being necessary, the B. L. Coy. moved to have it taken on commission at Inverness, instead of before the Lord Ordinary, on the ground that the saving of expense, the amount at stake being trifling, and the company having no security for recovering their expenses if successful, as the note had been passed without caution, amounted to such "special cause" as required to be shown under sec. 2 of the Evidence (Scotland) Act 1866. The motion was opposed mainly on the ground that this was especially a case where it was desirable for the Judge (who should moreover be one of experience) to see and hear the witnesses (of whom E F was an essential one) examined. The Lord Ordinary (Adam) having *refused* the motion, on a reclaiming note, the Court unanimously *adhered*, reserving expenses.

Counsel for Complainer (Respondent)—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondents (Reclaimers)—Gloag. Agents—Mackenzie & Kermack, W.S.

Saturday, December 20. *

FIRST DIVISION.

[Lord Craighill, Ordinary.

(Before Seven Judges.)

MARSHALL *v.* THE SCHOOL BOARD OF ARDROSSAN.

School—Schoolmaster—Retiring Allowance—Review of School Board's Resolution where there has been Dismissal for Fault.

Held (by a majority of seven Judges—*diss.* the Lord Justice-Clerk (Moncreiff) and Lord Ormidale—*rev.* Lord Craighill, Ordinary) that though upon a construction of the Education (Scotland) Act 1872 and the Parochial and Burgh Schoolmaster's (Scotland) Act 1861, the resolution of a School Board dismissing a schoolmaster for fault is final and not subject to review, a court of law has jurisdiction to inquire into the facts and circumstances which preceded that resolution, with a view to the question of the schoolmaster's right to a retiring allowance.

Averments in a claim for a retiring allowance by a schoolmaster against a School Board, who had dismissed him for fault, which, inasmuch as they amounted to a case of oppression and persecution at the instance of the School Board, were *held* relevant to be remitted to probation.

Opinion (*per* the Lord Justice-Clerk) that if a schoolmaster is *de facto* dismissed for fault by a School Board, his right to a retiring allowance is *eo ipso* precluded under the above-cited Acts, and that no review of the Board's resolution is competent.

* Decided December 10, 1879.

Observations (*per curiam*) on the cases of *Robb* v. *The School Board of Logiealmond*, Feb. 5, 1875, 2 R. 417, and *Morison* v. *Glenshiel School Board*, May 28, 1875, 2 R. 715.

School—Decree against a School Board.

Observed per Lord Deas, that a School Board being a corporation, any form of action which is appropriate against an individual in regard to a purely civil action will be equally so against them.

Process—Act 48 *Geo. III. cap.* 151, *sec.* 15—*Leave to Appeal to House of Lords from Interlocutory Judgment.*

Circumstances in which a petition for leave to appeal to the House of Lords against an interlocutor sustaining the relevancy of an action was *refused* on grounds of expediency.

Charles Marshall, who had been a teacher since 1835, became in 1850 schoolmaster of the parochial school of Ardrossan, which under the Education Act of 1872 became the "Saltcoats Public School." He brought this action against the School Board of the parish of Ardrossan, by whom he had been dismissed, and concluded for decree of declarator that he was entitled to payment of "retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to the office of teacher of the said public school at the date of the pursuer's removal therefrom, . . . to be paid in all respects in like manner with the salary pertaining to the said office," or alternatively for £2500 in name of damages and compensation. There was a further conclusion for reduction, if necessary, of all minutes and resolutions by the defenders in reference to the question of the pursuer's retiring allowance.

The pursuer averred, *inter alia*—"(Cond. 3) . . . The first elected School Board of Ardrossan contained several persons who were from various causes hostile to the pursuer, especially Mr Barr, the chairman thereof. The pursuer, under great difficulties, and in the face of adverse influences, devoted his energies to the diligent discharge of his duties as teacher of the said public school, so far as approaching age and other circumstances beyond his control permitted. From the first the Board entered on and continued a course of persistent and progressive injustice towards the pursuer—they thwarted, harassed, and oppressed him, both by neglect of their duties, and by positive acts. They depreciated his ability and vilified his character at their public meetings and in correspondence with the Education Department, and they made repeated attempts to remove him from his office as teacher, as subsequently detailed.

"(Cond. 4) In 1874 the Board applied for a special report, under section 60 (2) of the Education Scotland Act 1872, with a view to the removal of the pursuer, and though the report so obtained . . . was directly opposed to the removal of the pursuer, they actually proceeded, in the face of said report, to pass a resolution removing the pursuer from his said office. But the Board of Education refused to sanction this illegal and unjust deliverance, which accordingly fell to the ground.

"(Cond 5) Early in 1875 the Board again applied for a special report under the said section of the Education Act, with the same view. As

the inspector's report was again opposed to the removal of the pursuer, they did not repeat their former conduct, but adopted more subtle and circuitous methods to compass their ends. They diminished the efficiency of the school, were the means of getting the Government grant withdrawn from the school, suffered the school buildings to fall into disrepair, and neglected to supply the necessary teaching appliances, all as more fully hereafter set forth. . . . Explained that in 1874 there were 250 children at the pursuer's school; that in March of that year the defenders summarily dismissed the pursuer's wife and her assistant, and did not replace them. This female assistant immediately opened an adventure school, to which she attracted upwards of 100 of the best of the children.

"(Cond. 6) In July or August 1875 the defenders or their chairman depreciated and vilified the pursuer in correspondence with the Education Department, which the pursuer had no opportunity of seeing or answering. They also stated in the return sent by them to the said Department regarding Saltcoats Public School for the year 1874-75, that they were not satisfied with the pursuer's character, conduct, and attention to duty during the said year, in consequence whereof the pursuer's certificate was suspended for three years by the said Department, with the necessary result that the school taught by him ceased, under the regulations of the Department, to receive the annual Parliamentary grant, which grant the pursuer had for 23 years before invariably obtained.

"(Cond. 7) Thereupon the defenders . . . made a third attempt to remove the pursuer from the office of teacher. They made no inquiry, gave no opportunity of explanation, nor did they even go through the statutory form of requiring a special report, but proceeded summarily to dismiss the pursuer, and break up his school in manner following. On 27th August 1875 the clerk of the School Board wrote the following letter to the pursuer:—'Sir—As the annual report of inspection of the Saltcoats School, sent you upon the 20th current, would inform you, your certificate has been suspended for three years. At a meeting of the School Board held yesterday I was directed to intimate to you that in respect of such suspension you are no longer considered as in the employment of the Board, and the Board will not be responsible for your salary,' &c. . . .

"(Cond. 8) The officer, in obedience to these orders" (these were orders by letter from the School Board), "on 27th and 28th August 1875 visited the scholars attending the pursuer's school at their homes, and warned them not to return to it, and requested them to go elsewhere. All except some 15 scholars thereupon ceased attending the pursuer's school, and never afterwards returned. The officer continued from time to time to act on these instructions. The pursuer still struggled to fulfil his duty and serve the community by collecting scholars as best he could, and instructing them according to his ability and their capacity. Nearly all of these belonged to the poorest and most ignorant class of children, and many were taken off the streets. These new scholars again were waited upon by the officer, and some of them were induced to leave the pursuer's school. In this way the school was again and again suppressed, disbanded, and emptied by the defenders, so far as they could do so, until 19th January 1877, when they themselves actually recalled the above letters to the pursuer and the School Board officer.

