to the full extent craved, this petition for interdict cannot be granted. The Act 1696 is still in force, and according to that Act a school is ordained to be "settled and established in every parish in Scotland not already provided," and this is to be done "by advice of the heritors and minister," which I understand to mean, by the heritors and minister acting together. This part of the Act is very clear, and remains unaltered. The "settling and establishing" of the school is, by statute, the function and the duty of the heritors and the minister acting together. In whatever proceedings are fairly within the scope and meaning of the words "settle and establish," the minister is, in my opinion, entitled to take a part along with the heritors, and to attend and vote along with them.

I think that the selection of a suitable "site" for the school—involving many considerations of fitness, convenience, and propriety, some of them, it may be, considerations of a moral or religious character—is a proceeding fairly and reasonably within the scope and meaning of the words "settle and establish;" and I also think that, reading this Act passed in 1696, taking into view the state of the church and of the country at that time, it must be held to have been the meaning of the King and the Parliament that the parish minister should bear his part along with the heritors in selecting a site for the parish school. By none of the subsequent Acts is this provision and enactment in regard to "settling and establishing," including, as I think, selection of site, repealed or superseded. The enactment on this point remains as it was in 1696, and the right and duty of acting in that matter along with the heritors remains with the minister. Therefore, I think that, in so far as regards attendance and voting by the minister at meetings for the purpose of selecting the site, or for considering proposals for altering the site of the school, the prayer of the petition should be refused.

But a different question next arises. The petitioner further craves interdict against the attendance and vote of the minister at meetings for considering various questions in which the patrimonial and pecuniary interests of the heritors are directly involved, such as the state of repair of the schoolhouse, and the nature and extent of repairs proposed, the erection of the fabric of a new school, the arrangements with tradesmen in regard to building or repairs, and the assessment for the expenses.

On this part of the prayer, I have been compelled to form an opinion different from my opinion on the first point. I think that this part of the prayer should be granted. The second provision in the Act 1696, framed to carry out the enactment as to "settling and establishing," which precedes it, is, that the heritors, not the heritors and minister, shall "meet and provide a commodious house for a school." This change of expression is important. I do not think it could be maintained successfully that, under this Act of 1696 alone, the minister could insist, as matter of right, on attending and voting at meetings for discharge of this duty of providing a commodious house, or the relative duties, in proceedings clearly placed by statute in the hands of the heritors alone. Now there is nothing that I can see in the Act of 1803, or any of the later Acts, to take away the effect of this second provision of the Act of 1696, or to give the minister a right which under the Act 1696 he did not enjoy. In regard to the appointment of the teacher, the school fees, the salary of the teacher, and other matters, there are special clauses in the Act of 1803, and the Act of 1861, conferring the power on, and committing the duty of disposing of the matter to the "heritors and minister." To these clauses effect must, of course, be given. But in the matter of providing a "commodious schoolhouse," &c., the power and duty is, by the 8th section of the Act of 1803, given to the "heritors of every parish." The minister is not included, and is not mentioned—(*reads the 8th section of Act of* 1803). I cannot therefore perceive any sufficient grounds in the clauses of the subsequent Acts for sustaining the minister's claim as matter of right, to attend and vote at the meetings referred to in the prayer of the petition, in regard to repairing or erecting a school, apart from the question of selection of site. The question, whether a new schoolhouse is required, is for the heritors. The question, where the new schoolhouse shall be put, is a question for the heritors and the minister acting together. The 7th section of the Act of 1803 has been very properly founded on by the counsel for the minister. It is not without importance. It provides—(*reads section* 7 *of* 43 *Geo. III. c.* 54).

