text than as amounting to separable and separate instances of holding up the pursuer to hatred and contempt. But if there was room for doubt as to the correctness of Lord Hunter's decision the pursuer should have taken a reclaiming note and tried to get other issues—issues of slander or whatever he thought fit. He did not do so, and I think it is too late for him to do so now. I feel satisfied that the position taken by the Lord Ordinary was quite sound and that no injustice is being done to this young man.

LORD SALVESEN—I am of the same opinion. The issues here were modelled on those settled by the First Division in the case of *Paterson* v. *Welch*, 20 R. 744. Now the essence of that case is that, under certain very exceptional circumstances, falsely to attribute to a person the utterance of unpopular sentiments or opinions may constitute an actionable wrong. But then it is essential if the pursuer is to succeed that he shall show that the statements that were attributed to him were falsely so attributed.

Now here the defender said in substance, "All that you say I falsely attributed to you was actually uttered by you," and the issues were adjusted upon that footing. And the counter issue really raised the substantial question, viz., Whether the pursuer had said these things which he says were falsely attributed to him. No doubt, in addition, there were comments by the defender with regard to the pursuer on the assumption that he had made these statements—comments which might have been, perhaps, more moderately expressed, but which certainly were expressed with reference to the sentiments and not with reference to the private character of the pursuer.

The jury having found that the statements which the defender made with regard to the pursuer had been actually made by the pursuer, and having, as I take it, necessarily found that they justified the comments, it seems to me that the Judge was quite right in entering up the verdict for the defender. At all events no exception seems to have been taken to that course. The particular exceptions which were taken and which are embodied in this bill were exceptions which, if there was anything in them, ought to have been taken at an earlier stage, as Lord Dundas has said, and not after the trial of the case.

Accordingly I agree with your Lordship that we must refuse this bill of exceptions.

LORD GUTHRIE—I concur. I agree with your Lordships that it is enough to hold—as the Lord Ordinary rightly held, in my opinion—that the counter issue if found proved would justify the charges contained in the pursuer's issues by establishing their substantial truth.

LORD HUNTER—I concur. At the time when I heard argument upon the adjustment of issues in this case I indicated to the parties that in my view there was no room for allowing an issue for slander as slander is understood in the ordinary sense of the term. At the same time I did not think I could, in virtue of the decision in *Paterson* v. *Welch*, 20 R. 744, refuse issues framed in the terms settled in that case. The essence of such an issue, as I understand it, is that the defender has falsely ascribed to the pursuer odious or unpopular sentiments, and that he has done that and is proved to have done it with the design and with the result of holding the pursuer up to public contempt.

So far as I know, in no previous case in which an issue in such terms has been allowed has a counter issue also been allowed, and whether it is necessary to have a counter issue may be a matter of doubt. But be that as it may, it appeared to me that in a case like the present it was extremely desirable that there should be a counter issue, and that because when a case is before a jury it is impossible for a judge to restrain counsel from straying into matters which are unessential and immaterial. I considered that the best way to prevent an inconclusive result of the trial was to have the jury's attention very strictly directed to the essentials of the case. Those essentials were in the counter issue, which, in my opinion, fully countered the whole issues of the pursuer. That meant, if the defender succeeded in satisfying the jury as to the truth of his counter issue, that the pursuer could not succeed.

At the time of the discussion I indicated to the pursuer that that was my view, and that that was the course I would take at the trial. If therefore any objection was to be taken to that mode of procedure it should have been taken then. But apart altogether from the question whether or not the objection was timeously urged, I remain of opinion that this counter issue did effectually counter the whole of the issues of the pursuer, and I have not in any way altered the views which I then held.

The Court refused the bill.

Counsel for the Pursuer—Ingram. Agents—Allan-Lowson & Hood, S.S.C.

Counsel for the Defender—The Solicitor-General (Morison, K.C.)—Greenhill. Agents—Campbell & Smith, S.S.C.

Thursday, January 25.

SECOND DIVISION.

[Sheriff Court at Perth.

PERTH SCHOOL BOARD *v.* HENDERSON.

School—Board School—Powers of Board in Regard to Fees—Differentiation between Pupils—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 53.

Two schools having been amalgamated, the school board fixed a common scale of fees for the combined school which was lower in the one case and higher in the other than the previous scales. It, however, in the case where the new scale was higher charged these

pupils who had commenced their education at that school on the old scale of fees. *Held* that the school board was vested with powers which entitled it to make such a discrimination.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sec. 53, enacts — "The school board shall, subject to the provisions hereinafter contained with respect to higher class public schools, fix the school fees to be paid for attendance at each school under their management, and such fees shall be paid to the treasurer of the board. . . ."

