tion according to the only meaning which the words expressing it could bear, because of a difficulty in finding a place of rest and repose for the fee during the subsistence of the liferent.

I have already observed that I think the construction of the survivorship clause (or clause providing for the event of predecease) would have been clear had the subject of the gift been moveable property or mixed property, both heritable and moveable, and need not refer to the authorities, of which the case of *Young* v. *Robertson*, 4 Macq. 314, is now perhaps the chief. That was a case relating to both heritable and moveable estate, and there being a trust, there was, of course, a disposition which did not, however, and could not affect the construction of the survivorship clause. Suppose the testator here had left to his nephew Watson the lands of Bankhead, and also the sum of £10,000, with exactly the same expression of his will in the event of Watson dying without leaving an heir-male of his body, is it doubtful that the event would, on the authority of *Young* v. *Robertson*, have been referred to the death of the liferentrix? or would it have been referred to the death of the testator as to the land, and to that of the liferentrix as to the money?

LORD RUTHERFURD CLARK—I agree with the Lord Ordinary.

By force of the Act of 1868 the will is equivalent to a general conveyance in favour of James Francis Watson. If it were not, it would not affect the heritage of the testator. It is only operative because it is a conveyance or equal to a conveyance. Further, I think that it came into operation from the testator's death. There is no other time assigned. The creation of a liferent and annuities did not postpone the disposition of the fee. These are burdens merely, either on the land or on the fiar. Accordingly, under the will, James Francis Watson on the death of the testator could have made up a feudal title to the lands by expeding a notarial instrument under the Titles to Lands Act. That he did not do so is of no importance, for the will as a general conveyance vested in him a personal fee.

It is said that the clause which declares that on failure of heirs of the body of James Francis Watson "the said lands of Bankhead are to revert back" to John Hamilton, has the effect of suspending the conveyance till the death of the liferenter. I cannot see that it has. The words of the clause seem to imply an immediate fee. For unless such a fee were taken, the lands could not "revert" to Hamilton, and Watson seems to be the only person from whom they could so revert. But I am not disposed to put my judgment on any such narrow ground. I think that the clause is a substitution of Hamilton on the failure of Watson and the heirs of his body. It can be nothing else if we hold that the conveyance took effect on the death of the testator.

If there had been a trust, and if the trustees had been directed to convey on the death of the liferenter, the case would have been different. For in that case it would probably be held that the trustees were bound to convey to a beneficiary who survived the period at which they were directed to convey, and that no interest could vest in anyone who died before that date. But we are here dealing with a direct conveyance, which, unless there be some limitation to the contrary, must come into operation at the testator's death, and as on this view it necessarily created a fee in Watson, the clause in favour of Hamilton can only be a substitution.

I am further of opinion that the substitution was evacuated by the general settlement of James Francis Watson. I need not say more on this head.

LORD TRAYNER — I agree with Lord Rutherfurd Clark.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Pursuer — Dickson — James Reid. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender—Dundas—Kincaid Mackenzie. Agents—Campbell & Smith, S.S.C.

Wednesday, January 31.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACVICAR *v.* SCHOOL BOARD OF KILTEARN.

School—"Old Schoolmaster"—Government Grant—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 55.

An "old schoolmaster" was allowed by the school board to draw the full annual Government grant earned by the school until 1892. In 1888 and 1890 the school board arranged with him that as he was drawing said grant in full he should pay the salaries of certain pupil teachers. In 1892 they intimated to him that in future they proposed to give him only a portion of the Government grant but that they would relieve him of these salaries. His total emoluments continued to exceed those he enjoyed at the passing of the Education Act. In 1893 he brought an action against the school board for payment of the full Government grant received for 1892-93, in which he averred that he was entitled to the same in terms of his appointment and according to the usage of the parish, and further, by virtue of the agreements of 1888 and 1890.

Held that the action fell to be dismissed as irrelevant.