It is plainly implied that, in parishes where there is only one qualified heritor, there must be some one, not an heritor, entitled to vote, for, otherwise the giving two votes to the one heritor would be absurd and unmeaning. That the minister is that one person is also clear. But there are many meetings where the minister in such a parish, with only one heritor, would be entitled to vote. Take, for instance, the case of the appointment of a schoolmaster, where the right to appoint would be, according to the existing law, in the single heritor and the parish minister, and where, in the

event of difference of opinion, the 7th section, conferring on the heritor two votes against the minister's one vote, would practically give the absolute right of nomination to the single heritor. That is the law, and is the effect of this 7th section. The exclusion of the minister from all meetings of heritors would be inconsistent with any rational meaning of the 7th section. But as the minister has, by force of the statute, a right to attend and vote at many meetings, the exclusion of him from others does not involve a *reductio ad absurdum*, and, consequently, the enactment in the 7th section does not control the construction or the effect of the Act 1696, or of the 8th section of the Act of 1803. As I read these statutory provisions, I am of opinion that, on the subjects set forth in the petition, except in regard to the selection of site, the heritors alone, and not the heritors and minister, are entrusted by the Legislature with the duty of meeting for consideration, and for the erection of a commodious schoolhouse, or repairing the existing schoolhouse. Therefore, under the exception of the consideration of the site, which I have mentioned, I concur with the Lord Ordinary in continuing this interdict.

I observe that in the Bill Chamber Lord Gifford was disposed to be of the same opinion.

Lord Kinloch—The question raised by this suspension regards the right of the respondent, the minister of the parish of Moreham, to attend and vote at certain meetings of heritors connected with the subject of the parish school.

It appears from the proceedings laid before us that in March 1870 a meeting of heritors, at which the minister was present, resolved on executing repairs on the schoolhouse agreeably to a specified plan; but, as the minutes bear, "resolved to delay calling for estimates till they had ascertained whether Mr Ainslie would be willing to grant a new site in exchange for site of present buildings and garden, including piece of land along roadside to the north of them, in which case they would prefer new buildings altogether." The communications with Mr Ainslie not being satisfactory, and after certain intermediate proceedings, the following circular was issued on 20th June 1870 by the heritors' clerk—"There will be a meeting of the qualified landed heritors and others of this parish, held in the schoolhouse, on Thursday the 21st of July next, at 12 o'clock noon, for the purpose of proceeding with the erection of a new schoolhouse, arranging as to tradesmen, imposing an assessment for the purpose, and such other business as may be brought before the meeting." The complainers Mr and Mrs Ainslie now seek an interdict against the respondent, the minister, from attending and voting at this meeting, "in so far as the said meeting is to be held for the purpose of proceeding with the erection of a new schoolhouse for said parish, arranging as to tradesmen, imposing an assessment for the purpose; and from attending and voting at any meeting of the qualified heritors of said parish, which may hereafter be called or held for the purpose of considering the state or condition of the existing schoolhouse of said parish, or any motion, proposal, or resolution relating to the alteration of the site of said schoolhouse, or the repair, alteration, or renovation of said schoolhouse." The Lord Ordinary has granted interdict in these terms.

The question is mainly to be decided by the terms of the Acts of Parliament 1696, c. 26, and 43 Geo. III. c. 54. It is important at the same time to remember that the Act 1696 is not the first statutory provision on the subject of schools. So far back as 1494 a statute was passed, ordaining barons and freeholders of substance to send their children to school, under a penalty for non-observance. After the Reformation various enactments were made on the subject of schools. In 1616 an Act of Privy Council was issued, afterwards ratified by the statute 1633, c. 5, providing "that in every parish of this kingdom where convenient means may be had for entertaining a school, a school shall be established, and a fit person appointed to teach the same, upon the expense of the parishioners, according to the quality and quantity of the parish." Episcopacy being by that time restored, the duty of seeing this done was devolved on "the bishops in their several visitations, with consent of the heritors and most part of the parishioners." And if the heritors failed to stent themselves for the expense, the bishops, "with consent of the most part of the parishioners," were authorised to lay on the necessary assessment. During the Usurpation, the Act 1646, c. 45 (afterwards rescinded), was passed, containing, with some slight variations, the same enactments with the after statute 1696. One of these variations is that the establishment of the school should be in the hands of the presbytery, again by that time the ruling judicatory. It is declared "that there be a school founded, and a schoolmaster appointed in every parish (not already provided), by advice of the presbytery. And to this purpose, that the heritors in every congregation meet among themselves, and provide a commodious house for a school, and modify a stipend to the schoolmaster, which shall not be under 100 merks, nor above 200 merks, to be paid yearly at two terms. And to this effect, that they set down a stent upon every one's rent of stock and teind in the parish, proportionally to the worth thereof, for maintenance of the school and payment of the schoolmaster's stipend, which stipend is declared to be due to the schoolmaster by and attour the casualties which formerly belonged to readers and clerks of kirk-sessions. And if the heritors shall not convene, or being convened shall not agree amongst themselves, then and in that case the presbytery shall nominate twelve honest men within the bounds of the presbytery, who shall have power to establish a school, modify a stipend for the schoolmaster, with the latitude before expressed, and set down a stent for payment thereof upon the heritors, which shall be as valid and effectual as if the same had been done by the heritors themselves." No special mention of the minister of the parish is made in this enactment.

