The second point is one of greater nicety. I agree with Lord Deas that the report does not show actual fault, except by implication. But it bears that the school "has not been efficiently conducted," and that the pursuer "is unfit for the post;" and when, in such circumstances, the schoolmaster comes here and asks for a retiring allowance as a matter of right, he ought to have made more definite averments. I therefore agree with your Lordship in the chair.

Counsel for the Pursuer — Scott and Young. Agent—George Begg, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark) and Keir. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, January 26.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

ALEXANDER WEBSTER AND OTHERS *v.* WILLIAM ROGER MORISON.

Proof—Writ.

Where a party who held a property by virtue of an *ex facie* absolute disposition qualified by a back letter, founded on these documents, but admitted on record that they did not give an accurate account of the transaction,—*held* that the other party was entitled to a proof *prout de jure.*

This was an action of suspension and interdict raised by Alexander Webster and others, marriage trustees of John Scott Grant, whereby they sought to prevent the respondent from selling certain subjects in Arbroath, described in the marriage contract. Mr Grant being desirous of buying the said premises, in which he carried on his business, the sum of £125 was advanced by the respondent, that being the price actually paid to the sellers, and a disposition and assignation in security was executed in the respondent's favour, which bore that £250 had been paid by him, and he at the same time granted a letter of reversion in the following terms:—"Sir—I, William Roger Morison, merchant in Dundee, Considering that, by disposition and assignation granted by you in my favour, dated the 15th day of June 1871, you, in consideration of the sum of £250 sterling, advanced by me to you, sold and disponed to me, my heirs and assignees whomsoever, heritably and irredeemably,—(*First*), All and Whole [*Here follows description of property*]. And whereas it was agreed on between you and me that although said disposition and assignation in my favour was conceived in an absolute form, yet the same should be held by me only as a security for the said sum of £250 sterling which was that day advanced and lent by me to you, the said John Scott Grant, and of any subsequent advances I might make to you or on your account, and interest thereof as aftermentioned, and that I should grant a letter of reversion in your favour in terms underwritten: Therefore, in case you shall repay to me, or my heirs, executors, or successors, the foresaid principal sum of £250 sterling, and of any subsequent advances made by me to you or on your behalf at the term of Martinmas 1871, or at any term of Martinmas or Whitsunday thereafter, previous to the term of Whitsunday 1872, and of the expense of the disposition by you in my favour before-mentioned, and of this letter, and also of all expenses I or my foresaids may necessarily incur in completing our title to the said subjects or otherwise, with interest until paid; together with the interest of the said principal sum from the date of said disposition in my favour, and of any subsequent advances as before-mentioned, from the date of advance at the legal rate until paid, at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first term's payment of the said interest at the said term of Martinmas next for what shall be due at that term, and the next term's payment thereof at Whitsunday thereafter, and so forth half-yearly, termly, and continually during the not payment of the said principal sum, subsequent advances, and others above-mentioned; and in case you shall at your own expense insure and continue to keep insured in some established insurance office to be approved of by me and my foresaids the said tenement and others against loss by fire to the extent of £100 at least, and shall repay to me and my foresaids at same time all advances and expenses we may have been put to in the premises, and shall also pay regularly, as the same become due, the public and parish burdens affecting the said subjects, and exhibit to me or my foresaids discharges therefor: Then I and my foresaids shall be bound and obliged, as I hereby bind and oblige myself and my foresaids, to redispone to you, the said John Scott Grant, and your heirs and successors, heritably and irredeemably in fee, All and Whole the foresaid subjects in usual form."

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 19th January* 1875.—The Lord Ordinary having heard counsel and considered the closed record, productions, and process, Sustains the fourth plea in law for the respondent, and appoints the cause to be put to the motion roll of Friday, 22d January, with a view to further procedure.