Observed that the only right conferred upon old schoolmasters by the Education Act was to have as their

total emoluments a sum not less than they enjoyed at the passing of the Act, that since then the Government grant was paid not to the schoolmaster, but to the school board, and that the pursuer had failed to set forth any contract between him and the school board under which he could claim to receive such grant.

Donald MacVicar was appointed schoolmaster of the parish of Kiltearn, Rossshire, in 1871, and continued to act as teacher of Kiltearn Public School after the passing of the Education Act 1872. In July 1893 he brought an action against the School Board of Kiltearn for payment of £157, being the whole amount of the Government grant for the year 28th February 1892 to 28th February 1893.

He averred—"(Cond. 2) The emoluments of the pursuer, in terms of his appointment, and according to the usage of the parish, include, besides house and garden—(1) A fixed salary, which, as at his appointment, was at the rate of £35, but was by minute of the School Board of date 3rd June 1873, increased to £50, in respect of the reduction then made in the rate of school fees; (2) the whole school fees; and (3) the whole of the ordinary Government grant earned by and payable to said school. In 1889 the school fees were abolished, and the compensation payable to the pursuer in lieu thereof has not yet been adjusted by the School Board. The pursuer was, since his appointment in 1871 down to 1892, duly paid the said fixed salary and the whole of said ordinary grant. Down to 1889 he also received the whole school fees. The School Board have all along, and down to 1892, acknowledged and acted upon the terms of the pursuer's appointment, and the usage in the parish as above set forth, and by minutes of date 20th August and 11th December 1888 and 25th February 1890, it was specially agreed by the School Board with the pursuer that in respect of the said terms on which the pursuer held office, he should himself provide and pay the necessary monitors and pupil teachers, and he has done so accordingly in the case of two pupil teachers. The currency of the agreements between the School Board and the pursuer relative to these appointments was from 1st February 1889 to 1st February 1893, and from 1st March 1890 to 1st March 1894 respectively. The minutes above mentioned are referred to and founded on."

He admitted he had received £50 as salary for the year, but pleaded—"(1) The pursuer having right to the whole ordinary Government grant earned by the school in virtue of his appointment as condescended on, the defenders are bound to pay the amount thereof. (2) The amount sued for being the whole ordinary grant for the year condescended on, the pursuer is entitled to payment thereof with interest as concluded for. (3) In any event, in respect of the agreements condescended on between the School Board and pursuer relative to the appointment of the pupil-teachers of said school, the pursuer is entitled to decree as concluded for.'

The defenders admitted that the amount of the Government grant was correctly stated, and explained that they had paid to the pursuer out of it £37, 10s., a sum greatly in excess of the amount of Government grant he was receiving at the passing of the Education Act, and had, since Whitsunday 1892, relieved him of the salaries of the pupil teachers.

They pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (2) The defenders not having acted so as to prejudice the pursuer in the emoluments to which he is entitled, they ought to be assoilzied. (3) The defenders not having undertaken to pay to the pursuer the whole Government grant, and, *separatim*, not being bound so to do, the action cannot be maintained. (4) The pursuer's pleas are groundless, and untenable in fact and in law."

The minutes founded on by the pursuer were as follows:—"*20th August* 1888.—The clerk produced a letter dated 18th May 1888 from Mr MacVicar, teacher, making application for two temporary monitors owing to the increase in the average attendance of the school. The Board having gone into the matter, consider that, as Mr MacVicar receives all the annual grant earned by the school, it is not incumbent upon them to appoint salaried temporary monitors, but they are willing to sanction the appointment of such at Mr MacVicar's own expense." "*11th December* 1888.—The chairman reported that he had conferred with Mr MacVicar, and now produced his letter, dated 10th December curt., regarding the appointment of a pupil-teacher. The Board approve of the appointment of Miss Maggie Soutar, Teanord, as recommended by Mr MacVicar—her engagement as pupil-teacher to be for four years, commencing from 1st February next, at a salary of £8 sterling per annum, payable by Mr MacVicar, with a yearly increase of £2 each successive year." "*25th February* 1890.—The clerk also produced a letter from Mr MacVicar dated the 21st inst., recommending Maggie Stewart, Redburn, as a pupil-teacher. The Board approve of the appointment. Her engagement as a pupil-teacher to be for four years, commencing 1st March next, at a salary of £8 sterling per annum, payble by Mr MacVicar, with a yearly increase of £2 sterling, each successive year."

