quires that they shall do so. On that ground I am of opinion with your Lordships that the interlocutor should be adhered to. Of course the case does not decide, nor does it touch, any question such as was put in the course of the argument, of a company proposing to carry a tunnel through a seam of coal or other mineral belonging to a different owner from the owner of the house and the immediate substratum on which the house rests. Probably in that case, if the seam was not the property of the owner of the house, it would be difficult to maintain that it was part of the house within the meaning of the statute. It would certainly not be carried in property by any conveyance that might be given of the house. Again, as to the case which has been figured in the argument, of a tunnel passing through a hill, I can only say, agreeing with what your Lordship has observed, that such a case as that would probably be a very proper occasion for the Legislature allowing the property necessary for the tunnel to be taken without the ground lying above it. But it appears to me that even in that case if the railway company desired to relieve themselves from the obligation to take the superincumbent ground, they could only do so by having special provisions which would entitle them to take ground in that way. Such special questions as I have now alluded to are however to be considered and dealt with as they arise. On the general question involved in this case I have no difficulty.

The Court pronounced these interlocutors :—

In the case of M'Brayne and Others—"Recal the Lord Ordinary's interlocutor; recal the interim interdict formerly granted; repel the reasons of suspension; refuse the interdict, and decern."

In the case of Gemmel and Others—"Adhere to the interlocutor of Lord M'Laren, and refuse the reclaiming note."

Counsel for M'Brayne and Others—Solicitor-General (Asher, Q.C.) — Dickson. Agents — Paterson, Cameron, & Co., S.S.C.

Counsel for Gemmel—Ure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for The Railway Company—Mackintosh — Murray. Agents — Millar, Robson, & Innes, S.S.C.

Friday, June 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MITCHELL *v.* SCHOOL BOARD OF ELGIN.

School—Schoolmaster—Tenure of Office—Dismissal—Education (Scotland) Act 1872 (35 *and* 36 *Vict., c.* 62), *sec.* 60—*Interdict.*

A teacher in a burgh school appointed prior to the passing of the Education (Scotland) Act 1872 may be removed by the School Board if they are satisfied on reasonable grounds of his incompetency or inefficiency for the discharge of his office.

The School Board of a burgh adopted a resolution that a teacher in the burgh school, which was a higher class public school under Schedule C of the Education (Scotland) Act of 1872, was incompetent, unfit, or inefficient, and thereafter obtained a report from an inspector of schools regarding the teacher and the school. This report declared the teacher to be "incompetent, unfit, or inefficient." The teacher then presented an application to have the School Board interdicted from acting on the report, and from proceeding to dismiss him from his office, on the ground that (1) the proceedings were in the pretended exercise of section 60 of the Education (Scotland) Act 1872, which did not apply to higher class public schools, and that assuming it to apply, the statutory requirements had not been followed; and (2) that the tenure of a burgh schoolmaster appointed prior to 1872 was *ad vitam aut culpam*. Interdict *refused*, on the ground that the School Board, as coming in place of the magistrates and town council of the burgh, had power to dismiss the teacher if they considered there was reasonable cause, and that in forming their opinion they were entitled to take the advice of a competent person.

Opinions reserved as to whether sec. 60 applies to higher class public schools, which are specially dealt with by secs 62 and 63.

The Act 24 and 25 Vict., c. 107 (Parochial and Burgh Schoolmasters (Scotland) Act 1861) provides by section 22—"From and after the passing of this Act it shall not be necessary for any person elected to be a schoolmaster of any burgh school to profess or subscribe the Confession of Faith as the formula of the Church of Scotland, or to profess that he will submit himself to the government and discipline thereof, nor shall any such schoolmaster be subject to the trial, judgment, or censure of the presbytery of the bounds for his sufficiency, qualifications, or deportment in his office, any statute to the contrary notwithstanding." . . .

The 24th section of the Education (Scotland) Act 1872 (35 and 36 Vict. c. 62) provides—"Every burgh school shall be vested in and be under the management of the School Board of the burgh in which the same is situated from and after the election of such School Board, and the said School Board shall thereafter, with respect to school management and the election of teachers, and generally with respect to all powers and duties in regard to such schools now vested in the town council and magistrates or other authorities in whom the school management and the election of the schoolmasters and teachers is at present vested, supersede and come in place of such town council and magistrates or other authorities."

By section 60 of the Education Act of 1872 "any teacher of a public school appointed previously to the passing of this Act may be removed from his office in manner following . . . (sub-section 2)—"If the School Board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector charged with the duty of inspecting such school, and on receiving such report the School

Board may, if they see cause, remove such teacher from office, provided that before proceeding to give judgment on the matter they shall furnish to the teacher a copy of such report, and that a judgment removing the teacher shall not have effect until confirmed by the Board of Education."

