Counsel for Pursuer—Dean of Faculty (Watson)—Jameson. Agent—John Galletly, S.S.C.

Counsel for Defender — Balfour — Alison. Agents—Murray, Beith, & Murray, W.S.

Wednesday, March 1.

FIRST DIVISION.

[Lord Young.

STEUART *v.* LORD SEAFIELD.

Disposition—Relief, Clause of—Schoolmaster's Salary—School Rates—Education (Scotland) Act (35 *and* 36 *Vict. cap.* 62) 1872—*Road-Money—Banffshire Roads Act* 1866.

Two dispositions, dated in 1861 and 1867 respectively, contained similar obligations by the seller to relieve the purchaser of, *inter alia*, "schoolmaster's salary and road-money payable for the lands disponed."—*Held* (1) (*diss.* Lord Deas) that the clause did not import relief from school-rates imposed under the Education (Scotland) Act 1872; and (2) (*per* Lord Young, Ordinary, whose judgment on this point was acquiesced in) that it imported relief from assessments under the Banffshire Roads Act 1866, which abolished tolls, and made provision for the maintenance of roads and bridges by additional assessments.

This was an action at the instance of Andrew Steuart of Auchlunkart, Banffshire, against Lord Seafield, concluding (*a*) for payment (1) of certain road assessments imposed upon the pursuer under "The Banffshire Roads Act 1867," and (2) of certain school-rates imposed under "The Education (Scotland) Act 1872," both in respect of lands conveyed to him by the defender; and (*b*) for declarator that the defender was bound to free and relieve the pursuer and the said lands of these burdens in all time coming.

By two dispositions, dated respectively the 23d December 1861 and the 26th January 1867, the defender sold and disponed to the pursuer two different parcels of land, and in each deed he bound himself in precisely similar terms "to free and relieve him and his foresaids, and the lands and others hereby disponed, of all cess or land-tax, minister's stipend, schoolmaster's salary, and road-money payable for the lands and others hereby so disponed, from henceforth and in all time coming." For the first subjects the pursuer paid £3505, and for the second £981, 12s., and he averred that these prices "were above the market value of the lands at the time, in respect of the obligations of relief from public burdens."

After his entry to the lands the pursuer was relieved by the defender of assessments for schoolmaster's salary until "The Education Act 1872" came into operation, and of assessments under "The Banffshire Roads Act 1866," and previous statutes until 1870. After these dates the defender declined to give relief, and although he had paid the road assessment from the passing of the Act in 1866 till 1870, he denied that he had been under a legal obligation to do so.

The defender averred that the school-rates levied under the Education Act largely exceeded £80, which was the total amount payable to the schoolmasters, and that these rates were now applied to other purposes besides the payment of salary. The pursuer answered that school-rates under the Act of 1872 were of the like class, and applied to like purposes, with those exigible prior to that, which were all comprehended and known by the name of schoolmaster's salary.

With reference to the claim for road-money, the defender averred that the Banffshire Roads Act imposed a new burden on the land, inasmuch as it abolished tolls and made provision for the maintenance of roads and bridges by additional assessments.

The defender, *inter alia*, pleaded—"(1) The defender has undertaken no obligation to relieve the pursuer of the assessments under the Banffshire Roads Act, and is not liable to do so; (2) The defender has undertaken no obligation to relieve the pursuer of the school-rates which have been or may be imposed under the provisions of the 'Education (Scotland) Act, 1872,' and is not liable to do so; (3) Assuming that the defender is liable to relieve the pursuer of any part of the said school-rates, he is only liable in so far as the same can be shown to be applied in payment of schoolmaster's salary; and, *separatim*, he is not so liable to any greater extent than the pursuer's proportion of the salary allowed by the statutes in force at the date of the said dispositions."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 14*th July* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the record and productions—Finds and declares that, under and in virtue of the obligations of relief libelled, the defender is bound to free and relieve the pursuer and the lands libelled of all road-money paid, or which may hereafter become payable, for the said lands, under the Banffshire Roads Act 1866; and declares that money paid or payable under assessments duly imposed by virtue of the said Act, in respect of the ownership of said lands, shall be regarded as road-money within the meaning of said obligations of relief and of this decree: Decerns against the defender for payment of the several sums of road-money libelled, as already paid by the pursuer under the said Act, with interest as concluded for. With respect to the other conclusions of the action, viz., those relating to school-rates under the Education (Scotland) Act 1872, assoilzies the defender, and decerns: Finds no expenses due to either party.