"*Note.*—The complainers aver that the *ex facie* absolute disposition by John Scott Grant in favour of the respondent was granted only in security of £125, and that the amount specified in this disposition, and also in the relative letter of reversion executed by the respondent and by Mr Grant, was stated at £250, in order also to secure the current balance on the account between Mr Grant and the respondent's firm of W. R. Morison & Company, which balance has been extinguished. They further aver that they are Mr Grant's marriage-contract trustees, and that by this contract Mr Grant conveyed to them his right, title, and interest under that letter of reversion: And they maintain that they are entitled to a proof at large for the purpose of establishing these averments, on the ground that where a party, founding on a deed, admits on record that it does not contain a true account of the agreement of parties, parole proof is competent.

"But the respondent does not, the Lord Ordinary thinks, admit that the said deeds do not truly carry out the agreement between Mr Grant and him. The respondent's averment is that Mr Grant came to him in 1871 and stated that the rope-work premises in Arbroath then held by him on lease were for sale and could be got a great bargain, but that he had no means wherewith to purchase them, and that if the respondent would purchase them, with the working plant, which could be done for

£125, he would agree to buy them from the respondent in a few years at the price of £250. The respondent also avers that he agreed to enter into the transaction proposed by Mr Grant, and that, in implement of the agreement so made between them, Mr Grant purchased the subjects for the respondent at the price of £125. The respondent further avers that this agreement and purchase were attended with serious risk to him, as the sellers of the subjects found it exceedingly difficult to resist the encroachments of the sea, and as, if these encroachments were not successfully resisted, or if the subjects ceased to be used as a rope-work, for which purpose alone they are suitable, they might become almost valueless. The respondent also states that the sellers insisted upon introducing into the disposition a clause binding the purchaser to take precautions for defending the ground from the encroachments of the sea, with the view of protecting an adjoining property belonging to them, and that, being unwilling to undertake this obligation, while Mr Grant was ready to do so, it was arranged that the agreement above-mentioned should be carried out by the disposition from the sellers being taken in favour of Mr Grant, subject to the obligation to defend the ground from the sea; that Mr Grant should convey the subjects to the respondent by a disposition which should not contain that obligation; that the respondent's obligation to convey the subjects to Mr Grant at the price of £250 should be embodied in a separate letter of reversion; and that this arrangement was accordingly carried out by a disposition from the sellers in favour of Mr Grant, and by the disposition of Mr Grant in favour of the respondent, and letter of reversion above-mentioned.

"By this letter of reversion, which proceeds upon the narrative of the disposition in the respondent's favour, it was agreed to between Mr Grant and the respondent that although the disposition in the respondent's favour was conceived in an absolute form, yet that the same should be held only as a security for the sum of £250 sterling, and of any subsequent advances which the respondent might make, together with the expenses of the disposition in the respondent's favour, and of the letter of reversion, the premiums of insuring the premises, the expenses incurred by the respondent in completing his title, and the interest of the said sum of £250, and of any subsequent advances, at the legal rate. By the letter of reversion the respondent bound and obliged himself, upon payment of these sums and interest, to re-convey the subjects to Mr Grant, and, as the letter bears, Mr Grant did, by subscribing the same, 'accede to and approve of the terms hereof in all respects.'

"This letter of reversion is a formal deed executed both by the respondent and Mr Grant. It embodies, in clear and distinct terms, the conditions on implemeut of which Mr Grant is entitled to have the subjects re-conveyed to him. The respondent makes no admission in the record contrary to the terms of the disposition in his favour, and of the letter of reversion, or of the original agreement between Mr Grant and him, under which he purchased and paid the price of £125 for the subjects, and in pursuance of which these deeds were executed. The Lord Ordinary is therefore of opinion that the complainers, who are now litigating as in right of the letter of reversion, are not entitled, except by writ or oath of the respondent, to contradict the terms of that letter, and to prove that they are entitled to a re-conveyance of the subjects upon payment of £125.

The complainers reclaimed and pleaded—"The complainers being ready and hereby offering, to pay the whole sums due under the said letter of reversion, as they may be ascertained by the Court, they are entitled to suspension and interdict as craved."