Sections 62 and 63 of the same Act relate to higher class public schools, and provide for the standard of qualification of their teachers, their funds and revenues, their relief from the necessity of also supplying primary education, &c. By Schedule C annexed to the Act it is declared that certain schools, including the Elgin Academy, shall be deemed to be higher class public schools to which the provisions of these sections apply. By sub-section 6 of section 62 it is provided that "every such [higher class public] school shall, with reference to the higher branches of knowledge taught therein, be annually examined by examiners appointed and employed for that purpose by the School Board, and in fixing the periods of examination regard shall be had to the reasonable wishes of the headmaster and other teachers, and the expenses incident to such examinations may be paid out of the school fund," &c.

The School Board of the burgh of Elgin having become dissatisfied with John Mitchell, master of the English department of the Elgin Academy, which was a higher class public school in the sense of the Education Act of 1872, on 14th November 1881 declared that they considered him to be "incompetent, unfit, or inefficient, and hereby require a special report regarding his school and himself from Her Majesty's Inspector of Schools charged with the duty of inspecting such school."

Following upon this resolution a report was obtained, dated 4th August 1882, from Dr Charles Wilson, one of Her Majesty's Inspectors of Schools. Dr Wilson was at the time inspector for the Southern Division of Scotland. His report was in the following terms:—"In accordance with the resolution of the School Board of the burgh of Elgin, passed by that Board as follows:—'14*th November* 1881.—The School Board, considering that Mr John Mitchell, English teacher in the Elgin Academy, is incompetent, unfit, or inefficient, hereby require a special report regarding his school and himself from Her Majesty's Inspector charged with the duty of inspecting such school,' And pursuant to instructions received from the Lords of the Committee of the Privy Council on Education in Scotland, I have to report that I inspected the English School in the said Academy on the 8th day of February, and again visited it on the 6th day of June 1882, and that the result of my inspection was as follows:

"The general state of the English School in the Elgin Academy is unsatisfactory, and in pronouncing it to be so I have had regard to the following points:—I found in attendance on the 8th day of February 1882 only twenty-one pupils, *i.e.*, in the first and second or lowest divisions, five children aged from five to seven years; in the fourth division, three children aged from ten to eleven years; and in the fifth division, four pupils aged from thirteen to fifteen years.

"Of these twenty-one children only fourteen were paying pupils, three being children and one a boarder of Mr Mitchell, and three being children of Mr Pattison, another of the teachers in the Academy. In the year 1875-6 the average attendance is certified to have been 147, and in the previous year it stood at 156.

"As a further evidence of the decreasing attendance, I may mention that while at the public examination by Professor Geddes in 1881 there were 88 present, at my examination in 1882 there were only, as stated above, 21 present.

"The pupils were on the date first mentioned examined minutely on the subjects professed, *i.e.*, reading, writing from dictation, grammar, geography, and history, and passed a satisfactory examination, but the range of attainments was limited, and below what one is entitled to expect in the academy or burgh school of such a town as Elgin.

"So far as I could judge from the small number present, the discipline and order were good, and the organisation satisfactory.

"In a word, although the appearance made by the few children present in the school was satisfactory, yet the state of the school, as a higher class school in such a town as Elgin, was unsatisfactory, whether regard be had to the number in attendance or to the extent of the instruction.

"When I visited the school on 6th June 1882 no increase had taken place in the attendance.

"Finding the school so empty, without anything either in the state of the class-room or the appliances for teaching, both of which appeared to be satisfactory, to account for it, it was clear to me that Mr Mitchell had lost the confidence of the community.

"It therefore became necessary to inquire whether there were any circumstances connected with his conduct or character which could explain this evident loss of confidence in him as a teacher.

"On the 7th day of April and the 8th day of June I attended at the Academy, when much evidence was laid before me unfavourable to Mr Mitchell, and also evidence on his behalf. I permitted considerable latitude as to the period over which this evidence extended, because, while I had no right to make any report as to charges against Mr Mitchell of 'immoral conduct, and cruel or improper treatment of the scholars under his charge,' and have therefore entirely disregarded any evidence pointing to such charges which was submitted to me, I, however, deemed it to be incumbent on me not merely to report as to the state of the few scholars I found in his school, but also to investigate what appeared to call for explanation as affecting the question of his general fitness as teacher of the English School in the Elgin Academy.

"As the result of repeated and anxious consideration of this case, I feel compelled to report that I am convinced that Mr Mitchell's general bearing and tone in the school, and the freedom of language which he has permitted himself to use, have been such as adequately to account for the loss of confidence in him as a teacher, and for the manifest failure of his school.

"I think it right to say that in dealing with the case I have dismissed consideration of the differences which have existed between Mr Mitchell and the School Board as to the plans for re-organising the Academy. Mr Mitchell was entitled to protect what he deemed to be his vested interests, and I see nothing in his efforts to do so

to affect his general fitness as a teacher.

"It thus appears that the town of Elgin has suffered, and is still suffering, serious disadvantage in its educational interests from the failure of the English part of the Academy.

"As the result of the said visits of the 8th day of February and the 6th day of June 1882, and of the investigations held on the 7th day of April and the 8th day of June 1882, I have to report:—

"That the teacher Mr John Mitchell is responsible for the unsatisfactory state of the English School in the said Academy, and I therefore declare him to be incompetent, unfit, or inefficient, in accordance with the above resolution of the School Board."

