clauses of the Act on which he bases his claim is unreasonable. On the contrary, that clause seems to me quite capable of being read as including within "the expense of making up" the municipal register a fair remuneration to the officer who makes it up. But the considerations against that view stated by the Lord Ordinary are at least as strong against the pursuer's contention as anything which occurs to me in favour of it. I cannot therefore say that I think the Lord Ordinary's interlocutor wrong, but I assent to the judgment now proposed with some hesitation.

LORD MONCREIFF—Although this may be rather a hard case for the pursuer, I am not prepared to differ from the Lord Ordinary. The pursuer's claim depends entirely upon whether the words in the 67th section of The Town Councils (Scotland) Act 1900, "the whole expense of making up and printing the municipal register," &c., include remuneration to the pursuer, the Assessor for the County of Argyll, for his personal services in making up the municipal register as well as the necessary and proper expenses connected with the making up and printing the register, which admittedly must be defrayed by the burgh of Dunoon.

If this question had arisen for the first time, and we had no guidance from decision or from analogous provisions in other Acts of Parliament, I should have been disposed to hold that the expense of making up the register included suitable remuneration to the person upon whom the duty of making it up was laid by the statute. But the view which the Lord Ordinary has taken, that "expense" does not include remuneration to the pursuer, is confirmed by the decision to which he refers—*The Queen* v. *Governors of Poor of Hull*, 2 E. & B. 182. It is also confirmed by the provisions of other Acts of Parliament—in particular, the Registration of Voters Act of 1856, sec. 43, which expressly provides for remuneration to assessors and town-clerks respectively connected with the completion of the annual registration, and the corresponding provision in The County Voters (Scotland) Act of 1861, sec. 41.

The case therefore stands thus—The Town Councils Act of 1900, sec. 26, has laid upon the County Assessor the duty of making up the municipal register, and the statute does not provide for any additional remuneration, as distinguished from the outlays, being paid to him for the performance of that duty. The duty thus laid upon the County Assessor does not appear to be very onerous, and many instances could be given in which officials have had extra work laid upon them by statute of a much more onerous description, in respect of which no additional remuneration is given.

I am far from saying that the imposition of this extra work upon the county assessor may not furnish him with a good reason for asking the County Council to increase his salary; but that is a matter for arrangement between the County Council and the assessor.

The Court adhered.

Counsel for the Reclaimer — Campbell, K.C.—Graham Stewart. Agents—M'Neill & Sime, S.S.C.

Counsel for the Respondents — W. C. Smith, K.C.—Adamson. Agents—W. & J. L. Officer, W.S.

Friday, December 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

HOULDSWORTH *v.* HOULDSWORTH.

Trust—Lapse—Reversion to Donor—Disposition of Site to Trustees for School—Failure of School—Declarator that Site had Reverted—School Sites Act 1841 (4 *and* 5 *Vict. c.* 38), *sec.* 2—*Title of School Board and Parents to Oppose.*

A in 1858 feued to B a portion of ground "to be possessed and applied" as a site for a school for the poorer children of the parish, and for a schoolmaster's house. The feu-charter contained no clause of irritancy. B, upon a narrative that he did so under "The School Sites Act 1841," disponed the ground to trustees for the purposes above mentioned. The disposition contained no clause providing for the contingency of the failure of the trust purposes. A school was built and carried on by the trustees until 1903, when owing to lack of funds it was closed. In an action by the heir of A and others, directed against the trustees for declarator that the site had reverted to the heir of A, the trustees did not appear, but minutes of compearance and defences were lodged by the School Board and certain parents of poorer children of the parish.

Held (1) that the former had not, but the latter had, a good title to defend the action (*diss.* Lord Young, who was of opinion that neither had); (2) that the site had reverted to A's heir (*per* Lord Trayner and Lord Moncreiff) under sec. 2 of the School Sites Act 1841—(*per* Lord Young) at common law owing to the failure of the trust purposes.

Section 2 of the Schools Sites Act 1841 (4 and 5 Vict. c. 38) is as follows:—"Any person, being seised in fee-simple, fee-tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, or in Scotland being the proprietor in fee-simple or under entail and in possession for the time being, may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee-simple or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge: Provided

that no such grant made by any person seised only for life of and in any such manor or lands shall be valid unless the person next entitled to the same in remainder, in fee-simple, or fee-tail (if legally competent) shall be a party to and join in such grant: Provided also, that where any portion of waste or commonable land shall be gratuitously conveyed by any lord or lady of a manor for any such purposes as aforesaid, the rights and interest of all persons in the said land shall be barred and divested by such conveyance: Provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee-simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding."