The School Board of Perth, *pursuers*, brought an action in the Sheriff Court of Perth against the Rev. John William Henderson, Kinnoull Manse, Perth, *defender*, for recovery of the sum of £1, 15s., being the amount of certain school fees for the instruction of his pupil children at Perth Academy and Sharp's Institution School during the second quarter of session 1915-16.

The *facts* of the case are set forth *infra* in the Sheriff's note.

The defender pleaded, *inter alia*—"3. In respect that the imposition of the scale of fees on which the defender is charged is in violation of and contrary to the power possessed by and the duty imposed on them to fix and charge fees under the Education Acts, and in particular to section 53 of the Education (Scotland) Act 1872, and in any event constitutes an illegal and undue preference under said section and at common law, such imposition of fees on the defender is illegal and *ultra vires* of the pursuers, and decree of dismissal or absolvitor should be granted with expenses. . . . 6. The defender having tendered the sums payable by him according to the only scale of fees competently fixed by the pursuers, he should be assoilzied with expenses."

On 29th July 1916 the Sheriff-Substitute (SYM) allowed parties a proof.

The pursuers having appealed, the Sheriff (JOHNSTON) on 9th October 1916 pronounced this interlocutor—"The Sheriff sustains the appeal: Recals the Sheriff-Substitute's interlocutor of 29th July 1916: Finds—1. That the defender sent two of his children for the second quarter, 1915-16, to the school which at present is being conducted by the pursuers as Perth Academy and Sharp's Institution combined, and which was known to defender to be a fee-paying school; 2. That the fees sued for are the ordinary fees charged at the school to all pupils in the respective classes other than those who before the two schools were united for working purposes attended Sharp's school; 3. That the amount of the fees are usual, reasonable, and proper for a school of the kind; 4. That the defender is liable in payment of these fees to the pursuers: Decerns against the defender for payment to the pursuers of the sum sued for: Finds the pursuers entitled to expenses on the higher scale," &c.

Note.—"Neither party to this case is desirous of entering into the proof which has been allowed by the learned Sheriff-Substitute. I am disposed to think that a proof would not advance matters, and that for the following reasons:—If the fees charged were legal, then the defender, who sent his children to the school, is bound to pay them. If they were illegal, the defender by sending his children to the school did not render himself liable to pay them, even though he sent the children in the knowledge that the pursuers proposed to attempt to levy these fees. . . .

"Perth Academy and Sharp's Institution were both higher grade schools with primary branches, under the control of the School Board or statutory committees connected with it. In the summer of 1915 it was resolved to amalgamate the two schools. That was publicly announced, and whether approved of or not it was universally accepted and arrangements were completed and announced for managing the two schools as one. Certain of the necessary arrangements in connection with this amalgamation required Parliamentary sanction, and a Provisional Order was framed for the purpose. This Order has not yet been obtained, and therefore it is not perhaps accurate to describe what was done in 1915 as an amalgamation of the schools. It may properly, however, I think be described as an arrangement to work and manage the two schools as one school with a primary and a secondary branch pending the Parliamentary sanction of complete amalgamation. The two schools were *de facto* united as one school with one staff. To this school defender sent his children, and for the purpose of the present action I do not think it is necessary to consider whether the pursuers went rather too far in anticipating the action of Parliament. I treat the two schools as amalgamated for working purposes in 1915. It was necessary for the pursuers to fix fees for the combined school. The Academy fees were higher than those of Sharp's, and the fees at Sharp's were lower than what it seemed to the Board to be proper to make the ordinary rates in future. What they did was to fix for the primary classes in the combined school rates slightly lower than the old Academy rates, but considerably higher than the old Sharp's rates. There was this proviso, however—and *Eheu hinc illæ lacrymæ!*—that children who had already begun their course at Sharp's should be allowed to finish their course at the combined school at the old rates. Apparently in the view of the pursuers there were two reasons for this. Sharp's had valuable endowments which were to go to the good of the combined school. Although no doubt these endowments were dedicated to the secondary, not the primary, branch of the school, still the amalgamation of the one branch was consequential on the amalgamation of the other. The Academy would not have taken Sharp's secondary but for the endowments, and the taking of the secondary involved the taking of the primary. It seemed to the Board, whether rightly or wrongly I do not know, that it would be a grievance to those already associated with Sharp's as their children's school, if whilst their institution enriched the Academy they had in consequence to pay more for the education of their children. The other reason for the differentia-