On 18th September 1882 this note of suspension and interdict was presented by Mr Mitchell, in which he sought to have the School Board interdicted "from insisting in the proceedings after mentioned, and from acting upon or following up in any way as a valid and lawful report, under section 60, sub-section 2, of the Education (Scotland) Act 1872, the pretended report on the English School in Elgin Academy and on the complainer, alleged to have been made or granted by Charles E Wilson, one of Her Majesty's Inspectors of Schools, under said section 60, sub-section 2, dated said report 4th August 1882; . . . and, in particular, from proceeding, at a meeting of the respondents to be held on 28th September current, to remove or dismiss the complainer from his office of English teacher in said Academy, and to interdict, prohibit, and discharge the respondents from proceeding at any meeting of the respondents to remove or dismiss the complainer from his said office in respect of, or on the faith of, the said report as a valid and lawful report under said section 60, sub-section 2, and before the respondents have received a valid report in terms of law."

The complainer set forth that he was appointed to his office in 1866, and that for some years thereafter the attendance in his department rapidly increased, but that in 1874, 1875, and 1881 new schools were opened in Elgin which gave a similar education to that provided by the Academy, with the result that the Academy fell off in point of attendance. Two of these schools he alleged to have been set up by the respondents themselves, the fees at one of them being much less than the fees at the Academy. The complainer went on to set forth a number of favourable reports upon his department by Professor Geddes, Dr Donaldson, and others in the years between 1870 and 1878. Thereafter he set forth that the respondents had been anxious that he should retire in order that the Academy might be put in charge of a rector instead of as before, three masters, each at the head of his particular department; that having failed to obtain his retirement on the terms as to retiring allowance they proposed, they had resolved if possible to get rid of him, and had therefore opened the new schools above mentioned to compete with his teaching; and had finally passed the resolution of 14th November 1881 above narrated. In statement 6 he set out sec. 60, sub-sec. 2, of the Education (Scotland) Act 1872, as above quoted, and averred—"The complainer's school being a higher class public school was not entitled to a Parliamentary grant, and was not subject to inspection for that or any other purpose. It had been examined by Her Majesty's Inspectors (though not officially), but none of these officials were charged with the duty of inspecting it." Thereafter he set forth, that following upon the resolution of 14th November 1881 Dr Wilson visited the school on 8th February 1882 in order to inspect and report on the same, and on the complainer. "(Stat. 7) . . . The complainer got no notice from the respondents of the day fixed, and only knew of it through the newspapers a day or two before. It was therefore practically a surprise visit. Dr Wilson found the school in such a condition that he could not report that the complainer was incompetent, unfit, or inefficient, and he verbally stated this to the respondents. (Stat. 8) After Dr Wilson had inspected the school in February, the complainer was on the same day requested to attend a meeting of the respondents, at which were also present Dr Wilson, Mr J. Badenach Nicolson, counsel for the Education Department, and the law-agent to the School Board. Certain statements were then verbally made as to the complainer's character and conduct in school. This was the first time the complainer had heard anything about these matters, or that there was any dissatisfaction whatever with him. Sometime thereafter the complainer received from the respondents' clerk a copy of a letter from Dr Wilson, intimating that he, along with Mr Nicolson, proposed 'to hold the adjourned meeting on Friday the 7th April, at 11 a.m., to enable the School Board to produce any evidence which they may wish to bring forward in support of their charge of unfitness, &c., against Mr Mitchell,' and requesting notice to be given to the complainer. The complainer upon this wrote to Mr Nicolson protesting against the intended proceedings, and asking what precisely were the intentions and objects of the meeting, and also whether Dr Wilson was not *functus* in respect of the inspection of 8th February, and whether the proposed inquiry was competent. To this letter Mr Nicolson replied, stating, *inter alia*, that he could not answer the complainer's questions, as it would be his duty to advise the department and Dr Wilson regarding them. Thereafter the complainer's agent wrote Mr Nicolson asking for a statement which contained the grounds of the charges against the complainer that he might take a copy of it, but this was refused. . . . (Stat. 9) In these circumstances the meeting of 7th April was held. There was no writing containing any charge against the complainer with which he had been made aware except the minute of 14th November, and the only notice he had of the character of the charges in support of which proof was to be led was derived from the few verbal statements made as aforesaid at the meeting after the inspection in February. There were present at the meeting of 7th April Mr Nicolson, Dr Wilson, all the members of the School Board, a law-agent, who is the treasurer of, and at said meeting represented, the respondents; and although the complainer all along protested against the whole proceedings, and intimated that he did not recognise their validity, there were also present the complainer and his law-agent. Mr Nicolson and Dr Wilson made short statements as to the purpose of the meeting, neither of them, however, indicating anything as to the nature of the charges against the com-

