COURT OF SESSION.

Friday, June 11.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

BUCHANAN *v.* SCHOOL BOARD OF TULLIALLAN.

(Before seven Judges.)

School—School Fees, collection of—Education (Scotland) Act, 1872, §§ 43, 48, 53, 55.

Held (*diss.* Lord Deas) that a school board can compel a schoolmaster in office at the passing of the Education Act of 1872 to collect the school fees.

This was an action of reduction, declarator, and payment, brought by Thomas Robert Buchanan, teacher in the parish school of Tulliallan, against the School Board of that parish, in the following circumstances:—

The pursuer had been parish schoolmaster at Tulliallan for twenty-eight years previous to the passing of the Education Act of 1872, and continued teacher of the school after the election of the defenders as School Board, which took place on 10th April 1873. The defenders gave the pursuer the same salary as he formerly had, and also gave him the school fees at their former rates. On 3d July 1873 the defenders passed a resolution "that the clerk be instructed to collect the school fees quarterly and in advance." Between the date of the election of the School Board and the date of this resolution the pursuer had continued to collect the school fees as he had been in the habit of doing previous to the passing of the Education Act, the School Board not having said anything to him upon the subject. It appeared that the School Board were elected during the currency of a term, and that the resolution of 3d July was passed immediately on the commencement of the first term which began after their election. In compliance with the resolution of 3d July the pursuer ceased to collect the school fees, and the defender, the treasurer of the School Board, collected the fees from 1st July 1873 to 31st July 1874. On 8th January 1874 the defenders passed the following resolution—"That on and after 1st February next Mr Buchanan be required himself to collect the fees every four weeks in advance, commencing on 2d February 1874, rendering quarterly to the treasurer a statement of the fees collected and of those in arrear."

In answer to this communication the pursuer addressed a letter to the School Board directing their attention to the provisions of the 53d section of the Education (Scotland) Act, 1872, "that the fees shall be paid to the treasurer," and refusing to admit that the School Board had power to require him unconditionally to collect the fees. The pursuer however stated that, being anxious to work in harmony with the Board, he was prepared to make an arrangement by which he could accede to their wishes without prejudice to his interest in the school fees.

The defenders, however, continued to insist that the pursuer should collect the fees himself; but they intimated to him that it was not, and never was, the intention of the Board that he should prosecute for fees in arrear, but that the Board would 'prosecute these parties whom they think fit.' The pursuer persisted in his refusal to collect the fees, and the consequence was that no fees were collected after 1st February 1874. The pursuer accordingly brought this action, first for reduction of the resolutions referred to, secondly for declarator "that the pursuer is not bound to collect the school fees of the parish school of Tulliallan," and thirdly for payment of the fees which had not been collected.

The pursuer pleaded—(1.) "Having regard to the provisions of 'The Education (Scotland) Act, 1872,' the pursuer is not bound to collect the school fees of the parish school of Tulliallan, and it is incompetent and illegal for the defenders to require him to do so. He is therefore entitled to decree of reduction and declarator as libelled. (2.) The defenders being justly owing and indebted to the pursuer in the foresaid sum of £34, 3s. 8d., are bound to make payment of the same, with interest. (3.) Generally, in the circumstances, the pursuer is entitled to decree of reduction, declarator, and payment as concluded for."

The defenders pleaded—(1.) "The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (2.) By Statute 43 George III., c. 54, and the usage following thereon, the fees paid by the pupils in a parish school fell to be collected by the teacher, and no contrary provision being contained in the Education Act the old law in this particular is still unrepealed. (3.) In virtue of the powers vested in them by the Education Act, the School Board, with the sanction of the Board of Education, was entitled to require the pursuer to collect the fees, and to account to their treasurer. (4.) The defenders not having received the fees for the periods in question, and their non-recovery being in no way due to the fault of the defenders, they are not liable. (5.) The defenders not being indebted to the pursuer, ought to be assoilzied, with expenses."

The Lord Ordinary (CURRIEHILL) pronounced this interlocutor:—

"*Edinburgh*, 23*d December* 1874.—The Lord Ordinary having heard the counsel for the parties, and considered the Closed Record, productions, and whole process—Repels the reasons of reduction, assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the defenders entitled to expenses, of which allows an account to be lodged, and remits the same when lodged to the Auditor to tax and to report.

"*Note.*—The present action arises out of a dispute (of a class which is becoming unfortunately numerous) between the School Board of Tulliallan and the parochial schoolmaster of that parish, who was in office at the passing of the Education (Scotland) Act, 1872. I cannot help thinking that the dispute would never have arisen, or at all events might have been easily adjusted out of Court, if the parties had exercised a little mutual forbearance while the new system of national education introduced by the recent statute was being established in the parish. As the parties, however, still keep each other at arms-length, the matter in dispute must be judicially decided. The pursuer was for upwards of a quarter of a century before 1872 the parochial schoolmaster of Tulliallan. The defenders are the School Board of that parish, elected in 1873 under the provisions of the Act of