Henry Houldsworth on 11th September 1858 granted to James Hunter a feu of some 4 acres of ground. The charter was in the following terms:—"I, Henry Houldsworth, Esq., of Coltness, heritable proprietor of the subjects after described, considering that the Coltness Iron Company are in the course of erecting a school for the district of Newmains in the parish of Cambusnethan for children of the labouring, manufacturing, and other poorer classes therein, and a residence for the teacher thereof; and that they have applied to me to grant a piece of ground as a site therefor: Therefore I do hereby give, grant, and dispone to and in favour of James Hunter, of Auldhouseburn, residing at Newmains House in the foresaid parish, one of the partners of the said company, and his heirs and successors whomsoever, heritably and irredeemably, All and Whole . . . a piece of ground . . . to be possessed and applied as a site for the foresaid school and residence, and for no other purposes whatever . . . To be holden the foresaid subjects by the said James Hunter and his foresaids of and under me and my successors in the estate of Coltness, in feu-farm, fee, and heritage for ever; for payment to us by the said James Hunter and his foresaids of the sum of one shilling sterling at the term of Whitsunday yearly, and for payment of one penny Scots money on the entry of heirs and singular successors; And I bind myself to free and relieve the said James Hunter and his foresaids of all casualties and public burdens; And I grant warrandice; And I consent to the registration hereof for preservation: Moreover, I desire any notary-public to whom these presents may be presented to give to the said James Hunter, or his foresaids, sasine of the subjects above disponed, but under the special restriction as to the use thereof before specified." . . . James Hunter became infeft on the 5th of October 1858.

On 13th September 1858 James Hunter disponed the piece of ground to Henry Houldsworth and others and himself as trustees for the school to be erected. The disposition was in the following terms:—"I, James Hunter, . . . freely and voluntarily do hereby, under authority of an Act passed in the fifth year of the reign of Her Majesty Queen Victoria, entituled an Act to afford further facilities for the conveyance and endowment of sites for schools, and of all other Acts enabling me herein to sell, alienate, and dispone from me, my heirs, and successors, to and in favour of . . . and . . . being four of the resident inhabitants of the parish of Cambusnethan in which the said school is situated and being heads of families, and to such other person or persons as may be hereafter assumed to act along with them and me, in virtue of the powers hereinafter inserted as trustees for the said Act, All and Whole . . . to be applied as a site for a school for the district of Newmains in the said parish for children of the labouring, manufacturing, and other poorer classes, of and in the said parish or the vicinity thereof, and for a residence for the teacher or teachers in the said school, and for no other purposes whatever. The feu-disposition, which contained no warrant of registration nor precept of sasine, was recorded in the New General Register of Sasines on 17th September 1858 in terms of the Schools Sites Act 1841, sec. 10.

The trustees entered into possession of the subjects and erected buildings. A large part of the cost was borne by the Coltness Iron Company, and Government also made a grant. For many years the trustees carried on the school, the Coltness Iron Company giving substantial subscriptions.

In March 1902 the Coltness Iron Company intimated to the trustees that they were to discontinue their subscriptions to the school fund as soon as the School Board of the Parish of Cambusnethan could erect another school, and indicating a year or eighteen months thence as a period within which this might reasonably be done. This intimation was communicated by the trustees to the School Board, and also to the Education Department, on 5th April 1902. On 7th July 1903 the Coltness Iron Company intimated to the trustees that their contribution would terminate on 1st August 1903. This intimation was communicated to the School Board. On 26th June the school was closed for the summer holidays, and was never re-opened.

In April 1904 an action was raised by (1) James Hamilton Houldsworth, the proprietor of the estate of Coltness and grandson of Henry Houldsworth, (2) the trustees under the trust-disposition and settlement of James Hunter, and (3) John Leslie Hunter, James Hunter's heir-at-law, against the surviving trustees, original and assumed, acting under the above-mentioned disposition of James Hunter of 13th September 1858, in which they sought declarator that the subjects had ceased to be possessed and used as a site for a school or teacher's residence, and had reverted under the titles to the pursuer James Hamilton Houldsworth.

No appearance was entered by the parties called as defenders, but a minute of compearance was lodged by (1) the School

Board of the parish of Cambusnethan, (2) a number of persons, parents of children of the classes for whose benefit the school was originally erected. The Lord Ordinary, under reservation of all questions as to their title and interest, allowed them to lodge defences.

The pursuers pleaded, *inter alia*—"(1) The pursuers are entitled to decree as concluded for—(1st) In respect that the subjects in question were and are held by the defenders under the feu-charter mentioned in the condescendence solely for the purpose of being used and applied for the foresaid school and residence, and for no other purposes whatever, and they have now ceased to be so used and applied. (2nd) In respect that the said provision in the defenders' title with regard to the use of the said subjects is a material and essential condition of, and real burden on, the same. (3rd) In respect that under the provisions of the School Sites Act of 1841, which is incorporated in the defenders' title, the subjects in question, on ceasing to be used for the said purposes, revert in property to the pursuer, the said James Hamilton Houldsworth. (2) The minuters, the School Board of the parish of Cambusnethan and others, have no title or interest to appear to oppose the conclusions of the summons."

The minuters pleaded, *inter alia*,—"(4) The purpose for which the ground was conveyed not having failed, the defenders are entitled to absolvitor. (6) In any event, the provisions of the School Sites Act are inapplicable, in respect that the ground greatly exceeds one acre in extent."

On 12th July 1904 the Lord Ordinary (KYLLACHY) granted the pursuers decree in terms of the conclusions of the summons.