plainer, and then the respondents by their law-agent began to examine witnesses. The respondents examined in all 26 witnesses, including the chairman and a majority of the members of the School Board, and several old pupils who had been under the complainer. There was no record or written statement of what was to be proved other than the minute of 14th November 1881 above quoted. None of the witnesses were sworn. Parents were asked to state, and stated, what their children told them, and the children themselves were in many cases not examined. A great deal of other hearsay evidence was also received. The examination of witnesses for the School Board lasted from the morning till 10 o'clock at night. Thereafter the complainer, still protesting against the proceedings, asked to be allowed to lead proof in reply, and the 8th June 1882 was fixed for this purpose. On 6th June Dr Wilson made a surprise visit to the school, and again inspected it. He found the education of the pupils very satisfactory, and the complainer well qualified to teach. On 8th June the complainer examined witnesses in his defence, and having been told by Dr Wilson that the inquiry must be concluded on that day, that was done. As the complainer could not compel the attendance of witnesses, and had not funds to pay the expenses of witnesses from a great distance, he asked Dr Wilson to give a meeting of a few hours in Edinburgh, at which the complainer might adduce evidence of persons there to contradict some of the graver charges against him, and others near Edinburgh on other charges. But Dr Wilson refused to do so. Productions were lodged with Dr Wilson, and argument addressed to him by the agents for the complainer and the respondents. After a delay of two months Dr Wilson issued a report dated 4th August 1882, a copy of which is herewith produced, and which is here held as repeated *brevitatis causa*. Mr Nicolson was also present at the meeting of 8th June. A copy of the notes of evidence is produced herewith so far as the complainer has received these from the respondents. But the evidence of the second day, though asked for, was not received from the respondents till the end of October 1882. (Stat. 10) The evidence led by the respondents, as aforesaid, ranged over a period from 1870 or 1871 down to 1878 or 1879. With very little exception the whole of the evidence led related to charges which could only be competently inquired into in accordance with sub-section 1 of said section 60. There was no competent or relevant evidence whatever led against the complainer's competency, fitness, or efficiency. All this evidence was led without a single one of the charges having been put in writing. Those examined could give no date, or could only state that the events they spoke to took place within a year or two of a certain date. The gravest or more serious charges, however, relate to a date at least nine or ten years ago, and all of them were such as could only be inquired into by the Sheriff under section 60, sub-section 1, of the Act." [This sub-section relates to proceedings before the Sheriff for removal of a teacher on the ground of immoral conduct, or cruel and improper treatment of the scholars under his charge.] The complainer then went on to state that the charges against him were untrue.

After Dr Wilson's report of 4th August was issued, the clerk to the School Board intimated to Mr Mitchell, by a letter dated 5th September 1881, that at a meeting of the School Board to be held on the 28th of September a resolution for his dismissal would be submitted for adoption.

The grounds on which the complainer sought interdict were as follows:—"(Stat. 12) The whole of said proceedings and the said report are illegal and *ultra vires*. The said inquiry was not competent, and the inspector had no power to make any such inquiry. There is no authority for one of H.M. inspectors of schools holding a court of inquiry into the conduct or character of a teacher apart from his professional capacity, and going out of the school to judge a teacher was entirely beyond his functions. It is not the duty or in the power of such an official to receive and adjudicate upon oral or other kind of evidence. . . . There has been a complete disregard of the statutory requirements necessary to entitle the respondents to proceed to remove the complainer under section 60 of the Act 1872, even if it were otherwise competent for them to do so. The conditions prescribed by the statute as necessary to entitle the respondents to propose and consider a motion for the dismissal of the complainer have not been observed."

The respondents pleaded that their actings and those of Dr Wilson having been in accordance with the statute, and in all respects valid and regular, the complainant was not entitled to suspension and interdict as craved.

The other facts of the case relating to the condition of the school, and the negotiations between the complainer and the School Board previous to 14th November 1881, are detailed in the opinion of Lord Mure.

On 27th September 1882 the Lord Ordinary officiating on the Bills (KINNEAR) passed the note and refused interim interdict.

On 28th September 1882, at a special meeting of the School Board, a resolution was agreed to dismissing Mr Mitchell from the office of teacher of the English School in the Elgin Academy, subject to the confirmation of the Scotch Education Department.

On 17th November 1882 the Lord Ordinary (KINNEAR) having heard parties, refused the note of suspension and interdict, and found the complainer liable in expenses.

The complainer reclaimed, and argued—This was a higher class public school under Schedule C of the Education Act of 1872, and therefore the proceedings taken under section 60, sub-section 2, of the Act were incompetent. There was no provision in the Education Act for the inspection of higher class public schools; there was no Parliamentary grant made to them, and inspection and grants had always been regarded as correlative. Dr Wilson was not "charged with the duty" of inspecting the school. Even assuming section 60, sub-section 2, to apply, the statutory procedure had not been followed.—*Morrison* v. *Glenshiel School Board*, May 28, 1875, 2 R. 715; *Macfarlane* v. *Mochrum School Board*, November 9, 1875, 3 R. 88; *Kelso School Board* v. *Hunter*, December 18, 1874, 2 R. 228; *Robb* v. *Logiealmond School Board*, February 5, 1875, 2 R. 417; *Marshall* v. *Ardrossan School Board*, December 10, 1879, 7 R. 359; 41 and 42 Vict. c. 78, sec. 20. The tenure of the complainer's office was *ad vitam aut culpam*, as the rights of teachers appointed