The Education (Scotland) Act 1872 (35 and 36 Vict. c. 62) by sec. 55 enacts that "Subject to the provisions hereinafter contained regarding the removal of the teachers of public schools appointed previously to the passing of the Act, 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." . . .

Upon 16th November 1893 the Lord Ordinary (WELLWOOD) repelled the third plea-in-law for the pursuer in so far as stated as a separate ground of action and before further answer allowed a proof.

"*Opinion.*—As originally framed, the summons was brought to try the general question whether the pursuer, who is an 'old schoolmaster,' is entitled to receive the whole of the Government grant. The sum sued for, £157, 2s., was the amount of the Government grant earned between 28th February 1892 and 28th February 1893. The summons does not contain any declaratory conclusions. But, as I have said, the pursuer's original pleas raised the general question.

"On adjustment, however, the following plea was added—'(3) In any event, in respect of the agreements condescended on between the School Board and the pursuer relative to the appointment of the pupil-teachers of said school, the pursuer is entitled to decree as concluded for.' This plea, if well founded, would be sufficient for the decision of the case although it would not settle the general question. I am of opinion, however, that the arrangement made by the Board with the pursuer as to the appointment and remuneration of the two pupil-teachers is too narrow a foundation on which to build a claim for the whole of the Government grant during the currency of those appointments. The Board relieved the pursuer of his obligation to pay the pupil-teachers before the commencement of the period during which the Government grant sued for was earned, and I do not think they are now barred from disputing the pursuer's claim to the whole of the grant. What happened was simply this. The pursuer asked the Board to appoint additional teachers. They said —'We are willing to do so, but as you are at present drawing the whole of the Government grant you must pay them.' I do not think that this amounts to a contract between the Board and the pursuer, that so long as the appointments of the pupil-teachers continued he should continue to draw the whole of the Government grant, even if he ceased to pay the salaries. I think, that on the School Board undertaking themselves to pay the pupil-teachers, the question as to the pursuer's right to the Government grant became as open as it was before."

The pursuer reclaimed, and argued—(1) It was competent for the School Board to contract with regard to the Government grant—*Somers* v. *School Board of Teviothead*, October 31, 1879, 7 R. 121; *Smith* v. *School Board of Inverary*, December 8, 1891, 19 R. 247. (2) The School Board had throughout recognised that he was entitled to the whole Government grant, but in any case he had set out special agreements to that effect in 1888 and 1890, and was entitled to a proof. (3) Whatever might be his rights in the future, the Board were clearly bound to pay him the whole Government grant for the year now in question, for during that year he was under an obligation to pay the salaries of the pupil-teachers, the counterpart of which was the receiving of the Government grant. The Lord Ordinary was mistaken in saying that he was relieved of these salaries before the commencement of the period during which the Government grant sued for was earned. That relief only operated from Whitsunday 1892.