There then comes the Act 1696, c. 26, of which the leading enactment is, "That there be a school settled and established, and a schoolmaster appointed in every parish not already provided, by advice of the heritors and the minister of the parish." The Act thereafter proceeds, in almost the very words of the rescinded Act 1646—"And for that effect, that the heritors in every parish meet and provide a commodious house for a school, and settle and modify a salary to a schoolmaster, which shall not be under 100 merks, nor above 200 merks, &c., and that they stent, and lay on the said salary conform to every heritors valued rent within the parish." Failing the heritors doing their duty in these respects, or, as the statute expresses it, "if the heritors or major part of them shall not convene, or being convened shall not agree among them-

selves," the Commissioners of Supply are empowered to act in their stead.

There is in this statute a marked difference in the words applicable to the settlement and establishment of the school, and those which regard the fixing of the salary and providing a schoolhouse. In the first case the thing is to be done "by advice of the heritors and minister of the parish." In the second case no mention is made of the minister; but the statute says, "the heritors in every parish shall meet." The prior Act, 1646, had said, "the heritors shall meet amongst themselves;" and the words of the Act 1696 seem, according to their natural reading, to have exactly the same import. Under this Act, therefore, whilst the settlement and establishment of the school (whatever that may comprehend) is to be "by advice of the heritors and minister of the parish," the heritors seem to have exclusively conferred on them the provision of the schoolhouse, and the fixing and raising the salary.

The same difference of phraseology stands out in a very marked manner in the subsequent Act, 43 Geo. III. c. 54. In more than one point the minister is now admitted to a larger participation with the heritors by the express terms of the statute. In regard to the fixing of the salary, it is now expressly said—"the heritors possessed of the qualification required by this Act and the minister of every parish shall meet," and thereafter "such meeting shall fix and determine whether the schoolmaster's salary shall be 300 merks Scots per annum, or 400 merks per annum, or a sum between these two sums." So also as to other meetings connected with the fixing of the precise amount of the salary, and its division between two or more teachers in certain cases. The meetings for the election of the schoolmaster are in like manner described as composed "of the heritors, possessors of the qualification required by this Act, with the minister of the parish." The same is the phraseology employed in regard to the meeting for fixing the school fees. But in regard to the provision of a schoolhouse, what the statute says is, that "the heritors of every such parish shall provide a commodious house for a school, and also a house for the residence of the schoolmaster, &c. And the expense of providing such schoolhouse, dwelling-house and garden, and supporting the same, shall be defrayed and paid in the same and like manner as is prescribed for providing a house for a school by the aforesaid Act of Parliament (1696); provided always that where the heritors shall determine that such garden cannot be allotted to the schoolmaster without great inconvenience," they may make a certain allowance instead. It is further provided, that "in case the heritors shall neglect or refuse to provide the accommodations of house," &c., an appeal shall lie to the Quarter Sessions. There is nothing here expressly said as to the heritors meeting; but as action on their part must be always preceded by resolution, I conceive a meeting of the heritors, at which their determination shall be formed, to be necessarily implied.

I cannot consider the contrasted expressions of the two statutes without coming to the conclusion of the Lord Ordinary, that a difference was intended to be made between the provision of the schoolhouse and the other duties referred to in the Acts; and that, in the case of the schoolhouse, the heritors, on whom is thrown the burden of providing it, and by parity of reason maintaining and repairing it, have exclusively the right of deliberating and deciding on all points relative to this matter, their decision being of course always subject to the statutory appeal. I cannot read the 8th clause of the Act of 1803 as simply declaring the obligation of the heritors to provide the schoolhouse, apart altogether from any allusion to the deliberations precedent to such provision. I must hold it intended that those who provide are those who shall deliberate. I think the Act 1803, which is declared not to repeal the former statutes except where expressly altered, when saying, "the heritors of every such parish shall provide a commodious house for a school," means exactly the same thing with the Act 1696, when it says, "the heritors in every parish shall meet and provide a commodious house for a school." This Act, again means, I think, the same thing with the rescinded Act 1646, when it says, "the heritors in every congregation shall meet among themselves and provide a commodious house for a school." I consider this, which may be called the executive part of the statutory arrangement, as intended to be left entirely to the heritors, apart altogether from any direct action by the ecclesiastical authority, successively intrusted with it, whether presbytery, bishop, or parish minister. If the heritors go wrong, the statute provides the means of redress.