before 1872 were secured by sec. 55.—*Bell* v. *Mylne*, June 15, 1838, 16 S. 1136; *Adam* v. *Inverness Academy*, July 7, 1815, 14 S. 714, *note*; *Gibson* v. *Tain Academy*, March 11, 1836, 14 S. 710; *Presbytery* v. *Magistrates of Elgin*, January 16, 1861, 23 D. 287, Lord Ivory at p. 311; *Strachan* v. *The Magistrates of Montrose*, M. 13,118; Bell's Prin. sec. 2189; *Campbell* v. *Hastie*, M. 13,132—*rev.* April 14, 1772, 2 Paton's App. 277; Third Report of the Education Commissioners for Scotland, p. 229; Sellar's Education Act, 7th ed. p. 213; *White* v. *Haddington School Board*, July 9, 1874, 1 R. 1124.

Argued for the respondents—Assuming section 60, sub-section 2, to be applicable, then there was nothing irregular in the procedure followed by the inspector. If section 60, sub-section 2, did not apply, then section 24 did, and the powers and duties formerly vested in the town council and magistrates were now vested in the School Board. The right of town councils to dismiss burgh schoolmasters on reasonable cause was never seriously controverted; burgh schoolmasters did not hold office *ad vitam aut culpam*. There was sufficient cause here to justify the School Board in dismissing the complainer. —*Strachan* v. *Magistrates of Montrose*; *Campbell* v. *Hastie*; *dictum* of Lord Ivory in *Elgin* case, *supra cit.*; Duncan's Parochial Law, 819; Dunlop's Parochial Law, 531.

At advising—

Lord Mure—The object of the present action is to have the respondents, the School Board of the burgh of Elgin, interdicted from acting on a report made to them on the 4th of August 1882 by Dr Wilson, one of Her Majesty's Inspectors of Schools, with reference to the complainer's position in the English School in Elgin Academy, and in particular from proceeding, at a meeting of the respondents on 28th September 1882, to remove or dismiss the complainer from his office of English teacher in the Academy of Elgin. This application for interdict was presented on the 18th of September 1882, and appointed to be seen and answered. On the answers being lodged and parties heard by the Lord Ordinary on the Bills on the 27th of September, the note was passed, but interdict was then refused. On the 20th of October the record on the passed note was closed, and parties were again appointed to be heard, but it appears from the proceedings that in the meantime, at the meeting of the School Board held on the 28th of September, the respondents unanimously came to a resolution confirming one passed by them on the 14th November 1881, to the effect that the complainer was unfit and inefficient for the discharge of his duties in the Academy, and resolving on that account to dismiss him from the office. Parties having thereafter been heard on the closed record, the interlocutor now under consideration was pronounced on the 17th of November 1882, repelling the reasons of suspension; and the main grounds on which it is sought to have that interlocutor recalled are—First, that it was *ultra vires* and incompetent for the Board to proceed on a report which it is alleged was irregular and disconform to the regulations of the Education Act of 1872; and second, that the respondents have in the circumstances no power at common law to come to a resolution to dismiss the complainer. In dealing with these questions, and more particularly with the second question, it is necessary to keep in view the precise character of the Elgin Academy or school, of which the complainer was a master, and the precise position in which the masters and the School Boards of such a school stand towards each other in the matter of the removal or dismissal of a teacher. The school in question was a burgh school, and at the date of the Education Act of 1872 the election and removal of the schoolmasters of such a school belonged to the magistrates and council of the burgh; for although it was ruled in the case of the *Presbytery of Elgin* on 16th January 1861, to which we were referred in the discussion of this case, that the masters of this school were in some respects subject to the jurisdiction and control of the presbytery of the bounds, the law in that respect was altered and modified by the 22d section of the Act 24 and 25 Vict., c. 107, so that in 1872 the magistrates of the burgh appear to have had the exclusive right of regulating the election and removal of the masters of the burgh schools. The law on this subject, and the extent of the power of the magistrates in these respects is very distinctly laid down by Mr Dunlop in his work on Parochial Law, where he says—"The election of a schoolmaster in royal burghs belongs to the magistrates, who are entitled of their own authority to remove him summarily from his office. They cannot, however, do so arbitrarily and without cause, but to warrant their removing the schoolmaster it is not necessary that he should be guilty of absolute malversation in his office; it is sufficient if they have any reasonable cause such as insufficiency, unsuccessfulness in his mode of teaching, or the like." In support of this proposition Mr Dunlop refers to the cases of *Montrose*, January 18, 1710; and of *Hastie*, June 29, 1769. These decisions as reported, and more particularly that of the case of *Montrose*, appear to me fully to bear out the law as stated in the above passage, and it was given effect to by the House of Lords in disposing of the case of *Hastie* on appeal from this Court in 1772, as reported in Mr Paton's Appeal Cases. Now, the power thus belonging to the magistrates in 1872 has been transferred to the School Board of the burgh. This has been made matter of express enactment by the 24th section of the Act of 1872, which provides with respect to school management, the election of teachers, and generally with respect to all powers and duties in regard to such schools then vested in magistrates, that the same shall be vested in and be under the management of the School Board of the burgh in which the same are situated. Such, then, being the position of the respondents as coming in place of the magistrates and council of the burgh, with the power to remove the master on just and reasonable grounds, the question now raised for decision is, whether there has been anything so unjust and unreasonable in the conduct of the respondents relative to the removal of the complainer as to entitle him to have them interdicted from acting on the opinion they have formed as to their duty in regard to the removing of the complainer from his position as master of the English School in Elgin Academy? Now, the broad leading facts on which the solution of this question depends are not, as it appears to me, in serious dispute between the parties, and are as follow—