Argued for defenders—The pursuer had failed to set out a relevant claim to the Government grant; there was nothing to go to proof about, and the action should be dismissed. Any valid claim must be vested either upon his status as an "old schoolmaster" or upon contract, but both grounds failed. (1) As an "old schoolmaster," the holder of a *munus publicum*, he had rights under the 53rd section of the Education Act, but these were simply that he should not be prejudiced or in a worse position as regarded remuneration than he had been before. He had no claim to the Government grant as such, which after the passing of the Act was not paid to the schoolmaster but to the School Board to be administered by them—*Grant* v. *Glenmoriston School Board*, March 17, 1886, 13 R. 783. If he had received it until 1892, that must have been because the School Board thought that was the best use to which it could be put. He could not suggest that his emoluments were less than in 1872. (2) There was no general contract averred here with regard to the Government grant. In that respect this case was in marked contrast with those relied on by the pursuer. The mere fact that he had year after year received the Government grant created no right in his favour against the School Board. (3) There was no special contract constituted by the minutes referred to. As long as he in fact got the grant it was necessary he should pay the pupil-teachers, but to be logical he should have said "You must raise money for the pupil-teachers for I have an unqualified right to the whole Government grant." Was an obligation to pay some £20 of salary to be founded on as giving him a right to the whole Government grant of £157? If he was in any way prejudiced by the new arrangement as to pupil-teachers coming into effect during their term of engagement, he would have an action for compensation against the School Board, but not a claim to the whole Government grant.

At advising—

Lord President—I think that we are in a position to dispose of this action finally now, and I am of opinion that the pursuer's case fails on both the grounds which are stated. I agree with the Lord Advocate that the proper order in which to consider the pursuer's case, even for the purpose of estimating the alternative case which he presents in the third plea, is to ascertain first of all what are the original rights which he asserts himself to have possessed. Now this much is plain, that he has not set out on record any new contract or any innovation upon his rights during the period of the administration of the School Board beginning with its formation in 1872 down to the events of 1888 and 1890. He says that in terms of his appointment and according to the usage of the parish his emoluments included salary, fees, and the "whole of the ordinary Government grant earned by and payable to said school."

Now, these last words seem to contain a fallacy. They certainly cannot represent—he does not profess to represent—that those are the words of his appointment. I think we must read this as an averment that when he was appointed in 1871 he was entitled to the salary, fees, and the existing Government grant, which as we know was voted by Parliament to the schoolmaster of a particular parish. Well, from that time onwards down to the period in dispute, the course of events, no doubt, was that the Board suffered him to receive a grant which was payable in terms of the orders of Parliament not to him but to them. They allowed a system of administration to go on about which it is not necessary to say more than that it is not in exact conformity with the relative rights and duties of the School Board and schoolmaster. The schoolmaster was allowed during that period to act as if he was the head of an enterprise school, accountable to them only for the successful administration of the school, which, nominally as they treated it, but really in point of law, was under their control. But the important point, as it seems to me, is the negative one that from the time when the heritors appointed him, down to the period in dispute, the School Board did not enter into any contract with this gentleman at all. The only act alleged in this record to have been done by them is the increase of his salary, which has no bearing on the question.

Well, then, what was his position, say in 1888? He had no contract with the School Board, but had certain statutory rights secured to him by the Statute of 1872, and these may be stated shortly as the right to receive an equivalent in money of the total emoluments he held at his original appointment. Now, certain letters and minutes are referred to, which go no further than proving that that state of matters existed *de facto*. This gentleman was receiving the whole of the grant, and the School Board naturally looked to him to bear the burdens effeiring to the person, whoever he might be, who received the grant. But I cannot discover in these papers anything beyond the recognition of that fact, and cannot discover any act done by the School Board by which that system, which I think was not normal and scarcely legal, was stereotyped and imposed on them as matter of contract. Then, when we come to the period of 1888, it is important to observe what the pursuer's case on record is. He founds on certain specific minutes which primarily and directly relate to an increase of the staff of the School; and it is only indirectly that they bear on his own rights. Now, if he had said that there was an antecedent contract of which this transaction furnished evidence I could have understood his case, but he says this transaction about the pupil-teachers was itself a contract relating to the future appropriation of this grant. I cannot assent to this view. The situation may be illustrated in this way. Suppose a new school board had come into office the moment after this minute was passed, I think it is quite clear it would have been within their powers, and probably part of their duty, to say—"We are the recipients—the statutory recipients—of this Parliamentary grant; it has not been assigned away; it is questionable whether it could be; but we shall from henceforth ourselves receive the grant, make the pupil-teachers take their proper place under us, and we shall be their paymasters, relegating the master to his rights." Supposing that had been done at the critical period of April 1892, the schoolmaster might have had a grievance which might be represented thus. He would say—"From February down till now I have been acting on the assumption that the money was to come into my hands." Well, I think the answer of the Lord Advocate is conclusive, that assuming such a grievance to exist, the remedy for it is not a claim for payment of the grant, but a claim for compensation, and the only measure of compensation allowed is the difference between what he actually got and the *quantum* of his emoluments in 1872. Therefore I think the case on the second branch is unsound in fact and in law, and it appears to me that we are in a position to dispose of this case without proof. The parties table the minutes which form the contract which we are asked to enforce, and there are not averments that would extend or develop the scope of inquiry beyond these documents. I therefore think that we should recal the Lord Ordinary's interlocutor and dismiss the action.