This leaves in full operation the provision in the Act 1696, "that there be a school settled and established, and a schoolmaster appointed in every parish not already provided, by advice of the heritors and minister of the parish;" and also all the relative enactments contained in both statutes, providing for joint action in this matter by the heritors and minister. In these general phrases of the Act 1696 there is, as I conceive, a great deal more intended than a mere abstract resolution that a school shall be established in the particular parish. They comprehend, as I think, every arrangement connected with such establishment—such as the determination of the site of the schoolhouse, of the size of the building, and number of scholars to be accommodated, of the branches of learning to be taught in the school, and the like. On all these points I think the minister of the parish is joined with the heritors in the court of deliberation, and is entitled to a vote equal to that of a heritor. By parity of reason, I think he is a member of the deliberative body, wherever an alteration is proposed to be made in any of these particulars. But in regard to the provision of the building which is to fulfil the antecedent arrangements, or the repair of it when it needs repairs, and the assessment for the cost, I think the heritors are in the first instance left to themselves, and the minister forms no part of the deliberative meeting.

There was something said as to practice in this matter; but I do not think the practice of any relevancy. It is probable that no great strictness has prevailed in distinguishing between one kind of meeting and another. In most cases the heritors will be all the better of the information and intelligence of the minister; and any attempt to exclude him will be, generally speaking, as impolitic as uncourteous. I regret that the matter of legal right has been pushed to a decision; but as it has been so, I must decide it according to law.

The only remaining consideration is how to bring these general principles to bear on the conclusions of the present note of suspension and interdict. With regard to the interdict to be granted, none can now be applied to the meeting of the 21st

July 1870, which is long past. I think the complainers entitled to an interdict against the respondent attending and voting at any meeting of heritors, "in so far as the same may be called or held for the purpose of considering the state or condition of the existing schoolhouse of the parish, or the repair, alteration, or renovation of said schoolhouse." I do not think them entitled to any further interdict. In particular, I do not think them entitled to an interdict against the minister voting on "any motion, proposal, or resolution relating to the alteration of the site of the schoolhouse;" because I think the site of the schoolhouse is one of the matters connected with the establishment of the school, in which the minister has an equal voice with the heritors.

LORD DEAS—The meeting, the calling of which gave rise to this suspension and interdict, bears—(*reads notice of meeting*). The prayer of this application for interdict seems to be a prayer to interdict the minister from attending or voting at that meeting with reference to anything about the proposed new schoolhouse. Your Lordships do not propose to grant the interdict in the terms sought. It is suggested that the minister is entitled to vote with reference to the schoolhouse, except as to certain things. He is to vote, as I understand my brother Lord Kinloch, that there shall be a new schoolhouse, but, when that is once resolved, he is not to have any further vote in carrying this resolution into effect. It seems conceded that he is to have a vote about the change of site. The substance of my opinion is, that he is to have as much to do with the commodiousness of the schoolhouse as he is to have with the other business to be transacted at this meeting. It is very difficult to suppose that the Legislature meant that the minister is to take part and vote in regard to what may be called the more substantial matters, but when they come to details he is not. He is entitled to come to the meetings, according to the views of your Lordships, but how is this to be carried out? Are the heritors to say to him, "Please your reverence, walk out while we discuss matters on which you have no vote; when we come to a matter on which you have a vote you can come in again?" The distinctions between the points on which he is to vote and those on which he is not appear to me to be very fine indeed. I think the fair reading is that the minister is entitled to vote and take part in everything about the schoolhouse.