Opinion.—"The pursuers in this case are (1) Mr J. H. Houldsworth, who is proprietor of the estate of Coltness and heir of the late proprietor Mr Henry Houldsworth; and (2) the testamentary trustees and heir-at-law of the late Mr Hunter of Auldhouseburn, who was a partner with the late Mr Houldsworth in the Coltness Iron Company.

"The object of the action is to have it declared that a certain piece of ground forming the site of a school and schoolmaster's house erected in 1858 by the Coltness Iron Company has ceased to be used and applied for the purpose for which it was granted by the pursuers' authors, and has thereby reverted in terms of the title to the pursuers, and in particular to the pursuer Mr Houldsworth. The title consists of (1) a feu-charter by the late Mr Henry Houldsworth to his partner the late Mr Hunter; and (2) a disposition substantially of even date bearing to be granted by Mr Hunter in terms of the School Sites Act of 1841 in favour of certain trustees, who so far as surviving are called as defenders to the action. These trustees it appears consider that they have no good defence to the action, and accordingly they have not entered appearance. But a minute of compearance having been lodged by the School Board of the parish and certain concurring parishioners, I, perhaps not quite regularly, allowed these compearers to lodge defences, and (without deciding anything as to their title) allowed a record to be made up. Upon that record I had the other day a general argument in the Procedure Roll. The immediate question is, whether the compearers have made out a title to intervene. But in considering that question it is difficult to avoid trenching on the merits.

"The position of the compearing defenders seems to be this. They say that this is an educational trust; that the trustees who are called as defenders are committing a breach of trust in not defending the action; and that they, the compearers, having an interest in the educational arrangements of the parish, and being therefore, as they say, beneficiaries under the trust, have a title to interpose and maintain certain defences which the trustees as they (the compearers) contend wrongfully refuse to maintain.

"In the view which I take of the case it may, for shortness, be as well to assume that the defenders have a sufficient title to raise and argue this question of breach of trust, and perhaps on that assumption the best course may be to take the case as if the trustees were maintaining the defences which it is said they ought to maintain and to see whether and how far these defences are well founded.

"The suggested defences are (1) that under the title there is no effective provision for the reversion of the site to the donor, even on the assumption that the school has been discontinued, and (2) that assuming the contrary, the school has not in fact been discontinued—at all events, discontinued in circumstances on which the pursuers can found.

"It does not appear to me that either of these defences could have been maintained by the trustees with any hope of success.

"As to the terms of the title, it is quite true that in the original feu-charter there is no express clause of irritancy; and it may be that without such express clause no forfeiture of the feu is possible for breach, even of the most express conditions affecting its use. But the case is different with respect to the disposition by Mr Hunter, which constituted the trust and conveyed the subjects to the trustees. That disposition bears to be and is a statutory disposition under the Act of 1841, and of course incorporates by reference all the conditions and provisions expressed in that Act with respect to the duration and other incidents of titles granted under it. And that being so, it is not disputed that the second section of the Act makes the following provision:—'Provided also that upon the said land so granted as aforesaid or any part thereof ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate, held in fee-simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding.'

"Now, what is the supposed objection to the application in the present case of this statutory irritancy. It seemed to be something of this sort—(1) It was said that the site here extended to four acres, while the statute (which, *inter alia*, it has to be noted, empowers heirs of entail and other disabled persons to make conveyances for the purposes of this Act) confines the powers which it confers to sites not exceeding one acre. I fail, however, to see how the trustees who accepted without objection the larger area, could be heard now to complain of the excess, or to claim that because the donor, being an owner in fee-simple, chose to exceed the limit expressed (plainly, I think, only for disabled persons), the title must therefore be read, not as an invalid title, but (contrary to what it bears) as being a common law title, having no incidents beyond what the common law would imply. It appears to me that for the trustees this argument—supposing it sound—would be wholly *jus tertii*. It is in any case not an argument which in my opinion any Court would hold a body of trustees bound to take up and urge at the bidding of anybody.

"The next point was that the 14th section of the Act of 1841 provided (subject to certain safeguards) for excambions and sales of sites by the trustees or managers. But, of course, this power only applied while no irritancy had been incurred; and although no doubt its existence made, in possible circumstances, the donor's remedies somewhat imperfect, that imperfection could not, in my opinion, at all derogate from the effectiveness of the irritancy while the power remained unexercised.

"The third point was, I think, even more extreme. It was rested on a somewhat loose expression at the close of the clause to the effect that the site should revert to the estate from which it had been given off. The suggestion was that Mr Hunter, whose position I have explained, had himself no estate adjacent to the site in question, and that the ground, although truly given off from the estate of Coltness could not revert to any estate except to some estate held by Mr Hunter. I confess it seems to me that the meaning of the clause simply is that the ground shall revert to the donor. But supposing it necessary that the donor should still possess the adjacent ground, the true donor in this case was, quite obviously, not Mr Hunter but Mr Henry Houldsworth, whose grandson is now, as I have said, the proprietor of Coltness estate, and the leading pursuer.