"(Cond. 9) In December 1875 the defenders renewed their oppressive and unjust attempts to remove the pursuer, and applied a third time for a special report on the school which they had disbanded, and the teacher whereof they had dismissed as above explained. Accordingly in April 1876 Dr Middleton, one of Her Majesty's inspectors, visited the pursuer's school, and on 22d May 1876 made a report. The report bearing that the pursuer was unfit, incompetent, and inefficient, the defenders, with their usual promptness, passed a resolution removing the pursuer from his office, and that without any retiring allowance or allowance for house-rent. This resolution likewise the Board of Education refused to sanction . . .

"(Cond. 11) The defenders were exasperated by their repeated failures to remove the pursuer, by his raising the above action" [in that action the pursuer was found entitled to the sums which he had expended in house-rent, and to a sum in name of rent for the future, the school-house having been burned down] "in defence of his just rights, and by his constancy in fulfilling his duties so far as his strength and years would allow. Having by their course of acts and omissions brought about a state of circumstances calculated to convey false impressions to the mind of the Government inspector, and likely to procure such a report as they wished, the defenders on or about January 1877, for the fourth time, passed a resolution requiring a special report, but that they might not be non-suited by the Edinburgh Board on this occasion, the defenders caused their clerk to write to the pursuer on the following day (January 19), as already stated, recalling the letter of dismissal of 27th August 1875.

"(Cond. 12) In consequence of the said resolution, Dr Wilson, Her Majesty's Senior Inspector of Schools for the Eastern District of Scotland, who was not the inspector charged with the inspection of Saltcoats School, and was unacquainted with the very special circumstances affecting its condition, on 4th April 1877 visited the said school, and thereafter made the following special report '. . . I found in attendance on the day of visit 75 scholars (48 boys and 27 girls), but as the teacher Dr Marshall refused to take delivery of the official schedules from the clerk of the School Board, the usual preparation had not been made for the examination, and as there was neither time-table nor register (except an admission register) in the school, I was obliged to group the scholars above seven as I best could from a list reluctantly furnished to me by the teacher. I therefore arranged them in five classes according to their profession. . . . I examined them (41) in terms of the Scotch Code, and found the results generally very unsatisfactory. . . . The discipline and order of the school were also very unsatisfactory, and the organisation very defective. Considering, therefore, the results of the examination and inspection of the school, and the want of skill, tact, and judgment evinced by the teacher Dr Marshall, I have no hesitation in stating that the present very unsatisfactory state of the school is clearly traceable to his incompetency, unfitness, or inefficiency, and that the decision of the School Board of Ardrossan, as con-

tained in the following extract minute, of date the 18th January 1877, is amply borne out by the results of the examination and inspection of the school on 4th April 1877.—(Signed) CHARLES E. WILSON, H.M. Inspector of Schools.'

"(Cond. 13) Thereupon the defenders proceeded on 10th May 1877 to pass a judgment, oppressive, malicious, and contrary to their public duty, removing the pursuer from his office of teacher, and declaring him dismissed without any retiring allowance. The Board of Education on 29th June 1877 confirmed this judgment, but in so far *only* as regards the removal.

"(Cond. 14) The pursuer being advised that the foresaid report, and judgment of removal thereon, were illegal on statutory and other grounds, raised an action in the Court of Session on 9th August 1877, in which he concluded for reduction of the said judgment of removal and the deliverance confirming the same, and for declarator that he was still teacher of the said public school, and alone entitled to fulfil the duties of said office, and receive the emoluments appertaining to him as teacher. After certain procedure the Lord Ordinary (Curriehill) pronounced an interlocutor, of date 6th December 1877, dismissing the action on relevancy. The pursuer, assuming that the mere act of his removal was formally proceeded with in terms of the Education Act, founds on that act of removal as giving rise to his statutory right to a retiring allowance.

"(Cond. 15) The said visit of the inspector on 4th April 1877 was oppressively procured by the defenders in the full knowledge of the circumstances detailed and about to be detailed, and with a view to obtaining such a report as might afford them a specious and colourable ground for refusing to grant to the pursuer the retiring allowance to which he was and is entitled. No fault could or can be alleged against the pursuer; the said report does not attribute fault to the pursuer. The alleged inefficiency of the school was due to causes beyond the pursuer's control, and mainly to the oppressive acts and omissions of the defenders.

"(Cond. 16) Even before the election of the School Board of Ardrossan the school buildings had become somewhat dilapidated, and a large proportion of the scholars were taught in a small and ill-repaired building adjoining the school—a building which had formerly been used as a hay and corn store. From July to December 1873, as already stated, the pursuer gave the use of his house as a schoolroom. But after its destruction by fire he had no place to teach in except one small ill-lighted and ill-ventilated room 25 feet long by 17 feet broad. According to Departmental regulations this room ought not to have contained more than 51 scholars. It admitted rain through the roof, and owing to want of ventilation and other causes was so unwholesome as to affect severely the health and comfort of teacher and scholars. . . . .

"(Cond. 17) The defenders neglected to supply the school with the necessary furniture and teaching appliances. . . . . The ratepayers of the parish remonstrated strongly with the School Board, but without success. Thereupon the ratepayers of Ardrossan, to the number of a thousand, held a public meeting in December 1875, and adopted a memorial, prepared by a committee, which was forwarded to the Board of Education, setting forth the actings of the School Board hereinbefore referred to, stating that in consequence thereof the Saltcoats Public School had been reduced to a low state of efficiency, and requesting the Board of Education to exercise the powers conferred on them by the 36th section of 'The Education (Scotland) Act 1872.' At this very time the defenders were building a new school, which they opened in 1876 under a new teacher who had been appointed by them eight months before the school was opened. No successor to the pursuer has yet been appointed, and it is believed that the defenders have no intention of doing so. Their whole course of action was to supersede the pursuer and his school.

"(Cond. 20) By sections 19 and 20 of The Parochial and Burgh Schoolmasters (Scotland) Act 1861, and section 60 (2) of the Education (Scotland) Act 1872 (which Acts are referred to for their terms), the pursuer is entitled, as a matter of right, to a retiring allowance during his lifetime of not less than two-thirds of the salary pertaining to his office at the date of his removal, as from that date, being 29th June 1877. . . . .

"(Cond. 21) The pursuer is infirm, both physically and mentally, from old age. He is now 67 years of age, 42 years of which have been spent in active service as a teacher. He never possessed a robust constitution, but latterly he has been subject to various infirmities . . . .

"(Cond. 23) The said resolution or judgment of 10th May 1877, made by the defenders, dismissing the pursuer from the office of teacher, was, in so far as it further declared him to be dismissed without any retiring allowance, unwarranted, unjust, malicious, oppressive, and illegal. It was not warranted by the report of the inspector; and it was passed by the defenders without any specific charge of fault having been made against the pursuer, or any inquiry. Whatever led to the pursuer's dismissal, it was not fault for which he is responsible, or which could deprive him of his statutory right to a retiring allowance. The defenders did not at the time specify, nor are they able to specify, any ground which entitles them to refuse the said allowance. They, acting as judges, allowed the pursuer no opportunity for defence or explanation, refused to grant a retiring allowance before he had applied for it, and have declined even to entertain his repeated applications for it since."