LORD ADAM—I am of the same opinion. By the interlocutor under review the Lord Ordinary does two things—he "repels the third plea-in-law for the pursuer in so far as stated as a separate ground of action; and before further answer allows the pursuer a proof of his averments, and to the defenders a conjunct probation." The pursuer objects to the first finding of the Lord Ordinary's interlocutor, and the defenders object to the second finding, so that neither party is agreed on this judgment. I agree with your Lordship that the first question is that raised by the Lord Advocate—whether or no there is anything to go to proof—and I also agree that there is nothing to go to proof. The averments which are supposed to require proof apart from the special agreement founded on in 1888 are these—"The emoluments of the pursuer in terms of his appointment and according to the usage of the parish include, besides house and garden, (1) a fixed salary" and so on. What is there to go to proof there? There is no averment of agreement or contract at the date of his appointment—nothing said of such an agreement; and if you look at the pleas-in-law to elucidate the averments on the record, the first plea-in-law is this—"The pursuer having right to the whole ordinary Government grant earned by the school, in virtue of his appointment as condescended on." What does that mean? It means—"in virtue of my being public schoolmaster, in virtue of my

being appointed before 1872, I have certain rights," and one of these rights he says is a right to the ordinary Government grant. Well, as the Lord Advocate said, we would require to know what followed upon the appointment of public schoolmaster before 1872, and we know, as your Lordship has said, that before 1872 these school grants were voted directly to the teachers by Parliament, and in 1872 that was changed and this grant was appropriated by the School Board for School Board purposes. Now, why, how, or in what manner in virtue of his appointment as schoolmaster did this pursuer acquire right, as he says he acquired it, to the ordinary Government grant? I think he had no such right. If that be so, as I think it was, when we come to consider the second part of the case—the alleged special agreement contained in the minutes of 20th August and 11th December 1888, and 25th February 1890—do we find any agreement here in which the School Board agreed that during the currency of this appointment or in all future time, he, the schoolmaster, should have what he never had before, the right to all the ordinary Government grant? I do not think any contract could be spelt out of these minutes and documents. It humbly appears to me that the view of the Lord Advocate is the right view as to the minute of 20th August on which he founds. The whole matter comes to this—the schoolmaster being *de facto* by a voluntary allowance in possession of the whole of the school grant it is right and proper that if he wants assistants he must pay for them. I can spell nothing else out of the minutes and letters than that; and if that is the state of matters, I agree with your Lordship that our course is to dismiss the action.