"It remains, however, to consider whether the school has been in terms of the title discontinued. And here there is no doubt of one thing, that it has been discontinued in point of fact. It has been closed for at least a year, and (so far as the circumstance is of importance) after eighteen months' notice of the intention to close it. What is suggested, however, is that in closing the school the trustees acted unlawfully and in breach of their trust—unlawfully, because they had, it is said, the power to secure the continuance of the school by handing it over to the School Board, who were willing to take it over.

"Now, although I had an ingenious argument upon this, as upon the other points in the case, I am in the first place unable to understand what the pursuers have to do with the trustees' rights and duties in a question with third parties; or how the school having been in fact closed for a year, they (the pursuers) have any concern as to whether the trustees in so closing it acted rightly or wrongly. The pursuers may, I think, well ask why if the School Board desired to enforce against the trustees their alleged duty either to continue the school or to hand it over to them (the School Board), they did not bring an action to try that question during the eighteen months before the school was in fact closed.

"But in the next place, if I am to deal with the matter on its merits, I must state it as my opinion (1) that it is not at all clear that this was a school erected or maintained by contributions or donations in the sense of the 38th section of the Act of 1872, and therefore a school which the trustees could, even if they desired to do so, hand over to the School Board; (2) that it is on the other hand quite clear that the trustees are at least under no duty to do so, either under their trust deed or on any general doctrine of trust law. I rather think that although the School Board make some general averments the other way, that this was really a school founded by the Coltness Company or its partners, under trusts which were to some extent of a special character. But even if that were otherwise, the 38th section of the Act is at best only permissive, and applies only where the managers or trustees of the school are of opinion and resolve that it is proper to hand it over to the management of the School Board.

"The result, on the whole, is that the defences lodged by the compearing defenders fall to be repelled, and the pursuers fall to have decree in terms of the conclusions of the summons—with expenses against the compearing defenders."

The compearing defenders reclaimed, and argued—(1) Both sets of defenders had a good title to intervene; they were beneficiaries under the trust, being persons interested in the educational arrangements of the parish, and any beneficiary under a trust could appear and call the trustees to account—*Merchant Company and Trades of Edinburgh* v. *Magistrates and Governors of Heriot's Hospital*, August 9, 1765, M. 5750; *Christie and Others* v. *Magistrates and Council of Stirling and Others*, July 6, 1774, M. 5755; *Ross* v. *Governors of Heriot's Hospital*, February 14, 1843, 5 D. 589; *Bow and Others* v. *Patrons of Cowan's Hospital*, December 6, 1825, 4 S. 276; *Lord Advocate and Clyde Trustees* v. *Lord Blantyre*, June 19, 1879, 6 R. (H.L.) 72, 16 S.L.R. 661; *Kirk Session of Largs* v. *School Board of Largs*, June 10, 1899, 1 F. 915, 36 S.L.R. 721. (2) The ground had not reverted to Houldsworth. Upon any view no forfeiture could occur, nor could it revert until it had ceased to be used for the purposes intended, and permanent

discontinuation was not to be inferred from so brief a cessation. Forfeiture could not take place unless there was no possible way of carrying out the truster's general purpose. They might hand the site over to the School Board—*Grant* v. *MacQueen*, May 23, 1877, 4 R. 734, 14 S.L.R. 478; *M'Dougall*, June 29, 1878, 5 R. 1014; *M'Culloch* v. *Kirk Session and Heritors of Dalry*, July 20, 1876, 3 R. 1182, 13 S.L.R. 717. Assuming, however, that there had been discontinuation, as there was no clause of irritancy in the charter or of reversion in the disposition, the pursuers depended upon section 2 of the Schools Sites Act 1841. That section however was inapplicable, being confined to sites not exceeding one acre. Further, the conveyance was not in the form prescribed by the Act, and the presumptions were all against reversion, the object of the Act being to secure sites for educational purposes and not to safeguard donors. In any case the site must revert to the "estate" and not to the heir of the donor.

Argued for the respondents—The school had in fact ceased to be carried on. The pursuers were entitled to decree accordingly, the purposes of the trust having failed, and no cy-pres scheme being possible—*Young's Trustees* v. *Deacons of the Eight Incorporated Trades of Perth*, June 9, 1893, 20 R. 778, 30 S.L.R. 704; *Clark* v. *Taylor*, July 7, 1853, 1 Drewry Ch. Rep. 642; *Whyte's Factor* v. *Whyte*, January 10, 1891, 18 R. 376, 28 S.L.R. 78. That the site reverted to Houldsworth resulted both at common law and under the Schools Sites Act of 1841. At common law the obligation to maintain a school was a real condition of the tenure under each of the two deeds, enforceable prior to 1874 by declarator of non-entry, subsequently by declarator and adjudication. By statute reversion was provided for by section 2 of the Act of 1841—an Act expressly adopted in the disposition which was for practical purposes in the form provided by section 10. The limitation of the amount of land disponable under the Act applied only to limited owners and not to the case of a fee-simple proprietor such as the present. Further, the compearing defenders had no title. To give them a title they would have to point to some possible and competent scheme which would be to their advantage. Their only suggestion was a gratuitous transference to the School Board. That was neither competent nor advantageous—incompetent, because (1) the school was an "endowed school" and could not be transferred gratuitously—*M'Culloch* v. *Kirk Session of Dalry* (*supra*); *Sutherland*, February 3, 1903, 5 F. 424, *sub. nom. Trustees of Gateside School*, 40 S.L.R. 345; (2) the scheme involved delegation of duty —*Philp's Trustees*, June 27, 1893, 20 R. 900, 30 S.L.R. 790; *M'Lean*, November 4, 1898, 1 F. 48, 36 S.L.R. 46,—not advantageous, because it was a mere relief to rates—*Kirk Session of Prestonpans* v. *School Board of Prestonpans*, November 28, 1891, 29 S.L.R. 168, 19 R. 193; *Governors of Jonathan Anderson Trust*, March 12, 1896, 23 R. 592, 33 S.L.R. 430.