Authorities—*Miller* v. *Oliphant*, March 7, 1843, 5 D. 856; *Hotson* v. *Paul*, June 7, 1831, 9 S. 685.

Pleaded for the respondents—"(1) The complainers' statements are not relevant or sufficient in law to support the prayer of the note. (2) Mr Grant and the complainers having refused to fulfil the stipulations of the said arrangement and letter of reversion, the respondent was and is entitled to sell the said subjects. (3) At all events, the complainers are not entitled to demand and receive a conveyance of the said subjects unless upon payment of £250 with interest and expenses, under deduction of the sum of £47 above mentioned, and upon fulfilment of the whole other obligations stipulated by the said arrangement and letter o reversion. (4) None of the complainers' material allegations can be proved otherwise than by the respondent's writ or oath. (5) The complainers' whole material statements being unfounded in fact, the prayer of the note ought to be refused, with expenses."

At advising—

Lord President—On the face of these titles it appears that Mr Grant bought this property from the owners for £125 in February 1871, and obtained a disposition. He afterwards conveyed the same subjects to Morison by an *ex facie* absolute disposition at the price of £250, but a letter of reversion was executed by Morison, in which he says—[*His Lordship read the letter quoted above*]. Now, the complainers, who are Grant's marriage-contract trustees, allege that the £250 was not advanced, but only £125; and so they seek to interdict the respondent from selling the property under the power of sale contained in the letter of reversion. If the respondent had met that by a mere allegation that the disposition and the letter represent the arrangement which was made, and had stood on the letter of them, then a reference to writ or oath would have been the only course competent. But that is not his position. Both parties agree that the statement in the letter of reversion is not true. What the respondent in effect says is this—"The disposition from the original seller was direct to Grant, and I advanced £125 towards payment of the price; then he disponed to me *ex facie* absolutely, and I granted the letter of reversion." The respondent admits, distinctly, that £125 was all he ever advanced, which entirely contradicts the letter of reversion. Now, it appears to me that when a party standing on deeds admits that they are untrue, that takes away his right to rest his case upon them, and opens the way for a proof in the ordinary manner. I think the principle of the two cases cited here is applicable. I am for recalling this interlocutor, and remitting to the Lord Ordinary to allow a proof, and it would be most advisable to have this at the same time as the other action between the parties indeed, it may be a question whether the actions ought not to be conjoined.

Lord Deas—It appears that in June 1871 Grant

executed a disposition in favour of Morison, on the narrative that Morison had paid £250 for him, and at the same time a back letter was granted by Morison to the effect that although the disposition was *ex facie* regular it was only in security for £250, and in the letter was a condition on which Grant was to redeem, (on payment of £250), or Morison be entitled to sell. Now, if the case had stood there the Lord Ordinary would have been quite right; but then it is admitted that £250 was not paid, and that all Morison advanced was £125, and the moment that is admitted it is impossible to hold the disposition or letter conclusive. There is another view of the transaction stated by Morison on record which might entitle him to an equally favourable result, viz., that there was an arrangement between him and Grant that Grant should pay him £250 in two years. All we have to do with that is, that it is not the transaction set forth in the disposition and back letter, and it will not enable Morison to stand on those documents. I agree with your Lordship that there ought to be only one action of accounting in the whole matter between these parties, and so I agree in thinking that we should remit to the Lord Ordinary to conjoin the actions.

Lords ARDMILLAN and MURE concurred.

Counsel for Webster—Scott. Agents—Renton & Gray, S.S.C.

Counsel for Morison—Balfour and J. P. B. Robertson. Agents—Webster & Will, S.S.C.

Tuesday, February 2.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

M'KINNON (HANNAY'S TRUSTEES) *v.* ARMSTRONG BROTHERS & CO.

Settlement—Contra Account.

A owed B certain sums of money. B was agent for C, who through B owed money to A on a contra account. Circumstances in which *held* that a settlement did not embrace the contra account.