The complainer was appointed to his situation as English master in 1866, and matters seem to have gone on for a number of years without any differences, and apparently quite satisfactorily between him and the magistrates of the burgh, and also between him and the School Board after the passing of the Act of 1872. It appears, however, from the statements on the record, that during this period, and more particularly between 1874 and 1880, several new schools were started in Elgin. There was a private school alleged to have been set on foot in 1874, and there was what was called a West End Board School set on foot by the Board in 1875, and another apparently in 1880. Now, coincident with the opening of these different schools there appears to have been some falling of in the number of the pupils attending the Academy, and this led to the attention of the School Board being called to the position of the school, and in particular to the position of the master of the English department. The only written evidence that we have founded on in the record on this subject is a report in 1881 by Professor Geddes of Aberdeen (which is quoted in the answer to the third statement of facts for the complainer), in which he reports that "looking to the general outcome, and comparing the Academy with other schools of a similar character which I have recently examined, I cannot say that the results produced are adequate either in number or quality to the expectations that might be formed as to education in such a populous and influential centre. Besides the general languidness, which is both cause and effect of this inadequacy, there is a lack of concentration, in the absence of harmonious working toward a combined result." He suggests certain remedies in the way of working up for the local examinations, and he thinks that that might have the effect of producing a more satisfactory condition of matters in the school. Now, about this time, or rather before it, it appears from the averments of the complainer that negotiations had been going on between the respondents and the complainer as to some change being effected in the school, during which negotiations proposals were on two occasions made to the complainer by the Board that he should retire upon certain allowances. They made one proposal to that effect in 1880, and there was another made in the year 1881, but both of these were refused by the complainer. It also appears from the statements of the respondents that there was a petition presented to the Board about the year 1880 or 1881 expressing dissatisfaction with the way in which the Academy was carried on, and requesting some inquiry into the matter. The petition stated that a "a general feeling of dissatisfaction with the present state of education in the Academy prompts us to petition the School Board to appoint a rector qualified to teach higher English, also to make any other changes necessary to render it an efficient school for girls as well as boys." Therefore the attention of the Board being in that way again called to the position of the school, they took the matter into consideration, and various notices appear to have been given of resolutions to be proposed at the next meeting of the Board both as to the mathematical master, and also with reference to the complainer. These resolutions do not seem to have been followed up at that time, but on the 14th of November 1881 the following motion was made and unanimously agreed to by the whole members of the Board who were present. It is said to have been a full meeting of the Board, one gentleman only being absent who had not been able to see his way to concur with the other members of the Board. Now, that resolution was this, that "the School Board, considering that Mr John Mitchell, English teacher in the Elgin Academy, is incompetent, unfit, or inefficient, hereby require a special report regarding his school and himself from Her Majesty's inspector of schools charged with the duty of inspecting such school." Now, the Board being by law entrusted with the duty of investigating the conduct of teachers, and of removing these teachers if they think that they are unfit for their situations from inefficiency or incapacity in teaching, were acting within their power in applying for an inspector, or for any qualified person not an inspector—Professor Geddes for example. I presume that a School Board discharging their duties will in such a matter act fairly, according to what comes under their observation as a Board, and if they come to be of that opinion from their own observation, then I think it was within their power to apply for the advice or opinion of a person more skilled perhaps than themselves in examining into the position of the school; it was within their power to call for the advice of such a person to enable them to satisfy themselves that they are right in acting upon the opinion that they have formed. That I think is beyond doubt within the power of the School Board in administering their duties as a Board in the election or in the removal of a schoolmaster. And it shows, moreover, that they were careful and cautious not to take any final step against the complainer until the opinion which they had thus, I assume, honestly formed—it may have been an erroneous opinion, but until the opinion which they had honestly formed—as to the unfitness of this master for the position which he occupied had been confirmed. In fact, it was a remit made by them to ascertain whether they had not been mistaken in the conclusion they had come to. Now, Dr Wilson's report, which your Lordships have before you, in so far as it goes, tends to show that the respondents had good grounds for coming to the conclusion they did; and in the resolution which they came to, following on Dr Wilson's report, the whole of them unanimously came to the conclusion that they were right in the resolution which they had formed at an earlier part of the proceedings; so that they had not only their own unanimous opinion as to the insufficiency of the complainer's qualification to carry on the school, but that opinion had been confirmed by the opinion of a trained and efficient inspector of great experience, who after full inquiry had come to the same conclusion. Now, it being within the power of the School Board, subject to any question of legality or illegality that might be raised in this Court, to remove a teacher on the ground of inefficiency or incapacity to teach, without entering into any question of malversation of office of a more serious description, it appears to me that the application by interdict to prevent them from acting upon the resolution that they came to is one which the Lord Ordinary was right in refusing; and I would suggest to your Lordships that on that ground your Lordships should adhere to the

interlocutor of the Lord Ordinary.