1872. Prior to 1872 the pursuer, as parochial schoolmaster, had a fixed salary, and received for his own use the whole school fees paid by the pupils attending the school. These fees were collected by himself in conformity with the invariable practice in all parish schools. He was, however, under section 18 of the Act 43 George III., cap. 54, obliged to teach gratuitously, or for smaller fees than he was entitled to demand from ordinary pupils, such poor children as should be recommended by the heritors and minister at any parochial meeting. The Act of 1872 transferred from the heritors and the minister to the School Board the whole management of the parochial schools; and by repealing the Act 43 George III., freed the schoolmaster from the obligation to teach gratuitously any poor children. And the Act has further made it the duty of the Parochial Board of the parish to pay out of the poor fund the ordinary and reasonable fees for the elementary education of every child in the parish whose parent is unable from poverty to provide such education. The School Board, when appointed, assigned to the pursuer a fixed salary of £55 per annum, and in addition allowed the fees in his school to remain at their former rates, and to be levied by himself as part of his emoluments. Matters remained on this footing until July 1873, when the School Board resolved that the school fees should be collected by their clerk quarterly, and in advance. It does not appear, and indeed it is not alleged, that the Board intended by this resolution to take away the fees from the pursuer. On the contrary, the fees were collected by the clerk from 1st July 1873 to 31st January 1874, and were handed over to the pursuer. The School Board, however, seem to have found it difficult if not impracticable, to collect the fees satisfactorily by the hands of their officer, and on 8th January 1874 they resolved, 'That on and after 1st February next Mr Buchanan be required himself to collect the fees every four weeks in advance, commencing 2d February 1874, rendering quarterly to the treasurer a statement of the fees collected, and of those in arrear.' The pursuer, founding on the terms of the 53d section of the Act of 1872, which provides that the school fees 'shall be paid to the treasurer of the Board,' declined to collect the fees. Some communings took place between the pursuer and a committee of the Board, which led to no satisfactory result, and the Board, by minutes dated respectively 20th and 31st March 1874, adhered to their resolution of 8th January—that the pursuer should be required to collect the fees. The last of these minutes directs the clerk of the Board to explain to the pursuer 'that it is not and never was the intention of the Board that he should prosecute for fees in arrear, but that the Board will prosecute those parties whom they think fit.' All of these resolutions were communicated to the pursuer, who, however, refused and still refuses to collect the fees. The result is that no fees were collected by anyone for the two quarters beginning respectively on 1st February and 1st May 1874; and the present action has been brought by the pursuer to have the minutes and resolutions of the Board reduced and set aside, and, whether these are reduced or not, to have the Board ordained to pay to him the school fees payable during the two quarters mentioned, with interest thereon. The pursuer maintains that, having regard to the provisions of the Act of 1872, he is not bound to collect the school fees; that it is incompetent and illegal for the defenders to require him to do so; and that the defenders are bound to pay to him a sum equal to the amount of the fees which were payable, and which should have been levied during the period referred to. The contention of the pursuer appears to me to be based upon an erroneous construction of the statute, and to be untenable. It is rested mainly, if not altogether, upon the isolated expression in section 53 of the statute quoted by him in condescendence, article 3—viz., that the 'fees shall be paid to the treasurer. These words are read by the pursuer as meaning that the school fees must be actually collected by the treasurer of the Board from the pupils or their parents directly, and that no other person can grant a valid receipt for the fees. These words, however, do not necessarily bear that meaning, and they cannot, as I think, be rightly construed without reading in connection with them not only the whole context of the section in which they occur, but also sections 43, 48, and 55. Section 43, which deals with '*the school fund*,' provides that 'there shall be carried to the school fund all moneys received out of moneys provided by Parliament, or raised by way of loan, or otherwise received by the School Board for the purposes of that fund, and not by this Act specially appropriated; and any deficiency shall be raised by the School Board as provided by this Act.' In section 48, which prescribes the duties of the treasurer, it is not said that this officer is to collect the fees from the scholars, but it is declared to be his duty, *inter alia*, 'to keep and preserve in a proper book or books an accurate account of the school fund, and of all other property and funds under the administration of the School Board, and of the expenditure thereof; and the account of the school fund shall be kept separate from the account of all other property and funds.' By section 53, which deals with the '*school fees*,' it is provided that the School Board shall, subject to the provisions of section 62 with respect to higher class public schools, 'fix the school fees to be paid for attendance at each school under their management, and such fees shall be paid to the treasurer of the Board, and a separate account shall be kept of the amount of the fees derived from each school; and it shall be lawful for the School Board, if they see fit, to pay to the teachers of a school the fees derived from such school, and to divide the same among them as the School Board shall determine.' And by section 55 it is provided that teachers in office before the passing of the Act 'shall not, with respect to tenure of office, emoluments, or retiring allowance as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the School Board having the management of such schools respectively.' By the same section (section 55) it is provided that teachers appointed after the passing of the Act are to hold office during the pleasure of the Board, and are to receive such salaries and emoluments as the School Board shall think fit. These sections, when rightly construed, appear to me to show that the intention of the Legislature was—(1) That although the school fees were to form part of the school fund, and to pass through the treasurer's accounts as a separate item of the fund, they were not necessarily to be

collected by the treasurer, and that the requirements of section 53 would be satisfied by the fees being collected by any schoolmaster, old or new, with the sanction and authority of the Board, and retained by him as part of his emoluments—he always giving an account to the treasurer of the amount so collected and retained and of the arrear outstanding; and (2) that in the case of teachers in office at the passing of the Act, the School Board would fully comply with the provisions of section 55 if they authorised and empowered the teacher to continue to levy that part of his emoluments which consisted of the school fees in the same way as he was in use to do under the old system. In no better way could the Board 'provide' to the teacher that part of his emoluments without prejudicing him with respect thereto. In the present case the teacher is not only not prejudiced in the matter of emolument by being required to collect the fees as formerly, and being allowed to retain the whole for his own use, but he is rather benefited—(1) because he is no longer obliged to teach any pupil gratuitously, fees being now paid for every pupil who attends the school, and attendance being now compulsory; and (2) because, in the event of fees being in arrear, the Board, and not the teacher, are to bear the expense of prosecuting defaulting parents. It might perhaps have been more courteous in the Board to have explained their views to the pursuer before returning to the old system of collecting the fees, and the resolutions might have been expressed in less imperative terms; but I do not think that the proceedings of the Board have been such as to justify the pursuer in the course which he has adopted. I construe the minutes of the Board as meaning this—'We wish you, the teacher, to continue to have the fees as part of your emoluments as heretofore. We have not the facilities for collecting them which you have, but you will collect them and appropriate them in the same way as you used to do before 1872, and we will assist you in case of difficulty with our statutory powers of prosecution; and all that you have to do is to inform our treasurer how much you collect in name of fees, and how much remains in arrear.' This appears to me not only to be not at variance with the provisions of the Act, but to be in itself a most reasonable proposal; and I cannot see any ground on which the reductive conclusions of the action can be sustained. Nor are the petitory conclusions better founded. The pursuer has chosen to sacrifice his emoluments from the fees to a mistaken feeling of offended dignity, and he must submit to the consequences if he has failed to collect the fees when they were placed by the Board within his reach. In conclusion, I have merely to observe that, even if it were to be held that under section 53 of the statute the treasurer of the Board, and he alone, can grant a valid receipt to parents for the school fees, the pursuer's case would not thereby be benefited; both because such a difficulty was never suggested in the course of the dispute, and because there is no reason to believe that the defenders, if asked by the pursuer, would have declined to furnish him with receipts signed by the treasurer."

The pursuer reclaimed, and the First Division appointed the case to be heard before seven Judges.

The pursuer argued — By section 78 of the Education Act of 1872, the statutes which formed the educational law of the country were absolutely repealed, and the whole provisions of the statute of 1872 showed that the intention of the Legislature was that the old law and system of education should be abolished, and a new, and in itself complete, system should be introduced. Thus, if there was any enactment upon the point in question in the statute of 1872, that enactment alone must be looked to. Arguing the case, then, upon the Education Act, it must be kept in view that this was not a question whether a school board could authorise the schoolmaster to collect the fees, but whether, as a matter of right, they could compel him to do so. They had no such power, at all events in the case of a schoolmaster in office at the passing of the Act. For, first, the school fees formed part of the school fund, and became the property of the School Board alone, just as under the old law they were the property of the schoolmaster alone. Second, section 53 provided that the fees were "to be paid" to the treasurer, who was the only person under this Act entitled to demand payment thereof, and the only person whom the School Board could compel to collect them. Third, the Act gave the School Board no power over the schoolmaster, except in certain clearly specified cases, and drew a distinct line between the duties of the School Board and those of the schoolmaster. The schoolmaster was to confine himself entirely to the duties of teaching, and the School Board, on the other hand, had their duties confined to providing and keeping up the educational machinery of the parish, and among that class of duties the collection of school fees clearly fell.