LORD M'LAREN—It appears to me that the foundation of the arguments and of any view which can be taken in this case must be the 55th section of the Education (Scotland) Act of 1872. That section provides that a schoolmaster appointed prior to the passing of the Act shall not, in respect of emoluments as by law, contract, or usage secured to or enjoyed by him at the passing of the Act, be prejudiced by any of the provisions of the Act. Now, when an Act of Parliament dealing with pecuniary rights states that a person having a vested right shall not be prejudiced by a new arrangement, that would seem to me, *prima facie*, to mean that his emoluments shall not be cut down, that he shall be entitled to the same sum in pounds, shillings, and pence of which he was in receipt before the passing of the Act, neither more nor less. That is the view which was taken of the construction of the statute by the other Division of the Court in the case of *Grant* v. *Glenmoriston*—a view with which I entirely agree—and it is confirmed by this other consideration, that as regards the school grant—the Government grant for schools—the right of the schoolmaster prior to the passing of the Act in 1872 was a right quite different from anything that he can have in the grants voted by Parliament subsequent to that time. Prior to 1872 the grant was a grant in aid of the schoolmaster or teacher payable directly to himself upon a certificate of his exertions in teaching, but the grant now is a grant to the School Board to be applied in their discretion and according to the purposes of the Act. One result of this change is that a schoolmaster appointed prior to 1872 can no longer receive as in his own right the grant which he was previously in the enjoyment of. His right is to receive out of the school funds an equivalent of the emoluments of office—a sum equal to what he was receiving previously out of the Government grant, together with all the other elements that make up the emoluments of his office. That being so, I should have thought, apart from decisions, that it would not be a fair administration of school funds that a School Board should enter into an agreement with a schoolmaster to pay him the whole Government grant during his life. I shall not readily presume a contract of that kind, because I must say I do not think it would be a fair administration of the money voted by Parliament, that a School Board should part with the control of its public funds, and instead of being free to apply it in the appointment and payment of additional teachers when necessary, should be bound down to pay the whole of it to one man for the rest of his life. But that is the hypothesis of the pursuer's action, that the defenders, undertake to pay him the whole of that public fund. I see no evidence of such a contract, and no relevant averments of such a contract capable of being a proper subject of an order for proof. The averment in condescendence 2 really amounts to no more than this, that since the passing of the Act of 1872 the pursuer has been in receipt of the Government grant by voluntary concession on the part of the School Board. That may have been in their judgment the best thing they could do with the money, but the part payment by no means binds them to continue the arrangement if circumstances have altered, and if they now find it desirable to make a re-arrangement of the burdens affecting the school fund.

When we come to the alleged special agreement, I agree with the Lord Ordinary that the letters founded on do not amount to an agreement to pay the schoolmaster the Government grant even for the limited period of four years. It appears to me that those letters are wanting in the elements of contract between the schoolmaster and the Board, and it is consistent with the terms of the letters and the evident intention of parties that the letters meant nothing more than this, that so long as the schoolmaster was in receipt of the Government grant (being the fund out of which pupil teachers ought to be paid), he undertook to make payment of their salaries. That was the motive of the letters; that was the matter out of which the correspondence originated; and there is nothing in the correspondence tending

to show that the negotiations ever passed into a new phase involving a contract with the schoolmaster, giving him a right to the continuance of the sum he had previously been receiving. Matters seem to have proceeded on the old footing—that is to say, the payment depended on the pleasure of the School Board, and could be terminated by the Board without notice whenever they thought proper, in the exercise of their trust, to make a different disposal of their fund. I therefore agree that the action should be dismissed.