It is admitted that whatever part the minister is to take, when he is to take part at all, is to be by sitting and voting along with the heritors. That is how his "advice" is to be taken. That goes a good way towards the construction of the statutes. I read the Act 1696, c. 26, as enacting that there be a school settled and established, and a schoolmaster appointed by advice of the heritors and minister in every parish not already provided. The natural meaning of these words is, that the minister is to have a voice in settling and establishing the school. What is meant by settling and establishing the school? The term "school" is sometimes applied to the schoolhouse, sometimes to the scholars. It comprehends both in this enactment. I have no doubt that "settling and establishing the school" includes the choice of the site of the school-house, the kind and size of the building; in short, everything about it. The words which follow, "and *for that effect* that the heritors in every parish meet, and provide a commodious house for a school," show that a commodious schoolhouse is contemplated as part of the "settling and establishing" of a school. Providing a comfortable schoolhouse is surely a most important part of "settling and establishing" a school. Then comes a provision about the schoolmaster's salary. I think that the subsequent statutes show that it was not the intention of the Legislature to exclude the minister from all things affecting pounds, shillings, and pence. Then comes section 7 of 43 Geo. III, c. 54, perfectly general in its terms. No construction of this has been suggested than that there might be only one heritor in a parish, *and* the minister entitled to vote. (*His Lordship then referred to various clauses in the Act* 43 *Geo. IV, c.* 54, *and subsequent Acts.*) All these show that it was not intended that the minister should have no vote in money matters. We must attend to the enactments as a whole, to see what is meant. The result is, in my opinion, that in the "settling and establishing" a school was comprehended everything necessary to carry out that purpose, and more particularly the providing a commodious schoolhouse, and that there is no exclusion of the minister.

LORD PRESIDENT—I agree with Lord Ardmillan and Lord Kinloch, and I shall explain what I understand to be their opinion. In the originization of a school I think that the heritors and minister together are to do everything which falls under the description of "settling and establishing" the school. For this purpose they must take into consideration the circumstances and condition of the parish, the population, and the manner of its distribution, the kind of education suitable, the number of scholars who may be expected to attend. On these and other circumstances they are to form an opinion as to what kind of school is requisite, and to fix the same by a resolution. That being done, it is the duty of the heritors alone to provide a building suitable for the school thus settled and established. If they fail in their duty there is a remedy provided. But that duty is, in the first place, committed to them. The minister has nothing to say directly. It seems to follow, looking still at the Act 1696, c. 26, that when repairs or rebuilding is necessary, it will still be the duty of the heritors exclusively to execute the necessary repairs or rebuilding. There is no distinction between repairs and rebuilding so long as the point which the heritors have to decide is the necessity of one or the other. In any question regarding the repairs of a schoolhouse I am of opinion that the minister has no voice. In any question regarding the rebuilding of a schoolhouse I am still of opinion that the minister has no voice. But if a question arises with respect to a proposal to change the site, the minister has a voice. I conceive that this is a part of the duties assigned by the Act 1696, c. 26, to the heritors and minister together, in the way of "settling and establishing" the school.

The subsequent statutes do not affect the question. They introduce an alteration as to the right of the minister to vote in regard to the schoolmaster's salary. That only shows by force of contrast that it was not intended to introduce any novelty as to the providing of a schoolhouse. That is left to the operation of the Act 1696, c. 26.

The Court recalled the interlocutor of the Lord Ordinary, and granted interdict in terms of the

prayer of the note, except in so far as it prayed the Court to interdict the respondent from attending and voting at any meeeting of the heritors for the purpose of considering any motion, proposal, or resolution relating to the alteration of the site of said schoolhouse; found neither party entitled to expenses up to the date of the interlocutor of the Lord Ordinary, and the respondent (the minister) entitled to expenses since that date.

Agent for Complainers—William Kennedy, W.S.
Agents for the Rev. J. G. Tainsh—Menzies & Coventry, W.S.

Friday, January 29.

MRS CECILIA HATTON OR BAIRD—PETITIONER.

Petition to fix allowance for maintenance of pupil. A boy nine years of age became entitled on the death of his father to a landed estate of £15,000 a-year, and about £1,000,000 of personal property, which was directed to be held in trust for his behoof till he should attain the age of twenty-five years. Circumstances in which the Court (*diss.* Lord Deas) fixed the allowance to be paid to his mother out of his estate for his maintenance, education, and residence, at £3000 a-year.