The defenders argued—The intention of the Legislature in the Act of 1872 was not entirely to repeal the old system, but to take it up and carry it on, substituting the School Board for the heritors. There was also this proviso in sec. 55, that the old schoolmasters were not, "with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage, secured to or enjoyed by them at the passing of this Act, be prejudiced" by the provisions of the Act, and "such emoluments" shall be paid and provided "by the School Board. The school fees were emoluments secured to schoolmasters at the passing of this Act both by law and usage, and how could the School Board better "provide" such emoluments without prejudice to the pursuer than by allowing him to retain the school fees at their former rates, he collecting them as formerly. According to the pursuer's contention the Act rendered it imperative that the school fees should be first paid into the school fund, although they must of necessity be immediately paid out again to the schoolmaster. That was a forced construction of the Act, and was entirely rested upon the provisions as to the school fund in sec. 43, and the words "shall be paid to the treasurer" in sec 53. Such a construction was contrary to the whole provisions of the Act in regard to old schoolmasters, and especially to the idea, clearly set forth in sec. 53, of assigning the school fees as an emolument.

At advising—

Lord President—My Lords, the pursuer of this action is Mr Buchanan, schoolmaster of the parish

of Tulliallan, and the first purpose of the summons is the production of certain minutes of the School Board, "whereby the said School Board resolve that on and after 1st February next the pursuer be required himself to collect the school fees every four weeks in advance, commencing on 2d February 1874, rendering quarterly to the treasurer a statement of the fees collected and of those in arrear." He then concludes for the reduction of these resolutions, and then follows a conclusion for payment "to the pursuer of the sum of £34, 3s. 8d., with interest on £12, 9s. 1½d. thereof from 1st February 1874, and during non-payment of the same, and with interest on the balance of £21, 4s. 6½d., from 1st May 1874, and during non-payment of the same," this sum representing the amount of fees which should have been collected.

It seems to me that the only question raised by the pursuer is whether he is bound to collect the school fees, a view which is supported by his pleas in law, which are as follows:—"(1) Having regard to the provisions of 'The Education (Scotland) Act, 1872,' the pursuer is not bound to collect the school fees of the parish school of Tulliallan, and it is incompetent and illegal for the defenders to require him to do so. He is therefore entitled to decree of reduction and declarator as libelled. (2) The defenders being justly owing and indebted to the pursuer in the foresaid sum of £34, 3s. 8d., are bound to make payment of the same, with interest. (3) Generally, in the circumstances, the pursuer is entitled to decree of reduction, declarator, and payment, as concluded for." A good deal of reference has been made in the course of the argument to the terms of some of the minutes, and particularly to that of Jan. 8th 1874, in which a resolution was passed providing, *inter alia*, "(1) That on and after 1st February next Mr Buchanan be required himself to collect the fees every four weeks in advance, commencing on 2d February, rendering quarterly to the treasurer a statement of the fees collected and of those in arrear. (2) That Mr Buchanan be required to keep registers and accounts of fees. (3) That Mr Buchanan add to the usual monthly fees 3d. per month during January, February, and March, for heating the school, and one halfpenny per month throughout the year for cleaning purposes, and that he pay the sums thus collected to the treasurer, along with the other fees." It is said that whether he was bound to collect the fees or not, he was not bound to submit to these terms, but I not think that these form any part of the subject matter of this complaint. The only question is whether he is bound to collect the fees at all. Now it is beyond dispute that prior to the passing of the Act of 1872 the masters used to collect the fees, and that for the plain reason that as the fees belonged to themselves, and they had the only inducement to collect them, they were the proper persons to do so, and also because they had almost exclusive facilities for collecting. Now the Act has made no change as to the old schoolmasters, and if they have the sole and exclusive right to the fees, the old reasons still apply; but still no doubt the question must be solved by reference to the clauses of the Act. There are not many of them which I need quote, but still there are several which bear upon the question. The School Boards have the whole management of the schools; they are entitled to demand that the whole school funds shall be handed over to them, and for the due administration thereof they may appoint a treasurer. Sec. 43 relates to the school fund—*(reads)*. Then we come to sec. 48; we find that—*(reads)*. This treasurer is to be the keeper of the school fund, and every item of it is to enter his account; and taking these two clauses together, we have it laid down that the fund shall be kept by the treasurer, and that everything shall go into it. Then we come to sec. 53, which relates to the school fees, and is as follows—*(reads)*. Now it is a very important question whether sec. 53 can affect the case of the old schoolmasters, and I think that question cannot be solved without combining with sec. 53 the other two clauses I have named, and sec. 55, which provides—*(reads)*. Now sec. 55 must be considered in reference to the condition of the old masters in respect to the school fees. I have already described what that was; the fees belonged to them, and they were entitled to collect them. It was a privilege, for it not only saved them money by relieving them of all commission or charge for collection, but it gave them special opportunities for collection, greater than could have been enjoyed by anyone else. These fees formed part of the old schoolmasters' emoluments, and an important part, and this sec. 55 therefore provides that—"such teachers shall not, with respect to tenure of office, emoluments, or retiring allowance as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained." On the contrary, the Boards are bound, either by direct payment or by some arrangement, to keep them as well off as ever. That is very difficult to reconcile with the pursuer's view of sec. 53. He says it requires the fees to be paid to the treasurer; and though it was admitted in argument that that did not mean that he was to collect them personally, still it did mean that the money was to be paid to him, and the master was to obtain payment from him, which was inconsistent with the notion that the master should collect. It seems to me, however, that sec. 53 does not apply to masters in office at the date of the Act. It provides that the fees shall be fixed by the Board; but then it is provided that such fees shall be paid to the treasurer; and when it is further provided that it shall be lawful for the School Board, if they see fit, to pay to the teachers of a school the fees derived from such school, it seems to me that we are out of the case of the old masters altogether. Sec. 53 contemplates that the fees shall be dealt with by the Board, and given by them to the teachers if they see fit and not otherwise. Can anything be more in prejudice of the rights of the old masters? I cannot reconcile sec. 53 with the rights of the old masters as defined by sec. 55. It seems to me that these fees are not yet available as part of the school fund until the old master dies. If he is thus secured in his rights by sec. 55, is it not a necessary consequence that the Board should say "we have nothing to do with the fees, you must collect them as you did before;" the burden accompanies the privilege. It is in consequence of sec. 55 that I entertain the opinion I have now expressed, and I entirely agree with the Lord Ordinary. It has been said that the theory of the statute is that the master is to be confined exclusively to teaching; on the other side, that if he refuses to do their bidding the Board may dismiss him. I do not think the question would be so easily settled, but on that I give no opinion at present. I think that the old master is still

bound to collect his own fees just as he was before the passing of the Act of 1872.