The defenders answered, *inter alia*, that the view which the Board of Education took in refusing to confirm their resolution removing the pursuer was that there was not sufficient ground to justify their committing themselves. They also stated that the pursuer had from the first declined to hold any communication with them, and had on an occasion even used violence against their officer. In dismissing the pursuer on 27th August 1875 they stated that they had acted under the misapprehension that the suspension had operated as a disqualification and dismissal.

The 19th section of the Parochial and Burghs Schools (Scotland) Act 1861 (24 and 25 Vict. cap. 107) provided—"In case it shall be found, on a report by one of Her Majesty's inspectors of schools, ... that the schoolmaster of any parish is disqualified because of infirmity or old age for the due performance of the duties of

his office, or that from negligence or inattention he has failed efficiently to discharge such duties, it shall be lawful to the heritors and minister, at any meeting called and held as aforesaid, to permit or require such schoolmaster to resign his said office, and in case of his refusal so to do, to dismiss or suspend such schoolmaster, and when necessary to declare the school vacant; and in every case of such resignation the heritors and minister may grant to such schoolmaster a retiring allowance, payable during the remainder of his life; provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster." . .

The 60th section of the Education (Scotland) Act 1872 (35 and 36 Vict. cap 62), sub-sec. 2, provided—"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: Provided also, that in the case of teachers of parish schools appointed previously to the passing of this Act, who may be so removed, the school boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively by sections nineteen and twenty of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, in the case of parish schoolmasters permitted or required to resign or dismissed or removed from office as therein provided."

The statutes, so far as bearing otherwise upon the case, are quoted *ad longum* in Lord Deas' opinion.

The pursuer pleaded, *inter alia*—"(1) The pursuer being old and infirm, is entitled to a retiring allowance in terms of the statutes. (2) The removal of the pursuer not having been occasioned by any fault on his part, or at all events by any such fault on his part as disentitles him to a retiring allowance, he ought to have decree of declarator and payment as concluded for. (3) The acts and omissions of the defenders having been grossly oppressive, malicious, and outwith their public duty, the pursuer is entitled to a retiring allowance, any resolutions of the defenders notwithstanding. (4) In the circumstances the pursuer is entitled to have the whole proceedings inquired into, and any resolutions or portions of resolutions reduced so far as may be found necessary for the conclusions of the present action."

The defenders, the School Board, pleaded, *inter alia*—"(1) The averments of the pursuer are irrelevant and insufficient to support the action."

On 15th March 1878 the Lord Ordinary (CRAIGHILL) pronounced the following interlocutor:—"The Lord Ordinary . . . *in the first place*, Finds as matter of fact that the pursuer was removed by the defenders from the office of teacher of the Saltcoats Public School, to which he had been appointed in 1850, because in their opinion, and in that of H.M. inspector Dr Wilson, he was incompetent, unfit, and inefficient 'and that without any retiring allowance or allowance for house-rent, in respect such incompetency, unfitness, and inefficiency are attributable to his own fault;' . *in the second place*, Finds as matter of law that this determination of the defenders that the pursuer's incompetency, unfitness, and inefficiency are attributable to his own fault is conclusive upon that point, and may not be reviewed or set aside in a court of law: Therefore sustains the defences: Assoilzies the defenders from the conclusions of the summons; and decerns," &c. He added this note:—

"*Note.*—Had the Lord Ordinary been of opinion that the question of law upon which he has given judgment was one upon which he was at liberty to give effect to his own reading of the 60th section of the Education (Scotland) Act 1872, he thinks it likely that he would have arrived at a different conclusion; but he felt that the matter was foreclosed by the case of *Morison* v. *Glenshiel School Board*, May 28, 1875, 2 R. 715, taken in connection with that of *Robb* v. *The School Board of Logiealmond*, reported pp. 417 and 698 of the same volume; and he has decided accordingly."

The pursuer reclaimed, and argued that his averments were relevant to be admitted to proof. Assuming them to be accurate, his case amounted to one of oppression and persecution by the School Board, and there was nothing either in the statutes or in previous decisions to prevent this Court from inquiring into the proceedings which had led to the state of facts reported on by the inspector of schools, with a view to determining as to the right to a retiring allowance.

Authorities—*Robb* v. *School Board of Logiealmond*, Feb. 5, 1875, 2 R. 417, and May 21, 1875, 2 R. 698; *Morison* v. *Glenshiel School Board*, May 28, 1875, 2 R. 715; *Macfarlane* v. *Mochrum School Board*, Nov. 9, 1875, 3 R. 88.

The case was heard before the First Division, and by interlocutor of 3d July 1878 their Lordships appointed it to be argued by one counsel on each side before seven Judges.

At advising—

LORD JUSTICE-CLERK—I should have been very glad if we had been spared the necessity of pronouncing judgment in this case by an arrangement between the parties outside these walls. I was very desirous that that should be done, not on the merits of the case, but because the pursuer is a man advanced in years, and who has apparently been of some service to the public in his time; and one does not wish an old public servant to be turned adrift whatever may be the merits of the legal proposition on which his case turns. The parties, however, have failed to come together, and we are now to give judgment.

I understand that the majority of your Lord-

ships are of opinion that the allegations on record are relevant and should be sent to proof. I regret that I cannot concur in this view; but being in a minority, I shall, while expressing my opinion and the grounds of my dissent, endeavour to do so within reasonable space.

This is an action at the instance of the parish schoolmaster of Ardrossan for the reduction of certain proceedings of the School Board to certain effects, viz., to the effect of giving to him a retiring allowance on the footing prescribed under the Act of 1861. He finds that a minute of the School Board removing him from the office of schoolmaster stands in the way of his attaining that result, and his proposal here is to set aside the minute in so far as it so stands in his way, and also that we shall by authority of this Court give him a retiring allowance. He says he has a legal right to it by statute, and makes averments to which I shall presently allude in support of his claim. Let us see, shortly, what are the admitted facts of the demand which is now made, and which, on the grounds on which the case is now rested, becomes one of great magnitude and of large application.

In January 1877—for according to the view I take it is not necessary to go further back in the history than that—the School Board applied for a report by one of H.M. inspectors regarding the state of the school, they having become dissatisfied with the schoolmaster and the condition of the school. The inspector (Dr Wilson) came, and made his special report, which is quoted on the record. That report, dated 25th April 1877, goes at some detail into the state of the school, but it is not necessary to point out the defects in the school specially taken notice of; it is manifest on the face of it that the school was in anything but a creditable or satisfactory state. The report ends thus—"Considering, therefore, the result of the examination and inspection of the school, and the want of skill, tact, and judgment evinced by the teacher Dr Marshall, I have no hesitation in stating that the present very unsatisfactory state of the school is clearly traceable to his incompetency, unfitness, or inefficiency;" and the reporter refers to and justifies the School Board's minute of 18th January resolving to apply for an inspection. On that report it seems to me the School Board had no alternative as regards the position of the schoolmaster, and on 10th May 1877 it appears from the minute of meeting of the School Board that—"The clerk reported that, as instructed at meeting of 1st current, he had forwarded to Mr Charles Marshall a copy of the special report of inspection under sec. 60 (2) of the Education Act upon the Saltcoats School, and had also intimated to him as the teacher thereof that the Board would at this meeting proceed to consider and give judgment thereon, in order that he might have an opportunity of submitting a representation to the Board in the matter, if so advised; but that no communication had been received from Mr Marshall. The report having now been read, the Board—being of opinion that the said Charles Marshall, teacher of the Saltcoats Public School, is incompetent, unfit, and inefficient as teacher of the said school, which opinion is concurred in by Her Majesty's inspector Dr Wilson—resolve to remove the said Charles Marshall from the office of teacher of the said school, and do hereby remove him accordingly, and that without any retiring allowance or allowance for house-rent, in respect such incompetency, unfitness, and inefficiency are attributable to his own fault."