LORD KINNEAR—I am of the same opinion. I think with your Lordships that there is no relevant case on record of any specific contract either with the heritors before the passing of the 1872 Act or with the School Board afterwards, which can give the pursuer a claim to the Government grant. The pursuer says that in terms of his appointment he was entitled to certain emoluments, the first of which is a fixed salary of £35 a-year. Now, that might, of course, mean that the heritors agreed to give him a salary which was fixed at that time. If there were any question about his claim for salary, I do not suppose that anybody would dispute that there is a clear and sufficient averment to that effect, although he does not condescend on the specific terms of the agreement which is implied in that statement. But then when he goes on to say that by the terms of his contract and by usage he was entitled to the ordinary Government grant in addition to this salary, I think it becomes incumbent on him to make a much more specific averment of the terms of the contract, if he means to allege that it was by contract that he acquired a right of that kind. I do not myself see at present how it could be possible for the heritors to give him an absolute right to a future Parliamentary grant, irrespective of the terms of the statute by which it should be conferred. But if it was part of his case that such right had been really vested in him in virtue of his agreement with them, I think it was incumbent on him to make a specific averment to that effect. It might very well happen that when a parish schoolmaster was appointed before the passing of the Act of 1872, the heritors might hold out to him the prospect that his emoluments would include the Government grant, but then the Government grant at the time was voted directly by Parliament to the schoolmaster himself, and as the heritors had no power whatever to procure or administer the grant, such an intimation could not mean anything more than this, that whatever grant Parliament might think fit to give him should be over and above the salary and fees which the heritors undertook he should receive. In short, the contract of the heritors must always have been for a remuneration within their power; and, on the other hand, the schoolmaster's claim to the Government grant depended entirely on the will and pleasure of Parliament exercised in his own favour personally and individually. Therefore I agree that there is no relevant averment that at the passing of the Act of 1872 this gentleman had an absolute right by contract with the heritors to continued payment of any Government grant.

Well, then, after the Act passed, there is no averment at all of any contract with the School Board, by which it can be alleged that they gave him the grant prior to the averment with reference to the arrangement about the pupil teachers in 1888. When the Act passed there can be no question that it became the right and duty of the School Board to administer the grant, which was no longer made to the schoolmaster himself but paid into the school funds, and the distribution of which is a duty with which they are charged, and therefore it was for them to determine whether the whole of the grant should be paid to the teacher, or, if not, what proportion should be paid to him. The only qualification upon that right which the Act creates in favour of a schoolmaster—I mean in favour of a schoolmaster holding office before the Act came into force—is, that his emoluments prior to the Act should not be prejudiced, and therefore if the School Board chose to give him a smaller proportion of the Government grant than he had been in use to receive previously without increasing his emoluments in other respects, he would have a claim for compensation under the 55th section of the statute. But it is not alleged that any claim arises to the pursuer in this action, because the amount of income he is now receiving exceeds his total income prior to the passing of the Act. Now, if there be no contract with the School Board prior to the minutes of 1888, I entirely agree with your Lordships that it is impossible to spell any contract out of these minutes. If the schoolmaster had up to that time an absolute right to the Government grant, then I should have no difficulty in reading the minutes as meaning this, that he undertook to pay a certain proportion of the grant to which he was entitled to the pupil-teachers, and that the School Board had bargained with him that in respect of that agreement they would appoint pupil-teachers as his assistants, and otherwise they would not. But then that agreement depends entirely on his being able to establish that he had that anteeedent right with which the Board could not interfere unless he chose, and therefore that he was in a position to make stipulations in regard thereto. As he had no such prior right, it appears to me to come to nothing more than this, that the School Board assented to his proposal that pupil-teachers should be appointed, and that inasmuch as he is in receipt of the Parliamentary school grant, he must undertake to pay the pupil-teachers out of the sum so received.

I therefore agree with your Lordships that there is no relevant averment to be sent to proof, and that the action should be dismissed.

The Court recalled the Lord Ordinary's interlocutor, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Reclaimer—Dickson—Clyde. Agents—J. & A. Hastie, Solicitors.

Counsel for the Defenders and Respondents — Lord Advocate Balfour, Q.C. — Sym. Agents — Coventry & Roberton, W.S.

Thursday, February 1.

SECOND DIVISION.

(Before Seven Judges).

[Lord Kyllachy, Ordinary.

PHILP *v.* MARTIN.

Executor — Property — Goodwill of Going Business—Act 9 Geo. IV. cap. 28.