"*Note.*—The improvidence of obligations to relieve of taxes has been so frequently exemplified that it is surprising they should be continued.

"With respect to the conclusions of the action relating to road-money, I am of opinion that money payable under assessments authorised by the Banffshire Roads Act 1866 is road-money within the meaning of the obligations of relief in both deeds libelled. The road-money payable under the Act is probably of larger amount than the road-money payable before the Act, by reason of the increased number or length of the roads to be maintained, and the abolition of tolls as a source of income; but it is the same tax, however, and from whatever cause the amount of it may be increased or diminished.

"With respect to the school-rate under the Education Act 1872, I am of opinion that it is

not 'schoolmaster's salary' within the meaning of the obligations of relief. By the law prior to the Act 1872 a limited number of the heritors of each parish—viz., the valued-rent heritors—were bound to provide a salary for a schoolmaster within a certain statutory maximum. The defender was a valued-rent heritor, and his obligation to relieve the pursuer (his feuar) of schoolmaster's salary for his feu, imported only that he would continue to pay the whole amount of the salary payable on the valued rent of his lands in the parish, without asking any contribution or relief in respect of the feu which he had given off. By the Act of 1872 the valued-rent heritors are no longer required to provide a salary for a schoolmaster. The expense of the educational establishment instituted under that Act in each parish is defrayed out of a school fund, for which provision is made, and which in any particular parish may or may not, as it happens, be sufficient for the purpose without the aid of a school-rate. In the event (no doubt the usual event) of a deficiency in any year, a school-rate to an amount sufficient to supply it is authorised. Such a rate to supply a deficiency in the school fund of a parish has a very different incidence from the schoolmaster's salary, of which the defender undertook to relieve the pursuer, for it has the same incidence as the poor's rate, in assessing for which no distinction is made of valued-rent heritors or account taken of valued rent. Nor is it a rate for schoolmaster's salary in any other sense than this, that it is to supply an ascertained deficiency in a catholic fund, out of which all charges connected with the execution of the Act, including the remuneration of teachers, are paid. The deficiency to be supplied may in any year be largely or even wholly attributable to a school board election, the expense of which is payable out of the school fund. The school-rate under the Act of 1872 is thus, as I regard it, quite distinguishable from the schoolmaster's salary payable by the valued-rent heritors under the prior law, and I cannot extend to it the obligations of relief on which the pursuer founds. He is a ratepayer under a new system of national education, according to which also he is, as a ratepayer, an elector of the managing board of the district in which he is rated."

The defender acquiesced in the interlocutor, but the pursuer reclaimed, restricting his claim for relief, during the course of the argument, to such part of the school rates as contributed to the schoolmaster's salary.

Argued for the pursuers — An examination of the Education Act showed that no new system was thereby introduced. A change in the governing body or in the mode of collecting the tax did not so operate a new system. The school-rate was now less of a burden upon the heritors than before the Act. The expression "lands and heritages" was nothing more than an extension of the area of chargeability. The present burden was therefore identical with the old, as had been decided in the analogous case of poor-rates.

Argued for the defender—Under the Education Act owners and occupiers of land were assessed, not heritors. If the burden were new, the clause of relief did not apply. The position of the schoolmaster was quite changed. In the Act he was termed teacher. There was nothing now drawn as schoolmaster's salary, and the schoolmaster might be paid out of the Government grant or out of the school fees as well as out of the rate.

Authorities—*Fleming* v. *Dickson*, March 4, 1863, 1 Macph. 517; *Preston* v. *Magistrates of Edinburgh*, Feb. 4, 1870, 8 Macph. 502; *Scott* v. *Edmond*, June 25, 1850, 12 D. 1077; *Lees* v. *Mackinlay*, Nov. 11, 1857, 20 D. 6; *Sprot* v. *Governors of Heriot's Hospital*, May 29, 1829, 7 S. 682; *Reid* v. *Williamson*, Feb. 16, 1843, 5 D. 644; *Wilson* v. *Magistrates of Edinburgh*, Feb. 22, 1868, 6 Macph. 483; *Elliot* v. *Marquis of Lothian*, Dec. 2, 1824, 3 S. 348; *Greig* v. *Carstairs*, Nov. 24, 1775, M. 2333, 3 Pat. App. 675; *Hunter* v. *Chalmers*, July 16, 1858, 20 D. 1311.