That decision of the School Board proceeded under the power conferred by the Education Act of 1872, but by the subsection of section 60 of that Act, under which they proceeded, it is necessary before a schoolmaster be finally removed by a School Board that their judgment removing him shall be confirmed by the Board of Education, and it is of no effect till that is done; and accordingly the resolution I have read was transmitted to the Board of Education, when, as we find from other documents before us, the Board of Education did inquire with some detail into the complaints which the schoolmaster had to make. On 29th June 1877 they confirmed the School Board's judgment "so far as regards the removal from office of the said Charles Marshall." I may remark that in this the Board of Education were simply following the statute, which requires such a confirmation in order to effect removal. But it was not within their province—and they do not do so—to take notice of the concluding part of the minute in regard to the retiring allowance, which required no confirmation from the Board. Under these minutes it appears that Charles Marshall, the schoolmaster, was removed from office. He was an "old schoolmaster" in the popular sense—*i.e.*, he fell under the definition of subsec. 2 of the 60th section of the 1872 Act, as a "teacher of a parish school appointed previously to the passing of this Act." The first step Mr Marshall took was to bring an action to reduce the School Board's minute of dismissal, with the view apparently of reinstating himself under the School Board, and that action came before Lord Curriehill, who pronounced an interlocutor on 6th December 1877, to the effect that the dismissal by the School Board, and confirmed by the Board of Education, was final, and could not be reviewed by the Court. This being so, the schoolmaster brought the present action, which has for its object, not to touch the minute dismissing him, and not to assert that he should remain schoolmaster of the parish, but to have it found that so much of the minute as may militate against his claim for a retiring allowance is improper, being caused by malicious and oppressive intention, and should not bar him from his claim.

The question now is, Are his allegations on record relevant to admit the case to proof? It appears to me that the allegations here made, which are substantially the same as those made before Lord Curriehill in the action decided on 6th December 1877, have no more relevancy to affect that part of the minute which relates to the retiring allowance than the statements in the former action had in regard to the removal or dismissal. Now, I shall ask your Lordships' attention for a moment to the statutory provisions on this matter, which have so often been made the subject of discussion in this Court, and on which clear and decided judgments have been laid down before now, but I have no intention of making any lengthened review of their construction. The 19th section of the Act of 1861 provides thus in regard to the parish schoolmasters at that time—[*reads ut supra*]. Thus there are two classes to whom the dismissal

or removal may apply—(1) schoolmasters who are incompetent through age or infirmity; (2) those who have proved themselves inefficient through inattention or carelessness; and so far as the words go, the former class are entitled to a retiring allowance, but the latter not. The 1872 Act provided—[*reads the latter part of sec.* 60, *sub-sec.* 2, *ut supra*—"*Provided also*," *&c.* . . .]. In the case of *Logiealmond*, 2 R. 417 and 698, and in others, the question has arisen, whether there can be any right under this clause to demand retiring allowance except in the two cases mentioned in the Act of 1861, viz., age and infirmity? It is not necessary now to enter upon that, and I quite admit that if the schoolmaster in this case was not dismissed through his own fault he is entitled as matter of right to his retiring allowance. On the other hand, it is clear that if dismissed for his own fault he can have no legal right to that indulgence; and therefore before we can reach the point that there is any legal right here which the pursuer is entitled to demand, we must first determine the question, Was he or was he not dismissed through his own fault?

I fairly admit I have found it impossible to see any doubt upon this question. The clause in the statute does not mean that the schoolmaster may prove that he was not in fault, or that the School Board are bound to prove that he was. The question is, Was he dismissed for fault? If so, his legal right under the statute does not and cannot arise. Now, it would be out of the question, if the School Board had determined or had said nothing about whether there was fault or not, for a ratepayer in the parish to say—I will prove (though nothing is said in the minute, and though the School Board out of favour to the schoolmaster have neglected or violated their duty, and have said this schoolmaster was inefficient, although without fault) that he was in fault and the ratepayers must not be saddled with his retiring allowance. No such thing was contemplated by the Acts; and the only question is, Was he dismissed for fault?

Now, let us consider this question. That is a matter depending entirely on the School Board themselves — that is to say, if a School Board dismiss a master for fault, it is quite enough that they are satisfied of the fault themselves; we have no function, no province, and no competency to inquire into the matter, and I rejoice that we have not. The School Board, who have the master under their eye from day to day and from year to year, know the man perfectly well; they know his merits and his faults, and can give effect to their personal knowledge, and I should be sorry if that function devolved upon us.

The one question we have to determine is, Have they dismissed him for fault or not? Now, from the terms of their minute it is quite clear that they dismissed him for fault, and for fault alone; and it is not unimportant to observe that the School Board state on record that they are satisfied that his incompetency was due to "negligence and inattention," and that is the statutory sense of "fault" under the Act of 1861, for the two classes embrace, under the class where fault is found, "negligence or inattention." Larger faults, such as immorality, fall to be dealt with by a different tribunal. Now, what is there to send to proof here? Nothing that I can see. The history of the case previous to 1877 has, I think, no bearing on the only question we have to try here, viz., whether the schoolmaster comes under the class in the statute who are entitled as a right to a retiring allowance? The remainder of the record contains, no doubt, a somewhat clamourous statement of acts of injustice and of illegal proceedings on the part of the School Board against the pursuer; but I cannot conceive on what possible ground it can be said that these actings—of which in the meantime I say nothing, because I only read them in the schoolmaster's statement—ever led to the appearances reported on by the inspector, or can prevent the School Board's minute being taken *pro veritate*, as this Court has more than once determined in cases under the Act of 1872.

That leads me to the last observation which I have to make, which is, that I think the present case is very nearly on all-fours with that of *Morison* v. *The Glenshiel School Board*, 2 R. 715; and in the *Logiealmond* case (2 R. 417 and 698) there was a very strong opinion to the effect that School Boards are the only judges of the question of fault, and that we are not here to decide on that matter. I am not disposed to go back on those judgments, which I think have proved to be sound law and salutary. It is vain to treat the matter as if we were bound to stretch points in order to protect the legal rights of the schoolmaster; there are other interests to be protected as well—those of the School Boards and of the ratepayers—and if I had my own way I should be inclined to deal with this case precisely as we dealt with the cases of *Morison* and of *Robb*. In both these cases there were allegations very much of this kind. In the case of *Robb* (*Logiealmond* case) the School Board had not dismissed for fault, but when applied to by the Court, at once said that they had dismissed the schoolmaster because they were dissatisfied with him. In the case of *Morison* (*Glenshie* case) it was very much this, because the fault was an influence in their determination. I have no more to add. What we are asked to do here is to saddle the ratepayers with a retiring allowance to a schoolmaster who has been dismissed by the competent authority, and from that proposition I entirely dissent.