We had a great deal of argument in the course of the discussion as to the precise import of the inspection that is pointed at under the 60th section, sub-division 2, of the Act of Parliament of 1872, and as to whether the way in which Dr Wilson set about making his inquiry and the leading of evidence and adjourning the Court was a proceeding that was contemplated by that provision of the statute. In the view that I take of this case it is not necessary to enter upon this point. If sub-division 2 of section 60 of the Act of Parliament had not been passed I should have been of opinion that it was quite competent and within the power of the School Board to ask for the advice of any of Her Majesty's Inspectors, or of any Professor in Aberdeen—Professor Geddes or anybody else—to advise them as to whether or not they had come to a fair and just conclusion in resolving that the master was incompetent, unfit, or inefficient for the discharge of his duty. Altogether irrespective of sub-division 2 of section 60 of the statute, it was within the power of the Board to take that course; and if the mode in which Dr Wilson instituted his inquiry was not, as has been argued, strictly speaking in terms of that sub-division of the section, I do not think that has any serious bearing on the broad question which is before your Lordships; and in the view I take of it, the School Board was armed with the necessary power, they have taken the right course in this case, and one which they ought not to be interdicted from carrying out.

Lord Deas—This is the case of a teacher of a burgh school, and in regard to burgh schools it is quite clear that the School Board come in place of the magistrates, and have the same powers of dismissal which the magistrates had formerly. This teacher appears to have been regularly dismissed under those powers, and that being so, it is unnecessary to consider whether he might have been dismissed under section 60 of the Education Act. I shall only say upon that subject that it appears to me that it would have been very difficult to say that he might not have been dismissed under sub-section 2 of the 60th section of the Education Act. But it is not necessary to go into that question, and therefore I say nothing more about it except to express the difficulty I would have had, this being a burgh school, in holding that that section did not apply. As it is, I agree with Lord Mure that it is unnecessary, and therefore it is better to say nothing more upon that question than to mention the leaning which I have expressed already. I entirely agree with his Lordship that this schoolmaster has been regularly dismissed as a burgh schoolmaster might have been, and that is quite conclusive of this case.

Lord Shand—I am also of opinion that the judgment of the Lord Ordinary should be adhered to, and that for the reasons which have been so clearly stated by Lord Mure.

It appears to me that the complaint or application presented by the complainer rests upon a mistaken view of his position and rights as one of the masters of the Elgin Academy. The office of a parochial schoolmaster appointed previous to the Education Act of 1872 was held to be a *munus publicum*, and the master so appointed held his office *ad vitam aut culpam*. In the case of dismissal of such a master the proceedings described by the statute are necessary to his being effectually removed or dismissed from office. Accordingly, if the petitioner had been, as he maintains he is, in the position of a parochial schoolmaster, he would have been entitled to raise the question which has been mainly argued in the case as to whether the proceedings under the statute were here properly carried out; and in that view it would have been necessary to decide that question. But I agree with your Lordships in thinking that the petitioner is not in a position to raise that question, and that the Court are not called upon to decide it. The result of the judgments in the case of *Strachan* v. *The Magistrates of Montrose* and the case of *Hastie*, as decided in this Court and in the House of Lords, is that a master of a burgh school, such as the complainer is, does not hold his office *ad vitam aut culpam*. I think Mr Duncan in his book upon Parochial and Ecclesiastical Law has very well stated the result of these cases in a passage in which he says (p. 819) that "the appointment is such as protects its nominee from arbitrary dismissal at the caprice of his employers, but on the other hand renders him liable to dismissal by them when misconduct or incapacity on his part to discharge the duties of the office is proved to their satisfaction,"—that is, to the satisfaction of the magistrates and council if the case had occurred before the Education Act—now to the satisfaction of the School Board, which comes in place of the magistrates and council. That statement of the law seems to me to put the case upon the authorities quite as strongly in favour of the master as it can be put. I confess that I have considerable difficulty in holding that a master in the position of the complainer who does not hold his office *ad vitam aut culpam* has really in substance anything more than a right to reasonable notice before dismissal; for when it is said—and I think that is the result of the authorities—that he is liable to dismissal if incapacity on his part to discharge the duties of the office is proved to the satisfaction of his employers—those from whom he holds his office—that seems to me to be very nearly equivalent to this, that his employers have the power of dismissing him if they think proper, giving him of course always reasonable notice. It seems to be sufficient for the Board to say that they are of opinion that the master is incapable or incompetent, and therefore dismiss him without due notice.