LORD JUSTICE-CLERK—It is impossible not to regret the state of the relations between the School Board and the schoolmaster which this action discloses. With the exception of the particulars contained in the third requisition in the minute of the School Board, to which, inconsiderable as they are, objections may perhaps lie, and which were surrendered by the counsel for the Board at the bar, the Board have only required the schoolmaster to do what from time immemorial the schoolmasters of Scotland have done, and what the pursuer himself, during his long tenure of office, has been in the habit of doing. I can find little or nothing in the conduct of the Board which lays them open to observation. They tried the experiment of collecting the fees themselves, but finding, as has been found in other parishes, that this was a cumbrous and inconvenient operation, they have simply reverted to the former practice, and required the schoolmaster to act as he had previously done. I have looked in vain in these proceedings for any reasonable explanation of his refusal, or for any statement of any material interest which he wishes to protect. When pressed in argument he could only suggest two. One was that his time ought to be given solely to the teaching of his school, and that the collection of the fees would interfere with these duties. Considering that during the whole period of his tenure of office he has found no inconvenience arise from the same cause, it is difficult to put much faith in the sincerity of this objection. It appears, however, that he was quite prepared to undertake the duty if what he calls a reasonable arrangement had been come to on that subject, so that it is impossible to regard this ground of complaint as having any substance in it.

The other interest which the pursuer alleges to have been infringed is much of the same character. He suggested at the bar some supposed difficulties in carrying out the wishes of the Board, and represented their not unreasonable wish that he should resume a duty so long performed, as if it implied a domiciliary circuit of the whole parish, and an amount of labour which he had never undertaken before. These anticipations seem to me to be entirely imaginary. The fees which the Board desire him to collect are the fees which the children bring to the school. As explained by their counsel, they do not expect the schoolmaster to go round the parish, which has never been the practice in Scotland, and still less do they expect him to prosecute for the fees, a proceeding of which I have never heard of even a single example. The Board have undertaken any prosecutions which may be required; but these will be against the parents under the compulsory clauses, with which the schoolmaster has nothing to do.

I regard, therefore, the schoolmaster's position in this litigation as entirely unsupported by any substantial interest, and I think he has failed entirely to allege any reasonable ground, as far as his own interest is concerned, for the difficulties which he has raised.

It seems, however, that there is a legal argument, founded on a construction of the clauses of the Education Act, from which it is maintained that it is not lawful for the school boards to require the schoolmaster to collect these fees, and it is on the merits of that legal argument that our present advising takes place.

I must premise the few observations which I intend to make on the construction of the clauses of the statute referred to by one general observation. In a very able address the junior counsel for the pursuer contended that under this statute the schoolmaster had in some sense a position independent of the Board—that his function was solely to teach—and that the Board had no duty to discharge in regard to his teaching—while the Board were concerned alone in the financial concerns of the school. I heard the argument with surprise; for if there be one thing clear in this important Act of Parliament it is that the school boards are entrusted with a general right and duty of administration over the whole of the educational machinery provided by the statute. They are to ascertain the amount of school accommodation—they are bound to maintain a school in each parish, and keep it efficient—to provide what additional accommodation they may consider to be necessary—to clear out incompetent and inefficient schoolmasters,—and they have all the general powers necessary for the performance of these duties,—and for the greater part their power and discretion is without control. The Government inspector is concerned solely with the Government grant and the terms on which it is given. The Board in Edinburgh has no general power of control; and although schoolmasters in office at the date of the Act have certain rights reserved to them in regard to tenure and emoluments, the schoolmasters generally are simply the servants of the ratepayers, represented by the School Board, and are necessarily subject to the administration of those for whom they act, and by whom they are appointed and paid. While, therefore, we might interfere in cases which were fraudulent or oppressive, I listened without assent to criticisms on the statute founded on misconceptions such as these.

But however critically the statute may be read, I am of opinion that the contention of the pursuer derives no support from it.

The clauses on which this contention is founded are the 48th, the 53d, and the 55th sections of the Act. The 48th section authorises the School Board to appoint a treasurer, who is to take charge of the funds of the Board. The 53d section authorises the School Board to fix the school fees, and provides that such fees shall be paid to the treasurer of the Board—(*reads*). And the 55th section provides that, subject to the provisions in regard to removals, the teacher appointed previous to the Act, "shall not"—(*reads*). It is contended that by virtue of the provisions in the 53d section, which provides that the fees shall be paid to the treasurer of the Board, it is not lawful for the Board to direct that they shall be paid to any one else.

The simple view which I take of this argument is, that whatever its value might be in the case of a new schoolmaster—a question little likely to occur—it has no relation at all to the case of a schoolmaster in office at the passing of the Act. I have no doubt that the statute did contemplate that the Board should relieve the schoolmaster of such secular duties as might interfere with his proper functions; and that they gave the Boards power to maintain a staff of officials sufficient to enable them to do so. Whether they gave the

schoolmaster any right to question such arrangements as the present is a very different matter. But the reservation in the 55th section clearly qualifies the provisions of the 53d section, in any view which can be taken of it. Under that 55th section the schoolmaster's interest in the school fees is reserved entire—he is entitled to their amount and perhaps, if he chooses, is entitled to collect them as he has been wont to do. The School Board are certainly not bound to collect them for him free of charge, his right being to the amount of these fees minus the trouble or cost of collection; and if the schoolmaster can collect them more cheaply himself, or more conveniently, there seems no reason why the School Board should not leave them in his hands. In short, as far as an old schoolmaster is concerned, the fund belongs to the schoolmaster, and not to the Board, although the Board and the schoolmaster may by arrangement agree on a sum to be accepted in lieu of the fees. I therefore think that the 55th section takes the case of an old schoolmaster out of the procedure anticipated in the 53d, a conclusion much strengthened by the last provision of that section, which empowers the School Board if they see fit to pay to the teachers of the school the fees derived from such school, and to divide the same among them as the School Board shall determine. This provision cannot possibly apply to the case of an old schoolmaster, who might certainly object to any portion of the school fees, or their estimated amount, being paid to any one but himself.

Lord Deas—This is an action of reduction at the instance of the pursuer in his capacity of parish schoolmaster of Tulliallan, the object of which is to reduce and set aside certain resolutions embodied in a number of meetings of the School Board of the parish, which are said to be unauthorized by the Education (Scotland) Act 1872, and prejudicial to the pursuer's rights and interests under that Act.

The summons contains also certain petitory conclusions, but these are not essential to the action of reduction, the conclusions of which fall in the first instance to be decided, whatever may become of the petitory conclusions, which might have formed the subject of a separate action, and fall to be separately considered. The pursuer has quite a sufficient interest to insist on the reduction whether the Board be held liable to him for past-due fees or not.

The resolutions which the pursuer seeks to reduce are embodied in the minute of meeting of 8th January 1874 under three heads, but in substance they are four.

1. That the pursuer shall collect the school fees (that is, the fees payable by scholars) every four weeks, in advance, and pay them over quarterly to the treasurer of the Board.