Lord Deas—The pursuer in this action is an old schoolmaster both in the popular and the legal sense of the term. He became parochial teacher of Ardrossan in 1850—twenty-nine years ago. In 1851 he received a Privy Council certificate of the first division of the second degree of merit, and in 1868 a certificate of the first division of the first degree of merit. On the passing of the Education Act of 1872 the parochial school of Ardrossan became a public school under the Act by the name of the Saltcoats Public School. The pursuer did not prove so acceptable to the School Board of Ardrossan as he seems to have done to the heritors and kirk-session, and consequently the School Board passed repeated resolutions from time to time bearing to remove him from his office, but these resolutions up to 1877, from causes to be afterwards noticed, proved abortive, and fell to the ground. In spring 1877, however, the School Board procured a report from the inspector to the effect that the pursuer had become "incompetent, unfit, or inefficient" as a teacher. The Board thereupon, on 10th May 1877, passed

a resolution removing him from his office, which resolution was confirmed by the Board of Education so far as regarded "the removal from office." The School Board at the same time, on the footing that the pursuer's incompetency, unfitness, or inefficiency had arisen from his own fault, refused him a retiring allowance. The pursuer's removal from office had been acquiesced in, and the question on the merits of the present action, if we come to consider its merits, will of course be whether the School Board was justified in that refusal. The Board of Education had and has no control upon that point, and consequently that Board has not interfered in regard to it.

The Lord Ordinary has found as matter of law that the determination of the School Board, to the effect that the pursuer's incompetency, unfitness, and inefficiency were attributable to his own fault, is conclusive on that point, and may not be reviewed or set aside by a court of law, and on this ground his Lordship has assoilzied the School Board from the conclusions of the summons. These conclusions are—1st, For decree of declarator that the pursuer is entitled to the statutory retiring allowance, being two third parts of his salary, which is the word used in the old statute to be immediately cited, but which under the Statute of 1872 means two-thirds of his emoluments; 2d, Decree for payment, in quarterly instalments, of £117, 6s. 8d. sterling, which is said to be the amount of these two third parts, but if this amount turns out to be overstated, the sum admits, of course, of being restricted; 3d, If necessary—that is to say, if necessary to make way for the pursuer's pecuniary claim—then he concludes for decree of reduction of the resolutions of the Board so far as they affirm fault on his part and refuse a retiring allowance. The Lord Ordinary has said nothing as to the particular terms of the conclusions, but it has been suggested that the terms of the conclusions and the form of the action may of themselves afford a sufficient objection to its competency. I cannot say, however, that I have any difficulty on that point. The School Board is, in the fullest sense of the word, a corporation—a separate person in law—and I know of no form of action which if appropriate against an individual to vindicate a purely civil pecuniary claim, may not be equally competent against the separate person in law called a corporation.

Now, the Act of 1872 enacts, sec. 22, that "The School Board of every parish or burgh shall be a body corporate by the name of the School Board of such parish or burgh, and shall have perpetual succession and power to acquire and hold land for the purposes of this Act," &c.

The 23d section provides that the parish and other schools established and existing in parishes, with the teachers' houses and land attached thereto, shall vest in the School Board of such parish, those in burghs in the School Board of the burgh, and those in districts partly burghal and partly landward in the School Board of such district—a power being added by sec. 54 to discontinue existing houses and gardens and provide others in their place.

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

The mode of providing for such deficiency is next specified in sec. 44, thus—"Any sum required to meet a deficiency in the school fund, whether for satisfying present or future liabilities, shall be provided by means of a local rate within the parish or burgh in the school fund of which the deficiency exists."

The Act further confers on the School Board power to borrow; power to the Public Works Commissioners to lend on the security of the school fund and rates; power to the School Board to receive property or funds bequeathed or gifted, Parliamentary grants, &c.; and also power to appoint office-bearers for the management of its funds and affairs, with appropriate salaries.

In short, the position of the School Board as a separate person in law is as full and complete as that of any corporation can be. No personal liability is attached by the statute to the members of the corporation as such, and consequently none actually attaches to them at the instance of the pursuer or any other third party. The corporate funds alone are liable to third parties for the corporate debts and obligations, whatever right of relief the corporation itself may hereafter have against individual members if they have corruptly or wrongfully occasioned loss to the corporation, as to which I say nothing.

It appears to me therefore that the form of this action presents no practical difficulty. A decree in terms of the two first conclusions of the summons, or indeed a decree for payment merely, would be sufficient. I know nothing against the competency of a conclusion for reduction against a School Board equally as against any other corporation, or against an individual, if reduction be the appropriate remedy in the particular case—as, for instance, to reduce titles in a competition of heritable rights. But here the reductive conclusion may be left out of view as being quite unnecessary. The same remark applies to the alternative conclusion for a slump sum in name of damages or compensation, inserted, as I understand it, to meet the case of its being held (which I think it never can be) that capitalisation of the pursuer's claim and not annual payment is his appropriate remedy. If the pursuer is found entitled to payment of his retiring allowance, any allegation in the resolutions of fault on his part will become merely an erroneous reason assigned by a debtor for non-payment of a lawful debt.

Eliminating, therefore, entirely from the summons these two alternative conclusions, we come to approach the essence of the case by observing that no question of status is involved, and that the pursuer's claim to a retiring allowance is, as I have already indicated, purely a claim for payment of a civil debt with which the corporate funds are burdened by the statute, unless the defence against it be true in fact, that his removal became necessary from his own fault. The 55th section of the statute enacts that "Subject to the provisions hereinafter contained regarding the removal of the teachers of public schools appointed previously to the passing of this 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, and such emoluments and retiring allowances shall be paid and provided by the School Board having the management of such schools respectively."

Next we have subsection 2 of section 60, which provides that if the School Board consider any teacher "incompetent, unfit, or inefficient," they may obtain a report from the inspector, and may thereupon, if they see cause, remove such teacher from office, provided that before judgment they shall furnish to the teacher a copy of the report, and that the judgment of removal shall not take effect till confirmed by the Board of Education. But this is followed by the important proviso which regulates the question we have now alone to deal with. I shall quote it at length, for sequence of remark, although we are all familiar with it—"Provided also that in the case of teachers of parish schools appointed previously to the passing of this Act, who may be so removed, the School Boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively by sections 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, in the case of parish schoolmasters permitted or required to resign, or dismissed or removed from office as therein provided."

The 61st section enacts that the retiring allowance may be such as the School Board may think fit—"Provided always that nothing herein contained shall affect the right under the existing law to a retiring allowance of any teacher appointed under the recited Acts or any of them."

These enactments refer us back to the Act of 1861 (24 and 25 Vict. c. 107), and there we find it provided in section 19 that in every case of resignation, or removal in place of resignation, which "shall not be occasioned by the fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation thereof," meaning, of course, at the date of enforced resignation or removal.

Prior to the Act of 1861 the mode of removing parochial schoolmasters was by complaint to the Presbytery of the bounds and proof led, of the result of which, if regularly gone about, the Presbytery were the judges without review. This was under the Act 43 Geo. III. c. 54, which by sec. 78 of the Act of 1872 is repealed along with all other Acts so far as inconsistent with the Act of 1872 itself. Under the Acts of 1861 and 1872 respectively the mode of removing schoolmasters for immorality or improper treatment of scholars is by complaint to the Sheriff, whose judgment is declared to be final. But I do not find any particular mode prescribed by which a School Board is to ascertain, in a question like the present, whether there has been fault entitling the Board to refuse a retiring allowance. The result of that, I think, is that the mode of making inquiry is, in the first instance at least, to a large extent in the discretion of the School Board. The inspector's report may, I doubt not, be taken into account, although the question of removal, and not the question of allowance, is the proper object of that report. But the School Board is not limited to that mode of inquiry, and if upon the whole, and in apparent good faith, the Board come to the conclusion that the necessity for removal has arisen from the schoolmaster's own fault, I think there is a strong presumption that this has been so—so strong that it ought to prevail, unless averments special and specific are made and offered to be proved on the part of the schoolmaster, which, if true, distinctly show that his retirement or removal had become necessary or proper from some other cause or causes than his own fault. I think we went that length in support of the School Board in the case of *Robb*, 5th February 1875 (2 R. 417), and that the Second Division did so also in the case of *Morison*, 28th May 1875 (2 R. 715). But I am not prepared to go further in the same direction.