tion was that these parents, or at least a number of them—and individual discrimination was impossible—had sent their children to Sharp's (possibly after deliberately counting the cost) in the reasonable belief that they would be able to complete their education at certain rates. Now I am not called upon to say whether these reasons seem to me to be convincing or the decision a wise one. At all events it was not a corrupt or capricious resolution, but was one to which an honest and sensible body of men desirous to act fairly and justly might reasonably have come. If the resolution had been corrupt or capricious it would have been illegal, but it does not follow that because it was neither the one nor the other it was within the powers of the Board. It was conceded by Mr Logan, I think, that so far as this branch of the case is concerned the question is the same as if, apart from any amalgamation, a School Board resolved that the fees at a certain school should be raised, but that those who had already begun their course should be allowed to complete it at the old rate. This was recently done in the case of the High School of Edinburgh. Is such an arrangement illegal? I am opinion that it is not. The statutes seem from the first to have given the Board a very free hand as regards fees. They may, and might since 1872, have different rates for similar instruction in different schools, they may charge fees in some classes and not in others in the same school, they may have fee-paying schools or not as they think proper. Now on the best consideration I can give of the matter it does not appear to me that it would be an undue stretching of the undoubted power of a Board to raise the fees if they were to qualify the scale by a provision that it should come into operation only as new children came into the school, and that those already in the school should be allowed to complete their courses at the old rates. I quite accept the contention that a public board cannot treat one set of persons more favourably than another set of persons whose circumstances in relation to the matter in hand are exactly the same. But here the circumstances are not the same. One set had, and the other set had not, entered their children at Sharp's before the new scale was introduced. That is a ground of discrimination to which a reasonable body of men might give effect without arbitrary favouritism, caprice, or corruption.

"There is no complaint that the fees here sued for are exorbitant. Indeed, defender and those who now act with him were quite content with the fees until they found out that the children formerly at Sharp's were being allowed to continue at the old rates. It was only then that clamour arose, as great apparently (and I am bound to say, as it strikes me, with less provocation) as the clamour which arose among the all-day labourers in the vineyard when they discovered that the pay which they had bargained for, and with which they had been quite content, was being given to others for a shorter day's work. I had a great deal of argument on the question of contract. I do not think it necessary however to consider that matter in detail. I think it clear that under whatever category the obligation be placed a parent who sends his children to a fee-paying school in the knowledge that it is such is liable in the fees charged provided they are not extortionate or unreasonable.

"Even on the assumption that the Board acted *ultra vires* in making a concession from what was fixed as the ordinary rate in favour of those who had been at Sharp's before, I have doubts as to whether this is a good answer to their demand for fees which are admittedly reasonable. I should have some hesitation in treating the fixing of the fees in a school as on the same footing as a resolution of a public body to impose a rate where a flaw in one particular may render the whole assessment null. This question, however, in the view I take, it is not necessary for me to decide.

"If I have not referred in detail to the many cases cited for the defender it is not because I have failed to appreciate the exceedingly able argument with which his case was supported by Mr Logan."

The defender appealed, and argued—The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sec. 53, was the statutory enactment which entitled the School Board to charge fees, but these must be charged to all the pupils equally. There was no power to discriminate between pupils. If the Board did differentiate between children as to attending school, that was done under express statutory enactment, and the Board was bound to show good reasons for doing so—Education (Scotland) Act 1901 (1 Edw. VII, cap. 9), sec. 3. That statutory enactment showed that where power to differentiate was given that was done in express words. Section 69 of the Education Act 1872 (*cit.*) authorised the parish authorities to educate poor children at the public expense. Had the parish authorities had the power to differentiate between the children this provision would not have been necessary. In the present case the Board had not fixed the fees for the school but for two different classes of pupils who attended that school, and it really amounted to a relief of the pupils who originally came from Sharp's Institution at the expense of the parents of the boys attending the Academy. There was no warrant in the Education Acts for two sets of boys receiving the same education but paying different rates of fees. Any previous Acts providing for the free education of certain poor children had been expressly repealed by the Education Act. Preferential treatment might apply to any parents who satisfied a certain number of requirements, but not to one particular class of people to the exclusion of another. There was no legal obligation on the Board to give the pupils who had been at Sharp's Institution such preferential treatment as was complained of in this case. A public body administering a public utility had to do so for the equal benefit of all. Clauses of equality in the cases of harbours and railways were merely declaratory of the common law. On equality of treatment by public bodies counsel referred to *Stewart* v. *Isat*,