A wine and spirit merchant having died intestate on 7th December 1891, his widow continued the business in her husband's name, using for that purpose the existing stock, shop fittings, &c. On 16th February 1892 she obtained a transfer of the licence to her own name, the magistrates preferring her application to that of the executor-dative *qua* next-of-kin of her husband. From that time the business was carried on in her name by her till her death, and thereafter by her executor until the expiry of the licence in May 1892. Her executor then sold the business, goodwill, stock, and fittings for £1500, of which he paid £250 to the heir-at-law in satisfaction of all his claims.

The husband's executor sued the widow's executor for an account of all intromissions with the estate had by (1) the widow and (2) the defender.

Held by a majority (1) that the profits of the business between the death of the husband and the transfer of the licence belonged to the pursuer; beyond that date that the profits belonged to the widow and her executor; (2) that the defender was entitled to the price of the goodwill—*diss.* Lord Trayner and the Lord Justice-Clerk, who were of opinion (1) that the profits derived from the business during the existence of the licence were due to the pursuer as derived solely from the husband's estate; (2) that so far as goodwill attached to the premises, the heir-at-law had received it; the remainder attached to the business, and the pursuer was entitled to the price of the business including the goodwill.

The Act 9 Geo. IV. cap. 58, provides—"Sec. 19. Provided always and be it enacted that if any person duly authorised to keep a common inn, alehouse, or victualling house as aforesaid, shall die before the expiration of the certificate to him or her in that behalf granted, it shall be lawful for any two or more of the justices of the peace or magistrates of the county or royal burgh respectively in which such house or premises are situated, to grant to the executors, representatives, or disponees of the person so dying, and who shall be possessed of such house or premises, a transfer of the certificate to keep or continue such house or premises as a common inn, alehouse, or victualling house, as before such death, until next general or district meeting to be held under the authority of this Act."

John Henderson Philp having in November 1875 married Mrs Jeannie French or Philp, proprietor of a wine and spirit business in Glasgow, the licence was transferred to him. Philp died on 7th December 1891, intestate and childless, survived by his widow, his mother, three brothers, and one sister. His widow took possession of all his moveable property, and also of the wine and spirit business, which she continued to carry on. Upon 16th February 1892 she applied to the magistrates for transfer of the existing licence to herself. This application was opposed by Thomas Philp, writer, Glasgow, executor-dative *qua* next-of-kin of the deceased John Philp, but the transfer was granted. Mrs Philp died on 23rd February 1892, having by her settlement appointed Matthew Martin, Glasgow, her sole executor and universal legatee.

Upon her death Martin took possession of all the moveable property, and also of the wine and spirit business which he carried on, and of which he retained the profits till 16th May 1892, the date of the expiry of John Philp's transferred licence. He then sold the business and goodwill, stock and fittings, to Thomas Logan, Pollockshaws, for £1500, of which he paid £250 to Arthur Philp, heir-at-law of the deceased John Henderson Philp, and proprietor of the public-house premises, in satisfaction of all his claims as heir-at-law and in consideration of his granting and accepting the purchaser of the goodwill as tenant for seven years at a yearly rent of £45.

Upon 19th July 1892 Thomas Philp brought an action against Matthew Martin for an account of the intromissions with Philp's estate, first by the widow and afterwards by the defender.

The pursuer averred—"(Cond. 6) The said Mrs Jeannie French or Philp immediately after the death of the said John Henderson Philp, without any title, and before confirmation of the executor as aforesaid, at once took possession of the said deceased's wine and spirit business, and continued to carry on the business till the date of her death on the 23rd February 1892. She retained the profits of said business, and refused to account therefor to the pursuer, as executor aforesaid. The profits of said business amounted on the average to at least £6 per week. (Cond. 7) Immediately after the death of the said Mrs Jeannie French or Philp, the defender, as her sole executor and universal legatee, entered into possesion of her estate. . . . He also entered into possession of the said wine and spirit business, and carried it on and retained the profits till the 16th May 1892, when he sold the business without the authority of the pursuer, as executor aforesaid. The defender retains the sums realised by the