2. That he shall keep registers and accounts of fees, or (as expressed in the minute of 20th February 1874) "registers and log-book."

3. That he shall render quarterly to the treasurer a statement of the fees collected, and of those in arrear.

4. That, along with the usual monthly fees he shall collect 3d. per month during January, February, and March for heating the school, and one halfpenny per month throughout the year for cleaning purposes, and pay the sums so collected to the treasurer along with the other fees. These last words obviously imply that under the first resolution the fees themselves were to be so paid over.

The minutes of meeting subsequent to 8th January, so far as sought to be reduced, are merely confirmatory and explanatory of the resolutions embodied in that minute. The minute of 31st March explains "that it is not, and never was, the intention of the Board that he (the pursuer) should prosecute for fees in arrear, but that the Board will prosecute these parties whom they think fit."

It is avowedly intended that the duties thus imposed upon the pursuer shall be performed by him gratuitously. That being so, the only debateable question appears to me to arise under the first resolution. There has been neither law nor paction referred to for holding the pursuer bound to collect money for heating and cleaning the school. The Board might as well have ordered him to pay for the coals, or himself to sweep the school personally or by deputy, as to make collections for these purposes. I think he is entitled to have the resolution as to these items *de plano* reduced and set aside. A finding to the effect that he is not bound to comply with the resolution is not the remedy appropriate to an action of reduction, and if the resolution be clearly *ultra vires* I know no reason why his remedy should not be given, to this extent, in the usual form under the reductive conclusions of his summons.

I am disposed to make very much the same observations as to the resolutions requiring the pursuer gratuitously to keep registers and accounts, or "registers and log-book," and to render quarterly accounts to the treasurer of the fees collected and of those in arrear. These duties infer labour not incumbent on, nor performed by, him anterior to the Education Act—not laid upon him by that Act—and for the exaction of which, without remuneration, neither law nor paction can be pleaded.

The debateable question, however, remains—Is the pursuer bound gratuitously to collect the school fees and hand them over quarterly to the treasurer? I am disposed to think that he is not. The defenders themselves did not think so till recently, for they appointed the clerk to the Board to collect the fees, and he did so for the half-year ending 31st January 1874. But I do not rest upon this, but on the terms of the statute, the policy of which I think was that, beyond receiving his emoluments from the Board, the schoolmaster should in future have nothing to do with money matters at all—that he should devote his time and attention exclusively to teaching, and that all financial matters should be in the hands of the Board. There may have been many good reasons for this connected with the new system of compulsory education, and compulsory exaction of payment for that education from all classes alike, without fear or favour; but into these reasons I do not inquire, because the statute I think has said this is to be so, and that is enough.

There may possibly be a distinction, as regards the present question, between old and new schoolmasters—that is, schoolmasters who held, and still hold, their offices *ad vitam aut culpam*, and those appointed since the passing of the Act. But if there be so, the position of the old schoolmasters must be in that respect exceptional, and I do not see how we can judicially and satisfactorily deal

with the exception without first considering, although it may be not absolutely deciding, the construction of the Act as to parish schoolmasters generally.

The interpretation clause bears—"'Parish school' shall include any school established under the recited Acts, or any of them, and any school established under this Act by the school board of a parish, or which is by this Act vested in and placed under the management of the school board of a parish." The subsequent sections of the Act place the property and management of all parish schools in the school board of the parish, and the property and management of all burgh schools in the school board of the burgh.

The schoolmasters of all schools under the management of the school board are throughout designated by the common term of "the teachers," and wherever nothing is said to the contrary it is clear enough that the words "the teachers" include the schoolmasters of the parish schools, old and new.

The 43d section of the Act bears that the expenses of the school board shall be paid out of the school fund. "There shall be carried to the school fund all moneys received out of moneys provided by Parliament, or raised by way of loan, or otherwise received by the school board, for the purposes of that fund, and not by this Act otherwise specially appropriated, and any deficiency shall be raised by the school board as provided by the Act."

The 44th section provides for assessing and laying on a "school rate" to meet any deficiency of the school fund.

The 48th section provides for the appointment of a treasurer, "with such remuneration as the school board shall see fit," who is to keep an accurate account of the school fund, and of the expenditure thereof, separate from his account of the other property and funds, and once a year to transmit an account showing all receipts and payments to the accountant of the Board of Education for audit.

By section 52 the school board "may appoint a clerk or clerks, and other necessary officers," "and may assign them such salaries or remuneration as they think fit." There is no restriction as to the duties which such clerk or clerks may be directed to perform.

Then section 53 provides that the school board shall fix the fees "to be paid for attendance at each school under their management, and such fees shall be paid to the treasurer of the board, and a separate account shall be kept of the amount of the fees derived from each school; and it shall be lawful for the school board, if they see fit, to pay to the teachers of a school the fees derived from such school, and to divide the same among them as the school board shall determine."

A subsequent clause may probably, as I have already suggested, make an exception from this enactment. But the enactment itself is quite general. It applies to the fees paid for attendance at all schools under the management of the board, and it is absolute that all such fees shall be paid to the treasurer of the board, who is to keep a separate account of the fees derived from each school. The power of the board to pay, or not to pay, over the fees derived from each school to the teacher of that school, as they see fit, is also absolute, as well as the power to divide the fees equally or unequally (so I read the clause) among the different teachers where there are more than one. Similar provisions occur in section 62 (sub-section 3) as to burgh schools. The enforcement of the payment of the school fees under section 70 is also committed to the board, and nothing is said anywhere of enforcement of payment by the schoolmaster, either by refusing to teach the children of defaulters or otherwise.

These enactments seem to me to be inconsistent with the supposition that it is either the right or the duty of the teachers of any of the schools under the management of the School Board to collect the school fees and pay them over to the Board otherwise than by the authority of the Board on the one hand, and the consent of the teacher on the other. For any of the teachers collecting the fees and putting them into their own pockets I can find no authority whatever. The Board may or may not pay over the fees to the particular teacher as they think fit, or they may pay him by salary without reference to the fees, provided the salary fully covers the amount. But unless by mutual arrangement, the teachers generally seem to me neither entitled nor bound to interfere.

Is there then an exception introduced by section 55 in the case of old schoolmasters? I am unable so to construe the clause. It provides that teachers appointed previously to the passing of the Act "shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the School Board having the management of such schools respectively."

Now I cannot see how the pursuer is to be prejudiced in his emoluments by having the school fees collected for him in place of collecting them himself. He may be so far better by being saved that trouble, but he cannot be worse. I do not think the fact that under the old system he collected the fees, and put them in her own pocket subject to no further trouble and to no accounting, affects the present question. The statutes then in force, viz., the Acts 1696, 43 Geo. 3, c. 54, 1 and 2 Vict. c. 87, and 24 and 25 Vict. c. 107, are out and out repealed. The old system is swept away and a new system altogether different introduced into its place. The rights and duties of parties under the new system are to be looked for in the Education Statute, and I do not find in that statute any duty laid on the pursuer to collect those fees, which admittedly must go into the school fund, and keep books, register, and accounts without any remuneration for his time, trouble, and responsibility, simply because the statute says he is not to be prejudiced in his emoluments. The "other duties not relating to teaching," referred to in section 76, are obviously certain duties imposed on him by the Militia Acts and certain Railway Acts, &c., and that section therefore has no bearing on this case.