1775, Morison, 1993; *Magistrates of Inverness* v. *Cameron*, 1903, 5 F. 977, at p. 987, *per* L.P. Kinross, 40 S.L.R. 729; *Frazerburgh Harbour Commissioners* v. *Will*, 1916 S.C. 107, 53 S.L.R. 148; *Board of Education* v. *Rice*, [1911] A.C. 179, *per* L.C. Loreburn at p. 185; *Buchanan* v *School Board of Tullialan*, 1875, 2 R. 793, *per* L. Deas at p. 803, 12 S.L.R. 540. *Walkinshaw* v. *Inspector of Poor of Glasgow*, 1850, 13 D. 198, was cited as to differentiation of certain persons who could not pay school fees.

The respondents argued—The school was now since the amalgamation to be regarded as "The Perth Academy," housed in two buildings. The School Board had been given the right to fix the fees. The present case was not the only instance of preferential treatment being accorded to a particular class of pupils. Other examples were foundationers, children of teachers, the third or fourth sons of families attending the same school. The defender was not bound to send his children to the Academy, and it was not bound to receive them. He was perfectly acquainted with the scale of fees charged, in which there was nothing capricious or in favour of one class as against another.

At advising—

LORD JUSTICE-CLERK — In this case a number of points are raised in the record, but only one question was argued before us, namely, whether the School Board had power to charge one class of pupils a different scale of fees from that which was charged to another class when both classes received the same education together in the same school.

That question arises in these circumstances. There were in Perth two schools —one of them known as Perth Academy and the other as Sharp's Institution. The Academy came under the control of the School Board in terms of the Education Act of 1872, and Sharp's Institution came under that control in terms of section 29 of the Education Act 1908 with the approval of the Scotch Education Department. These two institutions were administered separately for some time, but ultimately the School Board resolved that they should be amalgamated, and that certain pupils should be transferred to the buildings belonging to Sharp's Institution and other pupils to Perth Academy. This was done, and the School Board then decided that pupils who had already begun their educational course in Sharp's Institution should be required to pay only the same fees as had hitherto been charged them in that school, but that new pupils should be charged at a higher rate, and that the fees at Perth Academy should not be so high as they had previously been.

The defender had two boys who attended the Perth Academy after the amalgamation took place, and he complains that he is charged fees for the two boys at a higher rate than those exacted from the parents of pupils who now attend the Academy but who attended Sharp's Institution before the amalgamation took place, although the education received is in both cases the same. His plea is that the attempt on the part of the School Board to discriminate, and to charge the two sets of pupils who are receiving the same education in, as he alleges, exactly the same circumstances, fees at different rates is illegal. Now I agree with the view which the Sheriff has expressed that the circumstances are not identical. According to the defender one of the reasons which the pursuers gave for the discrimination—although unfortunately the pursuers' record is not very happily expressed in this respect—was that the School Board thought that they were under a moral obligation to continue to receive the pupils who attended Sharp's Institution before the amalgamation at the old fees while they remained scholars at that Institution or at the Academy. Mr Macmillan, however, explained in the course of his argument that this was really only one of the reasons which the Board had in view. But whatever the precise reasons were, it appears to me that the discrimination was one which might quite well be founded in good sense and in accordance with prudent administration. We allow a very large measure of freedom to School Boards in Scotland so far as the administration of education is concerned, and I am not prepared to say that in the circumstances with which they had to deal in this case the School Board were not vested with powers which entitled them to make the discrimination complained of.

We were referred to cases such as those dealing with harbour rates and railway rates, but I do not think these are at all analogous. Harbour trustees and railway companies are really commercial concerns which have been granted what practically amounts to a monopoly, and in addition to that express provision is made almost invariably—I think I might say invariably—to secure that equal rates shall be charged to those making use of the railway or harbour facilities. I do not think the same reasoning applies to bodies like school boards, which are vested with large administrative powers and with large discretionary powers, and it appears to me that the pursuers here cannot be said to have gone beyond what the statute authorises them to do.