The late George Baird of Strichen and Stichill died on 24th August 1870. At the time of his death he was possessed of landed estate to the amount of £15,000 a-year, and personal property to the amount of £1,000,000.

In the year 1858 the petitioner was married to the deceased. By antenuptial contract between him and the petitioner she was provided with an annuity of £1500 a-year in case of her survivance.

There was only one child of the marriage, George Alexander Baird, born 30th September 1861.

In December 1868 Mr Baird executed a trust-disposition and settlement, by which he conveyed to trustees his whole estate, heritable and moveable. The trustees are directed to pay to his wife a free liferent annuity or jointure of £2000, over and above the £1500 a-year secured to her by the antenuptial contract, the additional annuity to be increased to £4000 in the event of George Alexander Baird dying before majority and without leaving issue, and to be forfeited in the event of her second marriage. The trustees are further directed to deliver over to his wife, as her absolute property, such of his carriages and carriage horses, with their harness, as she might select, and to allow her the free use of the mansion-house, offices, and garden of Stichill, with the whole household plenishing and effects situated in or belonging to the said mansion-house at the time of his death, and to pay her an allowance of £150 sterling per annum towards the cost of keeping up the garden of Stichill, but that only so long as she shall occupy the mansion-house, and with no power to let the mansion-house to others; and it is declared that when George Alexander Baird, or any other child born to the truster, who shall succeed to his lands and estates under the disposition and deed of entail directed to be executed by the trustees as after mentioned, shall attain the age of twenty-one years, he or she shall be entitled to take up his residence at Stichill house, if so inclined, in which event an allowance of £500 yearly is to be made to the petitioner to enable her to provide herself with another place of residence. The truster directs his trustees to execute a strict entail of his lands of Strichen, Stichill and others, in favour of his son George Alexander Baird, whom failing, in favour of a series of heirs named in the deed. Provisions follow in favour of younger children of the truster, if any should exist. After providing for the whole other purposes of the trust, the trustees are directed to hold the whole residue of his estate for behoof of George Alexander Baird, and the heirs of his body, whom failing, for behoof of any other son or sons thereafter born to him, in order of seniority, whom failing, for behoof of any daughter or daughters thereafter born to him, equally among them if more than one, but under the declaration that the residue should not be made over to George Alexander Baird, or any other son thereafter born, until he should attain the age of twenty-five years complete, it being expressly stated to be the truster's intention that his whole means and estate, including the lands directed to be entailed, should continue under the exclusive management and direction of his trustees, without any right of interference or control on the part of his said son or sons.

In the event of George Alexander Baird and any other child of the truster dying before attaining majority and without issue, the trustees are directed to divide his estate according to a certain scheme. Very ample powers are given to the trustees, and among others, to restrict at their sole discretion the share given to any of the beneficiaries under this part of the deed to a bare alimentary liferent of the share provided to them.

The trustees were appointed to be tutors and curators of such of the truster's children as might be in pupillarity or minority at his death.

The trust-deed contains no express directions with reference to the allowance to be made on behoof of the truster's son during his minority.

Mrs Baird accordingly presented a petition to the Court to fix an allowance for her son's maintenance.

The petition, after a narrative of the facts mentioned, proceeds:—"When not absent for the purposes of education, the pupil has resided with the petitioner.

"The petitioner has since her husband's death, when not absent on account of her health, which renders it necessary for her to live in England, or some more southern climate, during the winter months, resided at the mansion-house of Stichill, where her son has also resided during his holidays. It is the desire and intention of the petitioner to continue her residence at Stichill along with her son. It was the wish and intention of her husband that the pupil should reside at Stichill, and the petitioner is satisfied that it will be greatly to his advantage that he should do so.

"The petitioner has received from the trustees the jointure of £3500 provided for her by her antenuptial contract and the trust-disposition and settlement, and the free use of the mansion-house of Stichill, along with an allowance of £150 towards the cost of keeping up the garden, but this sum has been wholly inadequate and insufficient to enable her to maintain and educate her son according to his fortune and station. and to keep up the necessary establishment, and defray the expense of living at such a house as Stichill, unless a reasonable and fair allowance is made to her by