My conclusion, therefore, is in favor of decree of reduction of the resolutions complained of, and that parties should then be heard upon the petitory conclusions, which have not yet been entered upon.

LORD NEAVES—This action contains three classes of conclusions, reductive, declaratory, and petitory. It appears to me that the really impor-

tant question is raised by the declaratory conclusion. I doubt if the reductive conclusion was necessary at all, but certainly the only practical one is the declaratory. It is as follows:—"It ought and should be found and declared by decree foresaid that the pursuer is not bound to collect the school fees of the parish school of Tulliallan." That is the conclusion, drawn in simple terms. It is a very strong one to maintain where he is collecting for his own benefit, as before. I see no ground for it, and I adopt the view of your Lordships that it must be negatived. I think the pursuer must go on collecting the fees as he did before; he is not mixed up with the new masters appointed since the passing of the Act. It is quite possible that questions may arise which will have to be solved. The School Board say they do not mean to throw on him the burden of prosecuting for arrears of fees, should that become necessary, but I foresee that some difficulty might easily arise there. It is not necessary, however, to go into these matters now. I hope the parties will endeavour to settle any further difficulty which may arise without resorting to litigation.

LORD ARDMILLAN — I regret that yet another litigation has arisen in the administration of the Education Act. I regret still more the spirit in which this dispute has originated—a spirit obvious enough on the face of the minute before us; and I agree with the Lord Ordinary in thinking that mutual forbearance might have prevented this dispute. It is a bad public example, and a bad omen to the cause of education, that such a difference could not be settled without a lawsuit. But it is now here. The pursuer has forced the question into Court, and we must dispose of it. We have had the advantage of hearing very able arguments.

Mr Buchanan is the parochial schoolmaster of Tulliallan. He was appointed many years before the passing of the Act of 1872; he was well aware of the use and wont of Scotland in regard to the collecting of school fees, and, as the Lord Ordinary truly says, "the fees were collected by himself in conformity with the invariable practice in all parish schools." The question raised here is—whether he shall, as formerly, collect the fees for himself, or whether, on his being directed by the School Board to collect them, he is entitled to refuse to do so, and to demand that the School Board shall collect the fees for him?

His claim as pursuer in this action is in the character and in respect of the alleged rights of a pre-appointed teacher—a teacher appointed before the Act of 1872. It is with this claim of his, as an old teacher, that we alone have to deal. We have no other case before us. The case of a teacher appointed after the passing of the Act may be or may not be quite the same. I give no opinion on that case. On the one hand, the provisions of the statute in regard to fees and emoluments are not in all respects quite the same. On the other hand, these newly appointed teachers hold their appointment during the pleasure of the School Board; and in that case it is not likely that any question such as the present could be raised, since the School Board have a compulsitor by which they could enforce obedience to any lawful direction.

I agree with the Lord President in his construction of the 55th section of the statute, and I agree with the Lord Justice-Clerk in his remarks on the relation of the 55th to the 53d section. By that 55th section the teachers who had been previously appointed are protected from prejudice caused by provisions of the Act with respect to "tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act." Three grounds or sources of security are here mentioned, viz., "law, contract, or usage," prior to the Act. It is not pleaded that there is any law, as distinguished from usage, ruling this question, and conferring a right of enjoying fees without collecting them. Nor is it pleaded that there was any contract in respect of which this teacher was before the passing of the Act entitled to have these school fees collected for him, and not by him. On the contrary, collection by himself had been according to his own experience and practice. Therefore there remains only, as the source of his security for fees, "usage,"—the use and wont of Scotland, and it may be also the local usage in the particular parish. Now, it is beyond question that the collecting of school fees by the teacher was for a very long time before the passing of this Act according to the use and wont of Scotland, and in this parish the pursuer, as parochial teacher, did himself collect the fees for more than a quarter of a century prior to 1872.

His own statement on the record is that when he was appointed under the new Act the Board allowed the fees to remain as formerly, and awarded to him a fixed salary of £55 per annum in addition to the fees. It thus appears that when the pursuer entered on his tenure of office under the new Act he did so on the footing of retaining his right to emoluments, apart from the fixed salary awarded, as they stood upon the use and wont of Scotland, and on the usage in the parish of Tulliallan. That usage, general and local, was his security for his emoluments, and the measure of his claim under the 55th section if by the provisions of the Act he should be prejudiced therein.

It is very plain, and it was so specially represented by the pursuer, that the cost or the trouble of collecting fees is of the nature of a deduction from the fees which he receives—a burden on the benefit of receiving them. To get the fees which I must take the trouble of collecting is less advantageous, and was stated by the pursuer to be less advantageous, than to receive the fees collected by another. But if I am correct in holding that the ground and measure of the pursuer's right to the fees rests on usage, and if his own collecting of the fees for himself is according to the usage, and part of the usage, then the 55th section can give him no right to insist that the fees which he has hitherto collected for himself shall now be collected by the Board for him, or, in other words, no right to insist that the cost or trouble of collection, great or small, shall be borne not by himself but by another, that is, shall be added to the emolument sanctioned by usage.

I may here explain (as I think there has been some misunderstanding on the subject) that the collecting which the Board has required means only the receiving the fees from the children or their parents in the old manner according to use and wont, viz., at the school. Nothing more was ever done by any teacher. Nothing more was desired, or directed, or meant to be desired or directed by the School Board. Nothing more was suggested

by the counsel on either side as within the meaning of the resolution complained of. The Board state on record that they "resolved to revert to the old way." They were not introducing a new plan, but returning to the old way; and beyond all doubt the old way was for the teacher to collect the fees in or at the school from the pupils or others who came to pay them.

As I read the 55th section, the School Board are bound to give the teacher such emoluments as shall secure him from prejudice according to his right by usage at the date of the Act. If the fees are collected by the Board or by another than the teacher, that would be to that extent a departure from the previous usage, and these fees, or their amount, must be handed to the teacher. If withheld or diminished he is prejudiced. If the fees are collected by the teacher, the amount thereof, as matter of book-keeping, enters the account of the school-fund. Practically, if he paid that amount when collected to the School Board, the Board would hand it back to him, according to their agreement that he should enjoy the fees. A memorandum of the sum collected satisfies the requirement as to book-keeping. The circuitous procedure of first handing the fees to the Board and then receiving them back is avoided, or may be avoided, by allowing the teacher to retain them.