The parties in the end seemed to agree that section 53 of the Act of 1872 is the only statutory enactment which confers the power of charging fees upon school boards. It was argued for the defender that the terms of that section required that precisely the same fees should be charged for the same tuition given to pupils in such circumstances as we have here. I do not find anything expressly said in the statute to that effect. That is one difference which renders the analogy of harbour and railway rates inapplicable. But further, I do not think the circumstances were the same here, because the differentiation was made in favour of those who before the change in fees was made had begun their education at Sharp's Institution, and I think that was a circumstance which the School Board might legitimately take into account in determining whether they should continue to charge the same rate of fees to those pupils as they had hitherto been called

upon to pay. Apparently a similar course has been followed by other school boards, and we have printed in the papers the regulations of the Edinburgh School Board, by whom the same kind of thing appears to have been done. I think the Sheriff has very clearly stated the grounds on which he arrived at the conclusion he did, and in my judgment that conclusion is a sound one. [*His Lordship then dealt with the question of expenses.*]

LORD DUNDAS—I agree with your Lordship. The learned Sheriff has dealt with the case in a very satisfactory manner in his note. I am unable to say that the School Board have done anything contrary to the statute, or wrong or unfair in itself, or such as the defender as a parent is entitled to object to.

LORD SALVESEN—In this case we had a very excellent argument by the appellant's counsel, but in the end their argument upon the merits came to this, that while the School Board had power to fix a scale of fees they did not exercise that power in accordance with the section of the Act which confers the power, in respect that they had made an unfair discrimination between pupils attending the same school in the matter of the fees that were payable by them for their instruction. If that were a sound view, then it would probably logically follow that the action would fall to be dismissed on the ground that the scale of fees upon which it is founded had no legal or statutory warrant; and accordingly I think it was quite open to the defender to maintain that view in an action in which he was sued for fees, irrespective of whether he might have raised it more appropriately in another form of action by seeking the reduction of the resolution under which the scale of fees was fixed.

I quite concede to the defender that underlying such a statutory power as the Board have of fixing fees there is the assumption that they can only do so reasonably—without favouritism, caprice, or corruption are the words used by the Sheriff—and in the reasonable interests of the school they are conducting, and not for the purpose of favouring any special pupils or parents of pupils. But then within their power of fixing fees it does seem to me that they have a certain discretion as to exemption or partial exemption. The best illustration with regard to exemption is one which has been followed in other schools under School Board management—the exemption from fees, either partially or wholly, of a third child of a family who are attending school. If Mr Christie's argument were pressed to its logical conclusion—that everything in the nature of partial exemption would render a scale of fees bad—the result would no doubt be what he says, namely, that all the fees incurred under that scale would be irrecoverable, although the Board might proceed to fix a new scale of fees and to recover the fees exigible under that scale. I am not prepared to go that length, or to hold that in the special circumstances of this case anything that the School Board did was otherwise than an act of reasonable administration. Accordingly I agree with the judgment which your Lordship proposes. But I do not limit, as the Sheriff seems to do, the right of review of the Court to a case of arbitrary favouritism, caprice, or corruption. I think there may be other cases in which the Court may be entitled to interfere. A body of men may act unreasonably even though they act without arbitrary favouritism, caprice, or corruption, and they might act upon grounds which although plausible might yet not commend themselves to a judicature. But here I see no reason for holding that the Board have gone beyond their powers, or have fixed a scale which must be treated as inept, for that is what the argument comes to. I therefore agree that we must repel the pleas for the defender and decern in terms of the prayer of the summons.

LORD GUTHRIE—I concur. I adopt the reasoning of the Sheriff in the paragraph of his note beginning "It was necessary for the pursuers to fix fees for the combined schools," as commented on by your Lordship, subject to this, that if one takes the sentence to which Lord Salvesen referred it looks as if the Sheriff thought that it was enough for the School Board to show that it acted without arbitrary favouritism, caprice, or corruption, and that its resolution was one to which a reasonable body of men, or, as he puts it elsewhere, an honest and a sensible body of men desirous of acting fairly and justly, might reasonably have come.

I think it is fair to the Sheriff to point out that he does recognise the distinction which Lord Salvesen has referred to, because he goes on to say "If the resolution had been corrupt or capricious it would have been illegal, but it does not follow that because it was neither the one nor the other it was within the powers of the Board." So the Sheriff certainly has in view that it would not be sufficient merely to hold that the resolution was not arbitrary and that it was such as a sensible body of men could reasonably have come to, and in addition that it was in the interests of the school, for he goes on to find that it was not an undue stretching of the undoubted power of this Board.

The Court dismissed the action.

Counsel for the Pursuers (Respondents)—Macmillan, K.C.—Lippe. Agents—Rainey & Cameron, W.S.

Counsel for the Defender (Appellant)—Christie, K.C.—R. Macgregor Mitchell. Agents—Balfour & Manson, S.S.C.