At advising—

Lord President—In this case the Lord Ordinary has found that the pursuer is entitled to be relieved of the Road Acts assessments, but in regard to the school-rates he finds to the opposite effect, and to that extent he assoilzies him from the conclusions of the summons. The defender has acquiesced in the first branch of the interlocutor, but the pursuer has reclaimed upon the other, and that is the only question now before us.

The clause or clauses which form the basis of this action are contained in two dispositions, proceeding upon the sale of certain parcels of land by Lord Seafield to the pursuer. These are not feu-dispositions or feu-contracts as the Lord Ordinary seems to have supposed, but dispositions on a price paid with a double manner of holding. It is certainly peculiar to find clauses of such a nature in deeds of this kind. Lord Seafield undertakes a personal obligation "to free and relieve the purchaser and his heirs and assignees of all cess or land tax, minister's stipend, schoolmaster's salary, and road-money, payable for the lands from henceforth and in all time coming." Undoubtedly the obligation is not imposed upon the land or upon any other heritable security, and we are not here deciding whether the disponee could transmit the benefit of this to a singular successor without a special assignation. All I would say on that point is, that the clauses as they stand suggest something peculiar between the parties, but I do not think that affects their construction. For that purpose they are to be construed as if they had occurred in a feu-disposition, as the Lord Ordinary supposed.

The two dispositions are dated respectively in 1861 and 1867. The first consideration is, what was the meaning at that time of the term schoolmaster? The state of the law then was that the burden of sustaining the schoolmaster was laid on a limited class of persons, viz., on those heritors whose lands were entered at not less than £100 of valued rent. These heritors also provided the school and masters' houses as well as the salary. On the other hand, they enjoyed privileges connected with the obligation in the way of the appointment of schoolmasters, and they had a general supervision of the school.

By the Act of 1872 the parish schools were taken out of the hands of this limited class; the whole of their rights were abolished; and the whole of their liabilities extinguished. No man is now liable to provide any part of the

salary in respect of his property being of the valued rent of £100, and there is no such incidence of taxation. The burden of providing a salary is no longer transferred as a separate burden upon any class. It is to be paid out of the school fund, the constituent and component parts of which I shall advert to hereafter.

It is more important to notice, in the first place, that the persons to be subjected to it belong to a totally different and more extensive class than formerly. The school-rate is laid on all owners and occupiers of lands and heritages within the parish. Instead of embracing a few individuals, the incidence of taxation is now laid upon almost all the inhabitants of the parish, certainly upon all householders, and it goes a great deal further, because the definition of lands and heritages in the interpretation clause of the Poor Law Act is of the most comprehensive kind. It includes every conceivable species of what may be called immoveable property. Not only are these immoveable subjects liable, but every kind of interest connected with them is a direct subject of the tax itself. The law has gone this length, that a water company has been assessed both as owner and as occupier of the land because the pipes are laid under the soil.

Nothing therefore can be more extensive in area than the range over which it is provided by the Poor Law Act that the taxes thereby imposed are to be levied; and the rates imposed by the Education Act are to be levied by the Parochial Board along with the poor-rates. That constitutes a considerable difference between the schoolmaster's salary and the school-rates as imposed and levied under the recent statute.

But there are other circumstances which show a still greater difference. The school-rates are not levied for payment of the schoolmaster. The only authority which the School Board have under the Act to levy rates is in the event of their finding a deficiency in the school fund. If that is sufficient to defray their expenses they have no right to lay on any assessment. The Government grant forms an important part of the school fund, and so also do the school fees, and it may further happen in some places that there are gifts and mortifications which will afford a considerable assistance to the fund. It may thus occur in a parish that there are no rates levied at all.