It was entirely on the absence of any such averments and undertaking to prove them that we proceeded in *Robb's* case; and I do not see that any different view was taken in the case of *Morison*. In the present case there is no such absence of averments and undertaking of proof, and consequently neither of these two cases is in point here. The substance of the pursuer's averments in this case is, that from the time of the first election of the School Board on the passing of the Act of 1872 down to the final dismissal of the pursuer in May 1877, and more particularly during the three years immediately preceding that dismissal, the Board by a series of irregular and oppressive acts, narrated in the record, dispersed the scholars and destroyed the school, so as to make it no longer practicable for the pursuer to conduct it as an efficient or even a useful institution, and that, after having thus wrongfully and oppressively brought the school into this hopeless condition, and obtained a report by an inspector different from any who had reported in previous years, who was an entire stranger, and who knew and could know substantially nothing of the pursuer's conduct except what he inferred from the state of the school, the Board, not contented with the pursuer's dismissal, coupled that dismissal from his office with a refusal of the statutory allowance, on the untrue allegation that his dismissal had become a necessity from his own fault.

The pursuer alleges and offers to prove that the low state of the school and the backwardness of progress among the scholars had been brought about not by any fault of his but by the fault of the School Board acting irregularly and oppressively towards him for a series of years, and resulting in a state of matters which with his increasing age and infirmities it was no longer possible for him to contend against and rectify.

Now, this may turn out to be quite erroneous on the proof, but in the meantime there are facts looming on the face of the record, and supported to some extent at least by written evidence, which make it impossible to say that the radical allegation that the fault lay with the School Board is so extravagant as to entitle us at once to reject it without inquiry.

The allegation that from the outset the School Board manifested hostility to the pursuer is too vague and general to be of itself of importance. But the same remark cannot be made on what

took place in the course of the three years 1874, 1875, and 1876.

In 1874 the School Board obtained a report from the inspector which it is now conceded was not in terms to warrant the pursuer's removal, but the Board pronounced and intimated judgment of removal nevertheless; and this the Board of Education refused to confirm. That judgment, although not confirmed, was of course a serious blow to the pursuer's efficiency and usefulness.

Early in 1875 the School Board procured a second report from the inspector. But on this occasion the Board took a different course from the former, and in the annual return made to the Education Department for 1874-5 inserted a statement that the Board had not been satisfied with the pursuer's character, conduct, and attention to duty during the year,—the consequence of which statement was that the pursuer's certificate was suspended for three years, and the annual Parliamentary grant, which had always previously been paid to him, was thereafter withheld, thus proportionately increasing the burden on the ratepayers, for which they would naturally consider the pursuer had been to blame. The course taken on this last occasion was apparently resorted to by the Board because the terms of the inspector's report did not then, any more than formerly, warrant a judgment of removal; and it certainly appears to me that there could not well be a more palpable act of oppression than for the School Board to take a course so damaging to the pursuer's prestige and usefulness, in place of either following out or simply abandoning the course they had entered upon by procuring a third report from the inspector.

It is clear that this suspension of the pursuer's certificate did not operate in law as a removal from his office. But the School Board proceeded at once to act upon it as if it did so, and intimated to the pursuer in writing that he was no longer considered to be in the employment of the Board, who would not be responsible for his salary. At the same time the Board instructed the clerk to intimate to the children attending the pursuer's school that they would be accommodated elsewhere, and directed the clerk himself to cease his attendance and the collection of fees in the school. This was in August 1875. The clerk of course obeyed his instructions, and the pursuer states that all the scholars except 15 consequently left the school and never returned. This conduct on the part of the Board appears to me to be, if possible, a still more palpable act of oppression than what has been already described, and certainly I can have no hesitation in pronouncing it to have been grossly irregular and illegal.

The pursuer, anxious to retain his means of subsistence, struggled on and succeeded in collecting some more scholars, no doubt of an inferior class, but in number sufficient to induce the School Board in December 1875 to apply for a third report. After what had taken place it is not to be wondered at that on this third occasion the Board succeeded in obtaining a report in the terms desired. A resolution by the Board removing the pursuer from his office, without retiring allowance or allowance for house-rent, followed forthwith. But this resolution turned out to be so irregular that it was not sanctioned to any effect by the Board of Education, and fell to the ground.

In January 1877 the Board for the fourth time resolved to apply for an inspection and report regarding the school and its teacher. This resolution proceeded on the narrative that the school was "in a most unsatisfactory state, and the Board considered that Mr Charles Marshall as the teacher thereof is incompetent, unfit, and inefficient." The inspection was accordingly authorised, and took place on 4th April 1877. Dr Charles Wilson, who was on this occasion the inspector, was doubtless a perfectly qualified inspector, but, as I have already indicated, he was new to the school and the district, and could only judge by inference from the state of matters as he found them. How that state of matters had been brought about he had no means of knowing. In particular, he did not and could not know all that we now know, and which I have briefly narrated. He examined the scholars, and in his report he states the deficiencies he found in their acquirements. He then gives his opinion, no doubt intelligently and impartially, in the following terms:—"Considering, therefore, the results of the examination and inspection of the school, and the want of skill, tact, and judgment evinced by the teacher Dr Marshall in the general management and conduct of the school, I have no hesitation in stating that the present very unsatisfactory state of the school is clearly traceable to his incompetency, unfitness, or inefficiency, and that the decision of the School Board of Ardrossan, as contained in the follow ing extract minute, of date the 18th January 1877, is amply borne out by the results of the examination and inspection of the school on the 4th April 1877."

The minute of the School Board here referred to is the minute I have already quoted, bearing that the school was in a most unsatisfactory state, and that the Board considered that the pursuer as the teacher thereof was "incompetent, unfit, and inefficient." To that extent the opinion of Dr Wilson, the inspector, must, I think, be held to have been confirmatory of the opinion of the Board, although it does not appear that there had been any teaching by the pursuer in presence of Dr Wilson. But upon the point, vital to the present action, of fault on the part of the teacher, little or no light can be got from the report. The want of skill, tact, and judgment, or even incompetency, unfitness, or inefficiency on the part of a teacher of the pursuer's age and infirmities, formed very good grounds for his removal, but by no means necessarily for his removal without a retiring allowance. On that point we have the opinion of the School Board, which is entitled to great weight and respect, but I fail to see that in the meantime we have anything more. I have already said that I would be disposed to accept the opinion of the Board as conclusive if we had nothing to put against it. But when the School Board maintains that nothing, be it what it may—not even the fault of the Board itself—can be relevantly put against it in an action like the present, I cannot assent to that proposition.