Observed (*per* Lord Gifford) that a settlement could not take effect without a writing or some specific act, because the debts were not due in the same character.

Bill—Compensation—Bankruptcy—Retention.

A B & Co. owed a bankrupt, H, a certain sum of money, but, in an action at the trustee's instance, pleaded compensation, and produced bills drawn by A, M & Co. upon and accepted by H, and endorsed by A, M & Co., and by A B & Co. to a bank. At the date of bankruptcy the bills were not mature, but had been discounted by A B & Co., and were held by the Bank. A B & Co. retired the bills after the bankruptcy—*Held* that this was not a case of retention but of compensation, and that, as before so after bankruptcy, compensation may be pleaded provided the creditor has not acquired the debt on which he pleads subsequent to the bankruptcy.

Bill—Onerous Holder—Compensation—Retention.

In the above circumstances, at the date of H's bankruptcy A M & Co. were in liquidation. A B & Co. were their successors in business. A, a partner of A M & Co., was also a partner of A B & Co., and under the deed of dissolution acted as liquidator of A M & Co. It was not alleged that A M & Co. were insolvent. Part of the proceeds of the bills when discounted was applied in paying out the other partner of A M & Co. A M & Co. in liquidation had no separate bank account. A B & Co. retired the bills by cheques on their own bank account. *Held* that A B & Co. were entitled as onerous holders of the bills to plead compensation to the claim of H's trustee.

This was an action raised by William M'Kinnon, trustee on the sequestrated estate of Hannay & Sons, iron masters in Glasgow, against Armstrong Brothers & Company, iron merchants. The circumstances are very fully stated in the note appended to Lord Mackenzie's interlocutor, which is as follows:—

"*Edinburgh, 29th October* 1874.—The Lord Ordinary having heard counsel, &c., decerns against the defenders for the sum of £8501, 7s. 7d., with interest thereon at the rate of five per cent. per annum from 31st March 1874 until payment, and for the sum of £3135, with interest thereon at the rate of five per cent. per annum from 10th April 1874 until payment; but under deduction of the sum of £2301, 8s. 1d., and £90, 0s. 9d. due by Hannay & Sons to the defenders, with interest on said two sums at the rate of five per cent. per annum from 27th March 1874 until payment: Finds the defenders liable in expenses, &c.

"*Note.*—The pursuer is the trustee on the sequestrated estate of Hannay & Sons, iron masters, Glasgow, of which sequestration was awarded on 28th March 1874. The defenders, Armstrong Brothers & Company, are iron merchants and iron brokers in Glasgow, the partners of the firm being W. J. Armstrong and his brother T. N. Armstrong.

"Previous to 31st December 1873 the defender W. J. Armstrong carried on a similar business in Glasgow as a partner of the firm of Armstrong, Muller, & Company, the other partner being C. Muller. That firm was dissolved on that date, and the firm of Armstrong Brothers & Company was then formed, and thereafter carried on the business of iron merchants and brokers formerly carried on by Armstrong, Muller, & Company.

"The firm of Armstrong, Muller, & Company acted for Thomas Vaughan & Company, iron-masters and merchants in Middlesborough, as their agents in Glasgow, up to July 1873; and from that date to 31st December 1873 as their brokers in Glasgow. After 31st December 1873 the defenders Armstrong Brothers & Company acted as the brokers in Glasgow of Thomas Vaughan & Company.

"On 26th June 1872 Armstrong, Muller, & Company entered into a contract with Hannay & Sons for the delivery at their Blochairn Ironworks, near Glasgow, of 6000 tons of No. 4 Middlesborough forge pig-iron, at £4, 12s. per ton, at the rate of about 1000 tons per month, commencing in July in 1873, payment being made in cash on the last cash day of each month for the monthly quantity delivered, or by acceptance at four months' date.

"By a contract bearing date 26th June 1873, Armstrong, Muller, & Company bought from Thos.