This arrangement, surely not unreasonable or inequitable, or unfavorable to the interests of the teacher, is, in my opinion, within the province, and the power, and the ordinary management or administration, of the School Board. I think they were entitled so to arrange it.

An application was made very naturally and properly by the School Board to the Board of Education for Scotland at Edinburgh, and the pursuer having directed the attention of the School Board to the provisions of the 53d section of the Education Act, that subject was brought under the notice of the Board of Education. The letter of the Rev. Dr Taylor, secretary to the Board of Education, is printed on this record. Of course the opinion of the Board of Education does not authoritatively dispose of a legal question between the School Board and the teacher; and accordingly the Board of Education explain that they do not attempt to do so. But the views of the Board of Education—a body competent to judge of a matter within administrative working, and a body free from the local prejudice which may be supposed to actuate one or both of the sections of the local Board,—are not without importance. The opinion of the Edinburgh Board is stated to the following effect:—The Secretary of the Education Board thus writes:—"The words in section 53, 'Such fees shall be paid to the Treasurer of the School Board,' do not refer to the process of collecting fees, but to the carrying of them into the school fund, in order that a complete and accurate account may be kept of all the cash transactions of each school. The Board do not consider that there is anything in the Act to interfere with the 'use and wont,' according to which the fees in the public schools of Scotland have been collected by the schoolmasters." I think the view taken by the Edinburgh Board of Education of the 53d section is judicious and appropriate. There are no express provisions in the statute in regard to the mode of collecting, or to the fixing of the person bound to collect, school fees; and the mere use in the 53d section of the words "paid to the Treasurer of the Board" cannot be read as a statutory direction that the treasurer shall collect. If the person who collects pays the fees to the treasurer, that meets and satisfies the clause. Reading the 53d section in connection with the 43d, 48th, and especially 55th sections, I have arrived at the same conclusion as that expressed in this letter—the same as that explained by the Lord Ordinary In my opinion the purpose of these sections is not to direct the mode of collection, but to secure the formation and administration of a "school fund.' Now the administration of that fund is part of the management of the school, and is in the hands of the School Board for the purposes of the Act. Whether it may be a better arrangement that the collection shall be by the teacher, or shall be by the Treasurer of the Board, is a question which cannot be disposed of by inflexible rule, for it may depend on circumstances. In this case I see no reason to doubt the decision arrived at. But it is a question for the discretion of the Board. With that discretion we cannot interfere. We are not entitled to exercise our own discretion on a matter within the province and the administration and the discretion of the School Board. I think it is our duty to decline to interfere, and our duty to leave the School Board to exercise their own discretion, for the parish schools are by the statute "vested in" and placed "under the management of the School Board."

Accordingly, on the leading question now before us, I am of opinion that the matter embraced and disposed of in the resolutions complained of by the pursuer is within the sphere of ordinary management and administration by the School Board; and that this Court should not interfere unless the resolution of the School Board is clearly *ultra vires* and contrary to law. I am further of opinion that this resolution of 8th January 1874, with the subsequent resolutions adhering thereto, is not *ultra vires*, and not contrary to law, and that the pursuer is not entitled to decree of reduction as concluded for. There is no real importance in the question raised in this action. But very grave and important interests are involved in the interference of this Court with the administration of the School Board in such a matter. If, in a matter where the management and the discretion is by statute given to the School Board, every offended teacher, in whom irritation is kindled, or to whom irritation is supplied, were encouraged to rush into Court with an action of reduction, the consequences would be very serious. There are some trifling sums for heating and cleaning the school, in regard to which I do not think that we have sufficient materials for judging whether they were exigible according to usage, and whether they were collected by the teacher according to usage, prior to the date of the Act. I understood the Solicitor-General to say that on the part of the Board he did not press this point; and I was glad to hear that statement, as I think that this part of the resolution is wisely departed from.

I have therefore only to add that, subject to some slight modification in regard to the matter last mentioned, I concur in the opinion of the Lord President, and the interlocutor of the Lord Ordinary.

Lord Mure— have felt this case to be a diffi-

cult and important one, and I confess my opinion has fluctuated a good deal in the course of the argument. When the case first came before us the minute of Jan. 8 was defended by the Board to its full extent. Now, in the view I took of the master's position, their third requirement—"That Mr Buchanan add to the usual monthly fees 3d. per month during January, February, and March, for heating the school, and one halfpenny per month throughout the year for cleaning purposes, and that he pay the sums thus collected to the treasurer, along with the other fees,"—was beyond the power of the Board, and so I think that the master could not have duties imposed on him which he had not before the passing of the Act. I think those points go beyond the power of the Board. I understand, however, that all that your Lordships propose to do is to negative the declaratory conclusion of the summons, and give no opinion on the legality of the other duties imposed on the master by the Board. I am prepared to go so far as that, and to concur with the majority of the Court. I understood from the Solicitor-General that the defenders do not insist in the whole of their defence, and I am prepared to acquiesce in your Lordships' judgment.

Lord Ormidale—Were it not for the difference of opinion in the Court I could not have entertained any doubt that the interlocutor of the Lord Ordinary in this case is well founded. And, with all due deference, I cannot help thinking that it is only by giving way to an unnecessarily narrow and literal construction of a single expression in the Education Act that any other conclusion can be arrived at.

The question is—whether the School Board of Tulliallan are entitled to insist in the pursuer, the schoolmaster of that parish, receiving the fees tendered to him by the scholars attending his school, and accounting for them to the treasurer of the Board? I have used the expression "receiving" the fees paid by the scholars in place of the word "collecting," as the latter might be liable to misconstruction, although the true meaning of the Boardl has been, I have no doubt, all along perfectly wel understood by the pursuer to be—not that he should go about the parish insisting on payment of the fees from the scholars or their parents or others, and still less that he should be at any trouble or expense in enforcing payment of the fees, but merely that he should receive and account for such of the fees as may have been received by him at the school. I have also used the word "accounting" for the fees, in place of saying "paying" them over with one hand to the treasurer of the Board, and then with the other taking them back from that functionary, as I cannot imagine that any such circuitous proceeding was ever contemplated.

Having regard to these explanations, and the concession which I understand the Board to be quite ready to make in any form the Court may desire, that they will not require the pursuer to receive the dues for cleaning, or to take any trouble in reference to securing the services of a person to attend to the cleaning and heating of the school, as mentioned in their minute of 8th January 1874, I must own my inability to see how the proceedings of the Board are in any respect objectionable, or can be fairly complained of or resisted by the schoolmaster.

It is true that the pursuer was schoolmaster of the parish of Tulliallan for many years prior to the passing of the Education Act, and that consequently he is entitled to the benefit of the 55th section thereof, which provides that "with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured or enjoyed by him at the passing of this Act," he is not to be prejudiced. But by the minutes of the School Board complained of I am unable to see how the pursuer can be prejudiced to any extent or in any way whatever. That he will be prejudiced with respect to his tenure of office, or retiring allowance, has not been and could not possibly be said, as the minutes referred to have no relation to his tenure of or removal from office. Neither do I understand that the pursuer complains that his emoluments have been or will be to any extent or in any way prejudiced by these minutes, and he makes no such complaint in the record. On the contrary, he expressly says at the conclusion of the first article of his statement of facts that the School Board have "allowed the fees in his school to remain at their former rates," and that in addition to these he has a fixed salary of £55 a-year.