A high authority has said that a statute can do no wrong although it may do things very odd. But I know of no authority for saying that a corporation, such as this School Board, cannot do anything both wrong and very odd. It is not said that there is any clause in the statute giving

finality to a resolution of the Board, alleging fault as a defence against payment of the statutory retiring allowance; and even if there had been such a clause, it would not necessarily have excluded inquiry in a case of alleged abuse and oppression, calculated, if true, not only to injure the school, but to injure the mental and bodily vigour of the teacher. Medical men say, and experience shows, that nothing more surely propels advancing age than what is vulgarly but expressively termed "worry." It is not pretended that in either of the years 1874 or 1875 the pursuer could have been removed for fault, and the inspector's reports negative—in each of them—the supposition that he was then incompetent, unfit, or inefficient from any cause whatever, and if between the date of these reports and his dismissal in May 1877 he had become disqualified from fault, and not from advancing age and infirmities, it would have been satisfactory to have been told what the fault was.

A proof may very possibly present both facts and inferences in a very different light from that in which they are now made to appear, but my opinion is that the record in the present action embodies relevant averments, more particularly, first, of oppression on the part of the School Board; and second, that the necessity for the pursuer's removal arose not from his fault, but from the fault of the School Board itself. It follows that we cannot refuse inquiry as demanded by the pursuer, and therefore that a proof ought to be allowed.

Lord Ormidale — I concur with the Lord Justice-Clerk, and have nothing to add to his opinion.

Lord Mure—I concur in the result at which Lord Deas has arrived. I see that in the note to the interlocutor of the Lord Ordinary which is under review, his Lordship rests his judgment upon the decisions in the cases of *Logiealmond* and of *Glenshiel*. He says that had he been of opinion that the question of law upon which he had given judgment was one upon which he was at liberty to give effect to his own reading of the 60th section of the Education Act of 1872, he thinks it likely he would have arrived at a different conclusion, but he felt that the matter was foreclosed by those decisions.

As I read those cases, I do not understand them as deciding the question here raised, in the way in which the Lord Ordinary has assumed. In the *Logiealmond* case, in the First Division of the Court, it appears to me that we were all of opinion, notwithstanding the power given to the Board by the 60th section of the Act, in the matter of the dismissal of schoolmasters, that it would be competent for a schoolmaster appointed under the old system, and who had a vested right given to him in his salary by the provisions of that section, to challenge the proceedings of the School Board by which that vested right was injuriously affected, provided he could set forth relevant grounds for inquiry into the conduct of the Board in dismissing him; and Lord Ardmillan, who in some respects did not agree with the rest of the Court, is reported to have said (2 R. 426)—"I do not say what might be the effect of distinct and relevant averment by the pursuer of special and exceptional facts tending to explain the failure of the school, and his own unfitness, on grounds inferring no fault of his. We have no such averments at present. Lord Gifford in the *Whitburn* case (not reported) appears to have been of opinion that inquiry by proof in this Court might be permitted if relevant averments were made and proof demanded. I am not disposed to differ from his Lordship in that view. In such a case there should be some remedy, but in the meantime there are no averments relevant in the present case." The matter is therefore, I think, left quite open in the case of *Logiealmond;* for, as I understand the opinions of the Judges, they held it competent for a schoolmaster who had been dismissed by the Board to seek redress provided he could set forth a relevant case. In the case of *Morison* v. *The Glenshiel School Board* I observe that there are indications of a similar opinion. Lord Neaves, who delivered the first opinion, says (2 R. 725)—"After careful consideration, I am of opinion that a large and almost unlimited discretion is reposed in School Boards in this matter. I do not say that they could not be controlled if there was any appearance of their evading consideration of the questions before them, or of malice and bad faith in their proceedings. But there is nothing of that kind here." And, as I understand the opinion of Lord Ormidale, he seems to suggest a case pretty much the same as that which here arises as one competent for inquiry; for his Lordship says (2 R. 727)—"I can conceive the possibility of such behaviour on the part of a School Board in dismissing a schoolmaster, such as malice and oppression, or departure from the requisite forms, which if brought under the review of this Court in a competent and relevant way might result in the proceedings being quashed." And Lord Gifford says—"I concur in the view that in the general case School Boards are the sole judges of the fault that warrants dismissal, and in no case should there be review unless oppression or some such ground is averred and proved."

It appears to me, therefore, that these decisions not only leave the matter open, but amount substantially to this, that if there is a case of oppression or malice in the conduct of the Board towards the schoolmaster set forth which may fairly be assumed to be the reason why the school was reduced to the condition in which the reporter finds it to be, that would be relevant to go to proof. So that the question we have now to decide is, whether a relevant case has been here alleged on the record? I agree with Lord Deas that there has. The grounds of the pursuer's dismissal, as stated in the record, are "incompetency, unfitness, or inefficiency," arising from the fault, as the inspector has assumed, of the master, as evidenced by the condition of the school and the reduced number of the scholars in attendance. Now, assuming it to be the fact that these are the grounds of dismissal, the pursuer alleges and undertakes to prove that this condition of the school was brought about by the conduct of the Board; and he has set forth on record what appears to me to be sufficient, if proved, to instruct that the mismanagement of the Board and its treatment of the pursuer was the main, if not the sole, cause of the condition of the school.

I do not trouble your Lordships by again going over the passages in the record which Lord Deas

has so fully explained. But as regards the relevancy of the averments, I have only to say that, as at present advised, I can conceive few things better fitted to prejudice the efficiency of a school or a schoolmaster than sending people about the parish to warn the public not to send their children to his school, and for several years taking steps of that sort—some of them of questionable legality—with a view to the dismissal of the master. Now, the pursuer alleges that all this was done under the authority of the Board; and it is matter of admission that they issued one order relative to the schoolmaster, and calculated seriously to prejudice his position, which they were obliged to recal, as proceeding upon a total misapprehension as to their powers. It is further alleged by the pursuer that the Board, after having so acted for a considerable time, and thereby reduced the school to the condition in which it was, applied for an inspector to come and report upon the school; and who —not knowing anything of the way in which the pursuer had been treated, or of the steps taken by the Board to prejudice his position—reported that it was owing to the inefficiency of the master that the school had been reduced to the condition in which he reported it to be. Now, assuming all these statements to be true, it would, I think, require some very stringent provision indeed in the Act of Parliament to warrant us in holding that an injury of this description admitted of no remedy. I find no such provisions in the Acts which have been referred to. They no doubt give the Board power to remove the schoolmaster. But it is not to be presumed that Parliament intended that the removal, more especially in a case where the master's vested right to a retiring allowance was at stake, should be effected by unfair means; and when we find that the allegations on the record—dealing with them simply as allegations—amount to a relevant case of oppression, I think that the pursuer should be allowed to prove them, because by the law of this country everyone so treated is, as I conceive, entitled to redress.

Lord Gifford—I agree entirely in the opinion pronounced by Lord Deas, as well as that by Lord Mure, and I have nothing to add.