Further, the school-rates, if levied, are applicable to many purposes which were never heard of before the passing of the Act—to the maintenance of the buildings, and to the payment of interest upon the debt, of the expenses of the School Board election, and of all the ordinary costs of management. It may be, and I daresay in most cases it will be, used to furnish the schoolmaster's salary; but, on the other hand, it does not follow of necessity that the schoolmaster's salary is paid out of it. It is paid out of the school fund and out of the aggregate fund without reference to its constituent parts.

But the payment of the salary may be laid as a special burden upon some special part of the fund; for instance, nothing would be more in consonance with the Act of Parliament than that the School Board should apply the whole fees to the payment of the master, and it might well be that these were adequate for it. Could it in that case be said that this school-rate was the same thing as the schoolmaster's salary? It therefore appears clear, in the first place, that the nature of this tax is different from what was formerly known as schoolmaster's salary; the incidence and purposes of it are different, and the salary may or may not be paid out of the produce of the rate just as the School Board may see fit to order.

But, in the second place, the schoolmaster at the present day, if there be such an official at all, is a different person from what he was before 1872. Previously he was a public official of considerable importance; his office was a *munus publicum*, and he had many statutory functions. Under the Militia Acts, for instance, he had important duties, and under the Act he is the repository of all documents which may be laid before him.

So, too, under the Lands Clauses Acts and the Railway Acts. These are all functions which properly belonged to public officials, who are now nothing more than teachers, as is made plain by the 76th section of the statute, which transfers all duties "not relating to teaching" to the registrar. The schoolmaster is no longer the schoolmaster of the parish; there may now be more than one in the parish, all of equal rank, as the School Board may appoint.

Further, there is no longer any such tax on the land as the schoolmaster's salary, for I hold that the education rate is a totally different tax. In the course of the argument reference was made to a class of cases which were supposed to favour the pursuer, and to show that the tax of 1872 was no new tax, but merely a continuance of the old. The cases were those in which it was held that the poor-rates under the Poor Law Amendment Act were not different from those which were levied before the passing of that Act. If these cases were applicable to the present they would be entitled to great weight, but it appears to me that there is a great contrast between them and the question with which we are now dealing. The ground of judgment on which poor-rates after 1845 were held to be no new burden is best stated in the opinion delivered by Lord Wood in the case of *Hunter* v. *Chalmers*, July 16, 1858, 20 D. 1315, "I think that the claim of relief which would otherwise have been competent is not destroyed or invalidated by the Act of 8 and 9 Vic. c. 83. The burden of which relief is demanded is not a new burden introduced by that statute. It is a burden to which the owners of lands as such were subject, and which was exigible in respect of the laws existing at the time the original feu-contract was entered into—the Act, so far as regards the assessment for the support of the poor, only regulating the mode of assessment, and pointing out the different ways in which it may be imposed. In all of them the assessment is to be imposed to a greater or less extent on lands and heritages, or the owners and occupants thereof, and it is only for that portion of the assessment that relief is here asked. Had the assessment in question been one on means and substance, the objection to the claim would have stood upon a different ground. But as that is not the case, and the burden not being one which, in respect of the Poor-Law Amendment Act, can be held to be a burden imposed by a supervening law, there is no room for maintain-

ing that it could not be in the contemplation of the parties when the obligation of relief was granted, and therefore cannot, upon a fair reading of its meaning, be found to be included in it." Then it must be observed that the tax imposed by the Act of 1845 is precisely the same as the previous tax; it is imposed on heritable security as previously, and is used for the same purpose—the support of the poor and nothing else. In all these respects the two cases are in direct contrast.

But the pursuer further contended that even if he was not entitled to relief from the defender of the whole rate, he ought to be found entitled to relief of so much as is applicable to the schoolmaster's salary. I cannot entertain that view, for reasons already sufficiently indicated. The schoolrate may or may not provide the salary; it may in one year and not in another, just in the proportion which the produce of the rate bears to the whole fund. If that contention were entertained, it would follow that there must be an adjustment every year upon a calculation of the amount of salary contributed by the produce of the rate. That course appears to me out of the question when we are dealing with a clause of relief like this. Unless there is an assessment, which can be called schoolmaster's salary as such, I do not think the clause can apply, and I therefore agree with the Lord Ordinary in the result at which he has arrived.