At advising—

LORD YOUNG—The terms of the trust here are clear enough, the purposes of the trust being to erect a school and to conduct the school, the conduct of the school being under the control and management of the trustees, who are to appoint a teacher who is always to be subject to dismissal by them, and to make any rules they think proper for the admission of scholars. These are the purposes of the trust. The school was erected and it was carried on for behoof of the trustees for a number of years by teachers appointed by them, all management of the school being in their hands. In short, the trustees were the governing body. Two or three years ago—circumstances having changed very much owing to the success of the School Board system providing satisfactory and gratuitous education to all those requiring it within the district of each School Board—the circumstances so changed that the attendance at the school was not sufficient to satisfy the trustees that it could be carried on with any advantage to the public, or that they had the means of carrying it on. Previous to the stoppage the means were supplied gratuitously and charitably by the truster and the Coltness Iron Company, who had between them provided the land and everything that was necessary for carrying out the trust. They ceased to make these contributions; and the donation of £842, or any donation at all by the Government out of Parliamentary funds, was not repeated. The Coltness Iron Company having intimated to the trustees that they did not intend to continue to support the school, in view of the requirements recently made by the Education Board, the trustees, having no funds to carry on the school, intimated to the School Board that after eighteen months the school would be closed. In these circumstances the trustees had to consider, as all trustees for educational or charitable purposes have to do, whether if that could not be done they could suggest any scheme whereby something similar to carrying on that school could be suggested; and they came to the conclusion that they could suggest nothing that was cy-pres to the intentions of the trusters, and accordingly that the trust could not be carried on. Now, I suppose they were advised that the law in these circumstances was that the trust estate must return to the owner; and I am of opinion that if they were so advised, they were well advised; for when a trust such as this cannot be continued and no other scheme can be suggested by the trustees, or ought to be suggested by the trustees, I am of opinion that the law is that the property must return to the truster, the owner who gave it, who instituted the trust, that it requires no ultimate destination to the heirs to attain that result, but that the result follows on the impossibility of carrying on a trust in the way specified in the trust-deed, or by any substitute which could be suggested for that.

The trustees have not entered appearance at all, being of the opinion that they could not resist an action at the instance of the

truster or those representing him, the donor of the trust estate. Certain other parties have, however, appeared, among them the School Board, and also the parents of some children who are in the position of school children such as would have attended that school if it had been carried on under the trust. These parents have the same agent and counsel as the School Board, and we have to consider, or it is at least legitimate to consider, the cy-pres scheme which they suggest, though I am of opinion, for the reason which I shall state immediately, that neither of them is a party or are parties who can legitimately appear as parties in this action. The cy-pres scheme suggested by the School Board is that the land should be handed over to them that they may erect a school upon it. That is their cy-pres, and the only cy-pres which they suggest; but counsel suggested, as representing the parents of some of the school children, that the school should be carried on and supported by the trustees for them (with what money they do not say), or should be handed over to the School Board in order that they should erect a school there more economically for the ratepayers. These are the cy-pres. Well, I think the suggestion confirms the opinion which one would form to begin with, that the trustees having considered the matter arrived at a right conclusion—that there was no reasonable scheme to which they could append their names and suggest to the Court. I therefore come to the conclusion that neither can the trust be carried on as it was constituted, nor is there any suggestion of a cy-pres scheme to come in place of it. The testamentary trustees would have violated their trust, I think obviously and manifestly, and could have been restrained by the trusters from so acting, had they proposed to convey the land or any part of it to the School Board, or to sell the lands and contribute the price to the School Board that they might have more money than they receive by rates or from contributions from the money voted by Parliament.

Now, I do not think it is necessary to go further than that. The trust cannot be carried on as constituted; no reasonable suggestion of any scheme within the scope and meaning, but different in its particulars, has been suggested by the proper parties to suggest it, or has been suggested by either the School Board or these parents. I am of opinion, however, that neither the School Board nor these parents are proper parties here. School boards are statutory bodies, having statutory and only statutory duties to perform, and having statutory and only statutory funds in order to carry them on, these consisting of the rates and of contributions made by Parliament, assigned from time to time and provided by Parliament by the proper authority in London—the Education Department. These are the funds that they have assigned to them for the purpose, as a statutory body, of discharging their statutory duties, and it was no statutory duty of theirs as a governing body—the governing body of the Board schools, and the governing body of no other school—it was no part of their duty or within their competence to appear in this Court to suggest to the Court a cy-pres scheme, or to maintain that the trustees of a particular trust should have suggested a cy-pres scheme. I think that is manifestly outside their duty. It is not their duty as a statutory body, and the suggestion that they are the beneficiaries under this trust is to my mind altogether extravagant.