But upon the facts before us, even taking it that it must be proved that there was incapacity or inefficiency made out to the satisfaction of the School Board, there can be no question in this case. The Board minuted their dissatisfaction with the complainer, and their belief in his incapacity to do justice to the school. That I think was of itself sufficient. But the case did not rest there, for they called in the assistance of an independent person—I mean the inspector who was called upon to examine the school and make full inquiry—and the result of his inquiry was that, confirming the view which the School Board had themselves taken, he reported that there was inefficiency or incapacity on the part

of the complainer to perform the duties of the office which he held. I am of opinion that in these circumstances, and having regard to the fact that this was a burgh school, and not one of the parochial schools, the respondents were entitled to dismiss the complainer, and that he is not entitled to the interdict which he here asks.

LORD PRESIDENT—I concur entirely in the opinion of Lord Mure, and I abstain from giving any opinion on the question whether the 60th section of the statute applies to those higher class public schools which are specially dealt with in the 62d and 63d sections, and some of which, including this school of Elgin, are specified in Schedule C attached to the Act. We adhere.

The Court refused the reclaiming-note and adhered to the interlocutor of the Lord Ordinary except as to expenses; found no expenses due either in the Outer or Inner House, in respect the point on which the respondents ultimately succeeded was not stated in their answers.

Counsel for Complainer—Pearson—Dickson. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Respondents — Mackintosh — Guthrie—Orr. Agents—Philip, Laing, & Co., S.S.C.

Friday, June 1.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

PATTISON *v.* MACINDOE AND OTHERS.

Property—Title.

In 1790 the proprietor of the lands of D. disponed a small portion of these lands. Through the lands so disponed there ran the tail-race of a mill which was situated on the lands of B. In 1832 a succeeding proprietor of D. purchased the lands of B., and some months afterwards he reacquired part of the portion of D. previously disponed, which was of small extent, but contained the tail-race already mentioned. Under this proprietor's trust-settlement the estates of B. and D. were destined to different series of heirs, and the heir entitled to the estate of B. claimed the portion formerly belonging to D., and rejoined to it in 1832, on the ground that it had been intended by the proprietor that it should be regarded as a pertinent of B., as being essential to the beneficial use of B., and of no value to the estate of D. He also founded on a charter of *novodamus* granted by the heir who had succeeded to D., and who was superior of his estate of B. *Held* (1), on a construction of the deeds granted by the proprietor of the two estates, that he did not intend to attach to B. the piece of ground in question; (2) that it was not attached to B. by the charter of *novodamus*, and therefore that it belonged to the estate of D.

William Dunn of Duntocher by disposition and deed of settlement in 1830 conveyed his whole estate, heritable and moveable, after his death to Alexander Dunn, his brother. William Dunn was then, and at the time of his death, proprietor of (1) the lands of Dalmuir, which he had acquired in 1828, (2) the superiority of the adjoining lands of Boquhanran acquired in 1826, and (3) the *dominium utile* of Boquhanran acquired in April 1832. This settlement contained a destination (which was to take effect in the event of Alexander Dunn's dying intestate, without heirs of his body, and without altering the destination) by which he provided that his "lands of Mountblow and Dalmuir, and the superiority of that part of the lands of Boquhanran feued out by the late Sir Charles Edmonstone to Edward Collins of Dalmuir, with the feu-duty of three hundred pounds sterling, and casualities of superiority thereto attached, shall fall and devolve to the eldest lawful son of" Mrs Pattison, his niece, whom failing to certain other heirs. He also provided that the residue of his estate, heritable and moveable, should fall and devolve to, and be divided equally or share and share alike among, the whole lawful children of his nieces Mrs Pattison, Mrs Macindoe, and Mrs Black, including and comprehending their eldest sons or daughters who might succeed to the portions of his estates therein specially before mentioned.

The pursuer of the present action, Alexander Dunn Pattison, was the only son of Mrs Pattison.

William Dunn died in 1849, and was succeeded in his whole estates by his brother Alexander Dunn, in virtue of his settlement. Alexander Dunn, who made up his title by service as heir-at-law of William Dunn, died on 15th June 1860, leaving a trust-disposition and settlement dated 11th June of that year, by which he attempted to alter the destination of the lands in favour of Alexander Dunn Pattison contained in William Dunn's settlement, by conveying them to certain trustees. Alexander Dunn's settlement was, at the instance of Alexander Dunn Pattison, so far as affecting his interest in the lands destined to him by William Dunn, reduced *ex capite lecti* by decree of the Court of Session in March 1866 (March 9, 1866, 4 Macph. 555), affirmed by the House of Lords in July 1868 (July 23, 1868, 6 Macph. (H. of L.) 147). In order to make up a title through the heir-at-law of Alexander Dunn, who was under personal obligation as such heir-at-law to make over the lands to him, Alexander Dunn Pattison then raised against William Park of Boquhanran, nephew and heir-at-law of Alexander Dunn, an action of adjudication in implement of the personal obligation incumbent upon him under William Dunn's settlement. In this action he obtained decree in February 1869. The decree of adjudication contained a special description of certain pieces of ground included in the contract of excambion after mentioned.

In or about the year 1790 the company of proprietors of the Forth and Clyde Navigation had acquired from the then proprietor of the lands of Dalmuir certain portions of those lands. The ground so acquired consisted of the part on each side of the canal which had been cut up and used in the formation of its banks, and which