It being clear, therefore, that the pursuer can derive no support in this action from the 55th section of the Act, the question is narrowed to the 53d section, which is that on which the pursuer mainly if not exclusively relies. It is no doubt enacted by the latter section that the School Board shall fix the school fees; and that the same "shall be paid to the treasurer of the Board," and this is the statutory expression to which I referred at the outset as creating the only possible difficulty in the case. Founding on the 53d section of the Act, the pursuer has argued that School Boards are not entitled to require him to collect or receive the school fees of his scholars, and that it would be illegal for him to do so, seeing that the statute expressly provides that the fees shall be paid to the treasurer. But this, as I have already said, is, in my apprehension a very narrow and far too literal a construction of the statutory words, and one which cannot, I think, be supported by any show of reason. On this point I entirely concur with the Lord Ordinary. The statute does not, even in words, provide that the fees are to be paid to the treasurer by the scholars themselves. It does not, indeed, specify by whom the payments are to be made to the treasurer—that, as well as other *minutiæ*, being, as might be expected, left for the regulation of the School Board, so far as any regulation might be necessary. This being so, what else, consistently with good sense and reason, could the School Board have done than to require the pursuer, as schoolmaster, to take from the children attending his school their fees, and keep a note or record of his receipts? In requiring him to do this the Board did not impose any new duty or trouble on the schoolmaster to which he had not all along been previously subjected. On the contrary, it may well be suggested that his trouble in regard to his scholars' fees has been considerably lightened, for until the passing of the Education Act he undoubtedly was himself obliged to collect, and enforce if necessary, payment of the fees, or submit to their loss and go without them, while now he has only to receive what the scholars are ready to pay, leaving the Board to compel attendance of defaulting scholars, and in that way to enforce payment under and in terms of the compulsory powers of the statute. So far, there-

fore, from the complainer being prejudiced by the proceedings of the Board complained of, it is manifest that he must be considerably benefitted, for he will be entirely relieved from the disagreeable, troublesome, and expensive duty of enforcing at his own instance payment of the school fees. Nor can it avail the pursuer anything to say that the trouble he formerly had in collecting and enforcing payment of his fees was taken on his own account, so far as taken at all, while now the comparatively trifling portion of the trouble to which he will still be subjected will be taken by him on behalf of the Board, for any such reasoning as this proceeds on an obvious fallacy. The school fees formerly collected and received by the pursuer were no doubt appropriated by him as his own, but so also will still be all the school fees that may be paid. Neither can it with truth be said by the pursuer that he will be subjected to any new hardship by being obliged to enter in a book or register, to be furnished to him, the payments that may be made by the scholars, in order that the School Board may always know who have, and who have not paid, for such a note in some form must always have been kept by him.

The only other question that remains for consideration is, whether it was within the competency or power of the School Board to regulate, so far as regulation was necessary, the very small matters of detail about which the pursuer has raised the present dispute. Of this I am unable to entertain any doubt. By the 23d section of the Education Act it is provided that all the schools in the parish "shall be vested in and be under the management of the school board of such parish," which shall, with respect to the school management, "and generally with respect to all powers, obligations, and duties, in regard to such schools now vested in or incumbent on the heritors qualified according to the existing law, and the minister of the parish, supersede and come in place of such heritors and minister." And, again, by the 76th section of the Act the duties imposed upon the schoolmaster of a parish by previous statutes, "and any other duties not relating to teaching, which according to any law or statute in force at the date of the passing of this Act are imposed upon the schoolmaster of a parish, shall be performed by the schoolmaster of the parish in office at the date of the passing of this Act, so long as he continues to be teacher of a public school in the parish." Keeping these statutory enactments in view, and also bearing in mind that prior to the passing of the Act it was, beyond all question, the duty, according to the invariable practice of the parish schoolmaster, to collect his fees, I must repeat that I am unable to see how it can be reasonably maintained that the School Board have exceeded their powers by the proceedings complained of. That they have not done so appears to be clear, as well on a consideration of the statutory provisions as on the broad, and, as I think, indisputable ground, that the pursuer has not been required to do anything more than what is naturally and fairly incidental, on the one hand, to his position of schoolmaster, and, on the other hand, to the position of the School Board, as having the management and control both of him and the school. It does not, indeed, seem to be disputed on the part of the pursuer that it was within the competency and power of the School Board to do all they did. All he says is that they were not entitled to do what they did "unconditionally," but what he means by that he has not stated in the record.

On the grounds, and for the reasons I have now adverted to, I am of opinion that the interlocutor of the Lord Ordinary is well founded and ought to be adhered to, with the explanation or a finding if thought the preferable mode, to be inserted in the interlocutor of adherence, that the pursuer is only to receive the school fees that may be paid to him by the scholars attending his school, at the same time entering in the appropriate book or books, to be furnished to him for the purpose by the School Board, the payments so received by him, and the names of the scholars by or for whom such payments have been made. And, if thought in the least necessary, the interlocutor of the Court adhering to the Lord Ordinary's interlocutor may also contain an explanation or finding to the effect that the pursuer is not to be at any trouble in regard to the heating or cleaning of the school, and that the receipts, if any, which he may require to give his scholars for the fees paid by them shall be furnished by the School Board or their treasurer. With some such explanations or findings as these, the pursuer will be saved from all risk of any undue burden being laid upon him.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of this cause, with the assistance of three Judges of the Second Division, and heard counsel on the reclaiming note for the pursuer against Lord Curriehill's interlocutor dated 23d December 1874, after consultation with the said three Judges, and in conformity with the opinion of a majority of the seven Judges present at said hearing, Adhere to the said interlocutor reclaimed against, and refuse the reclaiming note; find the defenders entitled to additional expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Pursuer—Dean of Faculty (Clark) and Low. Agents—J. & J. Turnbull, W.S.

Counsel for Defenders—Solicitor-General (Watson), Guthrie Smith, and Taylor James. Agents—Keegan & Welsh, S.S.C.

Friday, June 11.

FIRST DIVISION.

[Lord Shand, Ordinary

PETER MACBRIDE *v.* HAMILTON & SON.

Contract—Damages—Set-off.

In a case where a contractor bound himself to set up certain machinery within a stipulated time, but failed to complete his contract till after that time had expired—*Held*, in an action for the contract price, that the defenders were entitled to set-off against his claim a claim of damages for breach of contract, even though illiquid.

This was an action by Peter Macbride, copper and tinplate worker and plumber, Glasgow, to recover from Messrs Hamilton, calenderers, the price of a set of steam drying cans and a steam engine