Then as to the parents of these children. Had they the power they might no doubt come forward and say, "The trustees were appointed to carry on the trust and keep this school in order that our children might attend it." But my opinion began with the view which I have stated distinctly, that the trustees cannot carry on the trust. Then what is their interest? Their interest is to get free education, and the free education which they suggest is education in schools under the control and management of the School Board. Well, they have that at present. It would be more convenient to have a school at this place, Well, that again can be acquired by the local Board if it is necessary and reasonably within the scope of their duty to acquire it under their statutory powers. They can acquire any land which they properly deem to be necessary and which is approved of for the erection of a Board school at a convenient place, and they can acquire that, if it is reasonably necessary, under their statutory powers.

I am therefore of opinion that the parents of school children having manifestly on their own statement no interest in the matter at all should not have been allowed to appear here, and therefore however desirable it might be that the conclusions of this action should be declared by the Court—that is to say, that the pursuers should be successful—not in an undefended case but as in a case with proper defenders entitled to appear as defenders and be received by the Court as defenders, that view cannot be taken. I think we have no defenders here, account of whom we can judicially take. I think the pursuers acted very properly by calling neither of them as defenders, and that there is no objection to their action because competent and proper defenders have not been called. I reject the view, so far as my opinion goes, that we have any conceivable defender here at all, and I give an expression of my opinion that the Lord Ordinary's view is right—that the pursuers are entitled to declarator on that ground as there is no defence.

LORD TRAYNER—This is an action of declarator and adjudication brought at the instance of Mr Houldsworth to have it declared that certain subjects described in the conclusions of the summons belong to him and should be adjudged to him. In this action he very properly called as defenders the persons in whom the subjects were vested feudally, there being at the time the action was raised no other defender whom he could call. Since then the School Board and certain persons claiming to be beneficiaries under the trust to be afterwards

referred to have compeared and been sisted as defenders. I dissent from the view, first, that the compearers are not entitled to be heard, and secondly, that it was irregular to proceed with the case with them as defenders.

I do not doubt that any beneficiary under a trust is entitled to interfere and call the trustees to account for their administration of the trust. If the trustees propose to do something contrary to the trust a beneficiary is entitled to come forward in the action in which they seek to do it and oppose the proceedings. If the trustees neglect to do something which is incumbent on them under the trust the beneficiaries under the trust have an undoubted title to come forward and insist that they shall do what the truster directed. I think there is no question that the persons represented here as beneficiaries are beneficiaries under this trust, and that it was not only their right to come forward and state their objections to the pursuer's action, but that the Lord Ordinary would have been distinctly wrong if he had refused to hear them.

But having got defenders who are competent and proper contradictors to the pursuer's claim, the question is whether the pursuer is to get decree. Now, the pursuer's action is based chiefly on the terms of the section quoted in condescendence 8 from the School Sites Act of 1841. The defenders have maintained that that clause cannot be imported into the trust nor pleaded upon by the pursuer. On that matter I think the defenders are quite wrong. I think the Lord Ordinary was right in giving effect to that section of the School Sites Act of 1841, and I shall state in a word or two the grounds on which I think so.

Mr Houldsworth on 11th September 1858, being the heritable proprietor of the land in question, conveyed it to Mr Hunter, and conveyed it to him as expressed in his conveyance "to be possessed and applied" as a site for a school and schoolmaster's house. Why Mr Houldsworth conveyed to Mr Hunter under this restricted and limited condition for this restricted and limited purpose I do not know. He might have proceeded at once to convey it to trustees. However, there was some reason I assume for what he did, but the result is exactly the same as if he had done so, because when Mr Hunter was feudally vested in the subjects he conveyed them by disposition in favour of certain trustees in December 1858. That disposition sets out with the narrative that he freely, voluntarily, and under authority of this Act (the School Sites Act), and for the purpose which it describes, conveys the lands to be applied as a site for a school for the district of Newmains for children of the labouring, manufacturing, and other poorer classes in the parish or vicinity thereof, and for a residence for the teacher of the school. I put it thus generally, because it is not necessary to quote the exact words of the trust-conveyance. It is said for the defenders that this was not a trust constituted under the Act of 1841. I think that is a mistake. It is said in the first place that the trust-deed is not in the terms of the form given by the statute. Well, I have compared it with the terms of the statute, and I find in its dispositive clause that it is practically the same if you take into account that this is a Scottish conveyance of Scottish heritage, and that the statute of 1841 is in its language more applicable to the constitution of a heritable right in England than in Scotland. But there is practically no difference between the disposition granted by Mr Hunter in trust and the disposition which, according to the statute of 1841, was to be granted under the authority of that statute. But Mr Hunter connects himself and his trust-deed absolutely with the statute of 1841 by the introductory words of his conveyance. He says that he does it under authority of the Act, and these are the words so far of the statutory conveyance. That he needed no authority to execute the trust-deed is certain, because he was fee-simple proprietor and could do what he liked with his own. But the words "under authority of these Acts" must be read as equivalent to "in pursuance of the Act of 1841." Now, the Act of 1841 as incorporated into the constitution of this trust provides at once an answer to the defenders' objection, because it provides in section 2 that where a trust has been constituted of this character, upon the lands so granted, or any part thereof, ceasing to be used for the purposes of the Act, the same shall thereupon immediately revert to and become a portion of the estate of which they had formed part as fully to all intents and purposes as if this Act had not been passed.