Lord Deas—I have found this to be a very troublesome question. We are quite familiar with clauses of relief of this kind in deeds between superior and vassal, and these have sometimes led to considerable difficulties, which have, however, never been held to interfere with the enforcement of the obligation. It is certainly not usual to find an obligation of relief of this kind in an ordinary disposition to a purchaser, which was the position Mr Steuart held under these deeds. For the first portion of the lands Mr Steuart paid £3505, and for the second £981, 12s., and he avers that these prices were above the market value of the lands at the time in respect of the defender's obligations of relief from public burdens. There is no proof of that, but the presumption is that that relief was paid for in some way. There is no room for dispute that Lord Seafield granted these deeds conveying lands to the pursuer, his heirs and successors, and though, when we come to the obligations of relief, it bears to be granted by Lord Seafield alone, there is no doubt the obligation was further binding on his heirs and successors. That is the nature of the obligation, which in itself is perfectly clear. Accordingly, it is not disputed that the clause must take effect so far as regards the land-tax, stipend, and road money; but it is said that there is no longer any schoolmaster's salary payable.

That seems to me a very difficult plea to maintain. There is still a schoolmaster, and he is a parochial schoolmaster, although he may not be a public officer, which is of no moment. He is paid a salary, which to some extent is obtained out of the lands, as the rate is partially laid upon them. My difficulty is to see how this express clause of relief is to be got rid of. Why is the pursuer not to have implement of it by getting relief in so far as the salary is levied upon the lands. There may be practica difficulties in fixing the amount, but I do not see how that can have the effect of defeating the clause altogether. The mere change in the position of the schoolmaster has to my mind no bearing upon the present question. There is a parochial schoolmaster; a salary is paid to him; and rates are levied for the purpose. I think the pursuer should be relieved to some extent of these by the defender, and I cannot agree with the Lord Ordinary nor with your Lordships in your opinions upon this case.

Lord Ardmillan—I concur with the Lord Ordinary in the view which he has taken of this case, both as regards the part of his decision which is favourable to the pursuer, and the part of his decision which is favourable to the defender. The only question seriously raised relates to the second part of the interlocutor, being that in regard to the obligation of Lord Seafield in the disposition granted by him to Mr Steuart in 1861, wherein his Lordship binds himself to free and relieve Mr Steuart and his lands of "schoolmaster's salary." A similar clause is in the disposition of other lands in 1867. I do not rely on the special and rather unusual peculiarity of the obligation of relief; that it occurs in a disposition, and not in a feu-contract.

The Lord Ordinary has assoilzied the defender from the conclusions of the action in so far as relating to this particular obligation. At the date of the obligation the pursuer was an heritor on valued rent, bound to provide a salary for a schoolmaster up to a certain statutory amount. His obligation to pay this salary to the schoolmaster was direct, and was laid on him as heritor in respect of, and in proportion to, his valued rent. It was a rate or tax chargeable on the valued rent, and it was for the direct and definite purpose of remunerating the schoolmaster, and was payable to the schoolmaster. Since then the position and the obligation of the pursuer has undergone a most important change; changed also is the incidence of the tax on his land, and the nature of the tax itself, and the position and relations of the schoolmaster. The pursuer, as a heritor, no longer pays the schoolmaster's salary charged on the valued rent. There is no such charge and no such payment. He pays his proportion, as a ratepayer in a new and wide class, of a general school-rate charged on the real rent, and administered and distributed and applied by a public board in promoting the purposes of primary education. It may, or it may not, happen that the rate or part of the rate he pays is applied to the remuneration of the schoolmaster. He does not pay directly any schoolmaster's salary. The obligation of relief has regard to the incidence of the rate or tax, rather than to its distribution—to the primary purposes of its enforcement rather than to the ultimate purposes of its application. As a charge on the pursuer, the school-rate under the Education Act is not a charge for schoolmaster's salary, nor is it a charge on the valued rent of his land; but supplemental and auxiliary to other funds, it is a general school-rate for the district; it is charged on real property, and applied to many purposes. It is not reasonable to expect that a

court of law shall trace out the administration of school funds, gathered from many sources, and raised under statutory authority for many purposes, in order to see whether any or what part of it may have reached the schoolmaster in the shape of salary. It is quite uncertain how much of the school-rate may so reach the schoolmaster, because the school fund under the statute is not entirely composed of school-rates, but is drawn from other sources as well as from the rate, and indeed the school-rate is raised to supply a deficiency. It is quite possible that the schoolmaster may be otherwise remunerated, and that no part of the rate paid by the pursuer may be applied in paying the schoolmaster's salary, or rather the teacher's salary, for that is the word used in the statute. The incidence of the tax, and its character and quality when exacted, is far more important in this question than the distribution of the tax, and its character and quality when administered.