Lord Shand—I also concur with the majority of your Lordships, and have only a few additional observations to make. It appears to me that the matter of retiring allowance and of the dismissal of a teacher are very closely connected with each other in the statutes, for both under section 19 of the Act of 1861, and section 60 of the Act of 1872, in order to put the Board in a position to dismiss the teacher and deprive him of the emoluments of his office by declining to give him a retiring allowance, it is required that the Board shall have obtained a report from one of Her Majesty's Inspectors of schools affirming the unfitness of the teacher for his position. Now, in the present case, if the report of Dr Wilson, on which the School Board proceeded, first, to the dismissal of the master, and, secondly, to refuse him a retiring allowance, had been fairly obtained,—the teacher having been fairly treated in reference to his conduct in the school before that report was applied for—I should have agreed with the Lord Justice-Clerk and Lord Ormidale that there was no case in which we could review what had been done; but the facts alleged (the proof may perhaps fall short of the averments) amount to a case of oppression on the part of the Board, and if proved would satisfy me that the Board had not *bona fide* come to the consideration of the question of retiring allowance at all. A School Board, from mere dislike of the master, might order the school to be closed, then reopen it after some months, and two or three days afterwards bring an inspector down to examine the children, when they could not possibly be in a condition to reflect credit on the master, and having thus obtained a most unfavourable report of the teacher, the Board might then induce the Board of Education to confirm the dismissal, and thereupon refuse to award him a retiring allowance. Oppression would be obvious in such circumstances, yet I think the case is hardly distinguishable from the present on the pursuer's averments. The present case indeed is stronger, for after several ineffectual and illegal attempts to remove the schoolmaster, which the Board had subsequently to admit were *ultra vires*, and after having induced the Board of Education to suspend him for three years, so that the Government grant should not be given to the school, the Board two or three days later summarily dismissed him from office, and, according to the pursuer's averment, sent the school-officer round to intimate to the children that they would be henceforth accommodated at another school. The pursuer was kept in this position from August 1875 to January 1877. Meanwhile an ineffectual attempt at removal had again been made, but in January 1877 the Board withdrew their intimation of his dismissal, which they had given eighteen months before. In their letter they say, referring to the letter of dismissal and the letter to the school-officer—"It is difficult to see how you could be affected by the letters, but at all events . . . the resolution of the Board upon which they were written has been rescinded, and both letters are hereby recalled." That was in January 1877, after the Board had, as the pursuer avers, destroyed his school by their intimation of his dismissal, and by sending away his pupils to another school. They then allowed him in his partially restored circumstances to go on for about two months, getting pupils for himself as best he might, and in April, when it was impossible that an inspector could give a favourable report of the school, they had the school inspected by Dr Wilson. I have no doubt his report is correct. The report could not have represented the school favourably if the pursuer's averments are true. The Board had, according to him, put the school in such a condition that only one report, and that an unfavourable one, could be made of it. The oppressive acts of the Board in this view enabled them to dismiss the pursuer, and so to take up the question of his retiring allowance, and to refuse an allowance on the ground that he had been dismissed through his own fault. As to his dismissal, I agree with the view of Lord Curriehill, that the approval of the Board of Education was final; but I think the School Board's actings as alleged by the pursuer amount to a case of oppression and want of *bona fides* in depriving the pursuer of his retiring allowance, and therefore that he is entitled to a proof of his averments.

Lord President—I agree with the majority of your Lordships, and have only a few observations to add. I think it is necessary to distinguish between the function of the School Board in regard to dismissal, and the duty imposed on them by statute as to the retiring allowance. If the School Board of a parish consider the teacher "incompetent, unfit, and inefficient," they are directed to obtain the opinion of an inspector of schools, and on receiving his report they may, if they see cause, remove him from his office. So long as the Board of Education subsisted under this statute their sanction was required for the removal, but now that is in the hands of the School Board themselves; and I agree that as regards the sentence of removal the School Board is final. They act in a quasi-judicial capacity, taking the place of the Sheriff under the Act of 1861, and of the Presbytery under the older law.

But the question of retiring allowance is on a totally different footing. There the School Board may exercise their discretion as to giving an allowance or not as regards one class of teachers; but as regards another, to which the pursuer says he belongs, they are obliged by statute to give it. If this be so, I cannot see how it can be maintained that that statutory right cannot be enforced by this Court. The pursuer must of course make out that he is in point of fact in the position contended for; and if I were of opinion, with the Lord Justice-Clerk, that the question is whether or not he was discharged through his own fault, I should then arrive at his Lordship's conclusion, but I am of opinion that the question under the Act is quite a different one. Under section 19 of the Act of 1861 the schoolmaster is entitled to a retiring allowance if his dismissal was not occasioned by his own fault in any way; but I do not think the matter is referred to the final or conclusive judgment of the School Board at all. It is a substantial matter of fact; if the actual cause of his dismissal—not the cause assigned by the School Board—be no fault of his, then he is by statute entitled to a retiring allowance; but in making that observation I must not be supposed to be going back in any degree upon the judgments in the two cases referred to. On the contrary, I am prepared now to attach just as much weight as I did then to the deliverance of the School Board on the matter of the allowance, and if they assign fault on the part of the schoolmaster as their reason for refusing a retiring allowance, it will require very distinct and explicit averments indeed to overturn the presumption.

The only question is, Have such averments been made here? I am disposed with the majority of your Lordships to answer that qustion in the affirmative, for the pursuer has very specifically averred that the condition of this school, from which the reporter inferred the incompetency of the teacher, was due not to any fault of his, but to the illegal oppression of the Board during the preceding three or four years. On that ground I concur with the majority of your Lordships.

The Court recalled the Lord Ordinary's interlocutor, and remitted the case to his Lordship for proof; and found the pursuer (reclaimer) entitled to his expenses from the date of the closing of the record.

On 29th January 1880 the School Board presented a petition to the First Division for leave to appeal to the House of Lords against the foregoing interlocutor, in terms of the Act 48 Geo. III. cap. 151, section 15. That section provided — "That hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of Judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the Judges of the said Division."

The petition bore that the School Board "desire to appeal to the House of Lords against the said interlocutor of 10th December 1879, but as it is of the nature of an interlocutory judgment, and as there was no dissent therefrom on the part of any of your Lordships—although there was a difference of opinion among the Judges of the Second Division—it is necessary to obtain leave to enable the petitioners to appeal."

After hearing counsel for the petitioners, and without calling upon the respondent's counsel—

Lord President—I am quite clear as to the inexpediency, as a general rule, of granting leave to appeal to the House of Lords against interlocutors involving questions of mere relevancy. I had occasion to state my views on the subject at some length in the case of *Gordon* v. *Davidson and Others* (Feb. 26, 1864, 2 Macph. 758) when I was in the Second Division, and I have never seen any occasion to withdraw from the grounds there assigned for refusing leave to appeal in cases of this kind. It was pressed on us that it was inexpedient to allow the case to go to an expensive trial with the risk of a subsequent appeal to the House of Lords on the merits. Now, the case of *Gordon* went on to trial, and was finally disposed of on the merits for a less cost than would probably have been incurred had we allowed the appeal on relevancy. That is an instance of the inexpediency of allowing such an appeal as is here asked; it involves the risk really of two appeals, and I see no reason for making any exception in this case.

Lord Deas—I concur in your Lordship's observations; and I think there is an additional reason for refusing leave to appeal, which we have assigned in such cases before now—I mean the risk of witnesses dying in the meantime. Now, in this case, as we have had occasion to know, the pursuer, who is a material witness, is a man of great age and frailty.

Lord Mure and Lord Shand concurred.

The Court refused the petition, with £5, 5s. of modified expenses.

Counsel for Pursuer (Reclaimer)—Kinnear—Nevay. Agent—W. N. Masterton, Solicitor.

Counsel for Defenders (Respondents)—Trayner—Mackintosh. Agent—J. Y. Guthrie, S.S.C.