Now, it is matter of fact here that the purpose for which this deed was granted has come to an end. It is the fact that for eighteen months this school has been closed, and has been closed by the trustees for the very satisfactory reason that they had no means whatever for carrying it on. It was not a capricious act on their part; the necessity of the circumstances in which they were placed compelled them, and accordingly we are now within the very words of this statute, and the land granted has ceased to be used for the purpose for which it was conveyed to the trustees. In these circumstances the statute distinctly provides that the lands so granted shall revert to the estate from which they were taken. Now, the estate from which they were taken was the estate of Mr Houldsworth of Coltness. The pursuer as representative and heir of Mr Houldsworth of Coltness (out of which this trust property came) is now therefore the person to whom it reverts as it is no longer used for the purposes mentioned in the trust.

I would add another word, and it is this. I think it is an advantage to the pursuer in this case that the Lord Ordinary allowed the defenders to appear and state their objections, because in my opinion they were proper contradictors, and in that event Mr Houldsworth is now getting a decree of declarator *in foro* instead of a decree in absence against the trustees whom he called originally.

I hold with your Lordship that the School Board has no title or interest to appear here, but with regard to the beneficiaries, while I admit their title to appear and be heard, I think their defences or objections must be repelled, because they have failed to show any interest to maintain them. The only interest they have is to obtain free education for their children, and that the Government now supplies, and accordingly they have no interest to maintain the trust.

On these grounds I think the interlocutor of the Lord Ordinary ought to be affirmed.

LORD MONCREIFF—I agree. In regard to the first compearers I think that the School Board has no title to oppose the conclusions of this summons. I am inclined to think that the other compearers, the parents of children living in the neighbourhood and parish, have a title to appear, but I think they have failed to state any tangible interest to oppose the conclusions of the summons.

The feu-charter granted by Mr Houldsworth in favour of Mr James Hunter proceeds on the narrative that he has been requested by the Coltness Iron Company, which was in course of erecting a school for the district of Newmains in the parish of Cambusnethan, for children of the labouring, manufacturing, and other poorer classes therein, to grant them a piece of ground upon which to build a school and a residence for the teacher. That is the purpose for which the ground was required, and Mr Houldsworth accordingly did grant them by charter a site of four acres for that purpose. I think it is clear that Mr James Hunter, in whose favour that feu-charter was granted, was really the hand of Mr Houldsworth, and the question is practically the same as if Mr Houldsworth was the person who executed the trust-deed in favour of the defenders, who were called as trustees for the school of Newmains. Now that trust-deed by Mr Houldsworth, which is printed in the appendix, professes to proceed upon the authority of the Act of 1841. The Act of 1841 applies in terms to such bequests, because it applies not only to entailed properties but to properties held in fee-simple. But I do not think it matters in the least whether, strictly speaking, it applies to land held in fee-simple in Scotland, where the proprietor can do as he likes with his ground, and attach such conditions as he chooses to a conveyance of it; because under this disposition it is plain that the granter adopted the terms of the Act of 1841 as the basis of his grant. Now the second section of the School Sites Act 1841 empowers a proprietor holding land either in fee-simple or entail to grant by way of gift one acre of his land as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purpose of the education of such poorer persons in religious and useful knowledge.

I pass by the question about the one acre limit, because I think it is immaterial to the question we have to decide. But then there is a provision that "upon the said lands so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee-simple or otherwise"—that is, the estate of the person, the proprietor, who has made the grant for the erection of a school or of a schoolmaster's house. That is the condition of the grant. Now what happened in this case was simply this. Many years ago the Coltness Company under this deed, which is dated in 1858, erected a school at considerable expense, the greater part of which was defrayed partly by the Coltness Iron Company and partly by grant from Government, which is not now redemanded; and they carried on, or tried to carry on, this school until about two years ago. At that point the Coltness Iron Company, who were the principal subscribers to the school, and practically at whose expense the school was being carried on, intimated that they could no longer continue their subscription. The school was not serving the purpose for which the disposition was made, and they intimated that they would no longer subscribe. Thereupon the trustees intimated to the School Board their intention to close the school in eighteen months, and they did close the school. They found they could not fulfil the purpose of the trust by carrying it on.