I am not prepared to say that the change from valued rent to real rent, if in other respects the charge had retained its former character, would of itself have been sufficient for decision of this question. But it is an element in the consideration of the question, and is not without some degree of weight. The assessment under the Poor Law Act is, in my view, quite different from the school-rate. Your Lordship's explanations on this point are most important, and I entirely concur in them. I agree with the Lord Ordinary in holding that the nature of the rate itself is different, and that payment into a fund out of which all charges connected with the execution of the Act of Parliament are to be met—the remuneration of teachers being one of them—is not payment of schoolmaster's salary within the meaning of Lord Seafield's obligation of relief. There is truly no rate or tax exigible under the present law which can be correctly termed a rate or tax for the specific purpose of paying schoolmaster's salary. Since the application of part of the school-rate to that purpose is not a necessary nor a certain application of the rate, it cannot give a character to the rates, which form only part of the general fund. This school-rate, paid in respect of assessment on real rent, is one of several streams which flow into a general fund. The administration of that fund is in the hands of a public board, and it is applied to many purposes, to other purposes than the remuneration of teachers. We know not what part of the entire expenditure for various purposes is met by one of the several streams which form the fund and to attempt in every case where such a question is raised to trace each stream and to eliminate the application of each particular part of the fund seems to me to be out of the question.

I think, accordingly, that we should adhere to the Lord Ordinary's interlocutor.

Lord Mure—In the leading conclusions of this action the pursuer's claim is substantially for relief of the whole school-rates levied upon him. Upon this broad view the claim is untenable, but at the discussion that was limited to the proportion which was contributed out of the rates to the salary of the schoolmaster.

That raises a nice and subtle point. I have come to the same conclusion with your Lordship in the chair and Lord Ardmillan. There has been under the Education Act a total change in the whole incidence of the rate. Under clauses of relief it was easily ascertained what the amount of relief was, but now that cannot be done without investigating what comes from Government grants, what from school fees, and elsewhere, and it is only after that that any rate is levied at all to make up the deficiency in the school fund. That has constituted so great a change in the whole nature of the tax that I do not think, as at present situated, it can have been in the contemplation of parties when the deeds were executed. The observations of the Lord Ordinary on this point are very pertinent, and I concur in the view he has taken.

The Court adhered.

Counsel for Pursuer (Reclaimer) — Guthrie Smith—R. V. Campbell. Agents — Maitland & Lyon, W.S.

Counsel for Defender (Respondent)—Dean of Faculty (Watson) — Kinnear. Agents — Mackenzie, Innes, & Logan, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, March 1.

M'ADAM *v.* KENNEDY LAURIE.

(Before Lords Justice-Clerk, Ardmillan, and Young.)

Crime—Trespass—Statute 2 *and* 3 *Will. IV. c.* 68 *— Game.*

Appeal against a conviction of trespassing in pursuit of game, under the Statute 2 and 3 Will. IV. c. 68 (The Day Trespass Act), *sustained*—the appellant being the manager of, and resident upon, the farm on which he was said to have trespassed, and having been authorised by the tenant, who was his father-in-law, to kill rabbits—the right to kill them not being reserved to the landlord in the lease.

This was an appeal taken from the decision of a Justice of the Peace Court, held at Castle-Douglas in November 1875. A case setting forth the circumstances was prepared by the justices for the opinion of the High Court, in terms of the Summary Prosecutions Appeals (Scotland) Act.

The appellant William M'Adam was charged with an offence under the Day Trespass Act, alleged to have been committed in September 1875 upon the farm of Cullenoch, the property of the respondent William Kennedy Laurie. The appellant denied the charge, but admitted that on the day in question he had killed three rabbits, maintaining, however, that he had a right to do so, as he was the husband of the tenant of the farm, who had given him permission to kill rabbits, or, that if his wife was not herself the tenant, her father was, from whom he also had