Now, the question is whether there is anything to prevent the ground being claimed by the proprietor who made the original grant. The persons who were originally called as the defenders in this action were simply the trustees under this trust. They entered no appearance, and I am not surprised at it, because they must have felt that they had no defence to the action. But appearance has been made for other parties to whom reference has already been made; and the question is whether either of them—either the School Board or the parents of children in the parish—had any title or interest to do what the trustees felt they could not do—oppose the demands of Mr Houldsworth. Now, as I have already said, I think the School Board has no title to appear here. As to the others, I assume they have a title to appear, but they have failed to show that the trustees have committed any breach of trust, or that they themselves have any interest to insist either on the trustees carrying on the school themselves, which is impossible in the present state of matters, or presenting a petition on the footing of cy-pres for authority for the School Board to carry on the school for purposes other than those mentioned in this trust-deed.

On the whole matter I agree with both your Lordships that the interlocutor of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK—I agree with the majority of your Lordships.

The Court adhered.

Counsel for the Reclaimers—Ure, K.C.—Chree. Agents—Patrick & James, S.S.C.

Counsel for the Respondents—Lees, K.C.—Berry. Agents—Hagart & Burn Murdoch, W.S.

Saturday, December 17.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

HUNTER *v.* BAIRD & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Schedule, sec.* 1 (*b*)—*Amount of Compensation — "Employment of the Same Employer"—Employment by Contractors in a Mine—Subsequent Employment in the Same Mine by Mineowners who Employed the Contractors.*

The Workmen's Compensation Act 1897, First Schedule, section 1, enacts—"The amount of compensation under this Act shall be . . . . (*b*) Where total or partial incapacity for work results from the injury a weekly payment during the incapacity, after the second week, not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

A workman was employed in a coal-pit belonging to a firm of coalmasters, by a series of contractors between 12th October 1902 and 7th October 1903 at a daily wage. The contractors were employed by the coalmasters at a contract price per ton of coal brought up by them to the pit-head. On 7th October 1903 the workman was dismissed by the contractor in whose employment he then was. On 8th October he was out of employment. On 9th October he entered the employment of the coalmasters, his earnings being dependent upon his output of coal. On 12th October he was injured in the course of his employment.

Held (*diss.* Lord Young) that in assessing the compensation to which the workman was entitled under the Workmen's Compensation Act 1897, no portion of his earnings prior to 7th October fell to be considered.

In an arbitration under the Workmen's Compensation Act 1897, in the Sheriff Court of Lanarkshire at Glasgow, between William Hunter, miner, 50 Newton Street, Kilsyth, and William Baird & Company, Limited, iron and coal masters, West George Street, Glasgow, the Sheriff-Substitute (DAVIDSON) awarded compensation at the rate of 2s. 10½d. per week.

The claimant appealed.

The case set forth—"(1) That the appellant was employed as a miner in respondents' Dumbreck Pit, Kilsyth, under four different contractors, between 12th October 1902 and 7th October 1903. (2) That the said contractors were employed by the respondents at a contract price per ton for the amount of coal brought by them to the pit-head. (3) That said contractors employed workmen to assist them at a daily wage. (4) A fixed weekly sum was deducted from their wages for the general medical fund at the pit. (5) That on the last-mentioned date the appellant was discharged by Reid, one of said contractors, in whose immediate employment he then was. (6) That he was out of employment on 8th October 1903. (7) That on 9th October 1903 he entered respondents' employment as a miner, his earnings being dependent upon his output of coal. (8) That 10th October 1903 was a Saturday, being the conclusion of the trade week in the works of the respondents; that the appellant worked again on 12th October; that on that date, while in the course of his employment a stone fell upon his right leg, whereby he was injured, and that in consequence of said accident he has been unable to earn wages since. (9) That his total earnings during the period from 9th to 12th October 1903 were 11s. 6d., and that respondents offered appellant compensation at the rate of 2s. 10½d. per week."

"On these facts I held—(1) That the appellant received injury by accident arising out of and in the course of his employment in a mine of which the respondents were undertakers within the meaning of the Workmen's Compensation Act 1897. (2) That the average weekly earnings of the appellant while in the employment of the respondents were 5s. 9d."

"I therefore found the appellant entitled to compensation from the respondents at the rate of 2s. 10½d. per week from 26th October 1902 till the further orders of Court.

"I found the appellant liable to the respondents in expenses."

The questions-of-law for the opinion of the Court were—"(1) Whether the appellant was in the employment of the respondents prior to 7th October 1903? (2) Whether, in assessing the compensation to which the appellant is entitled, any portion of his earnings prior to 7th October 1903 fall to be considered?"

Argued for the appellant—He was continuously in the employment of the respondents from 12th October 1902 until the date of the accident, and his earnings during the whole of that period fell to be taken into account in estimating the amount of compensation under the Act. Employment by the contractors was equivalent to employment by the respondents — *Morrison* v. *Baird & Company*, December 2, 1882, 10 R. 271, 20 S.L.R. 185.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—In this case the statement of facts is to this effect, that this man was employed for a certain period named in the case by a series of contractors. Then the statement proceeds to say