The security was one of a speculative nature. The pursuer desired such a security in order to obtain a high rate of interest. He has lost money because the security became insufficient. That was just the risk he voluntarily undertook. That he should lose is not the uncommon result of such an investment. He must blame himself for desiring to obtain a large return from a hazardous security. At least he cannot, I think, with justice blame the defenders, who in my opinion failed in no duty which they owed to him.

I think therefore that the interlocutor should be affirmed.

LORD YOUNG—I think this is a difficult case—at least I have had great difficulty about it. I think it very much on the border-line between such negligence (for I think there was negligence) as infers liability, and such negligence as is merely to be characterised as not good or zealous agency in the interests of the client. I do not think the interests of the client here were well protected. I think the reverse—that the interests of the client were not protected; but then, as I have indicated, the conclusion that there is legal liability for such negligence is another matter. I should not have been greatly surprised if the result arrived at by your Lordships had been otherwise—if it had been to the effect that there was legal liability for the loss sustained by the client on account of the want of these inquiries and communications which I think it was the duty of the agent to have made. But with the judgment of the Lord Ordinary in favour of the agents against liability, and the decided and clear views to the same effect entertained and expressed by my brother Lord Rutherfurd Clark, I could not bring myself to the conclusion that liability ought to attach to the agents. Therefore I may be held as concurring in the judgment. But I repeat that it is with difficulty, and with the conviction that there was not good agency here, and that the client has severely suffered in consequence.

LORD JUSTICE-CLERK—I share in the doubts Lord Young has expressed, but I think that in a case of this kind, where there is an attempt to make a law-agent responsible for negligence, the matter should be clearly established. I am of opinion with Lord Rutherfurd Clark, if your Lordships will allow me to repeat his opinion, that that has not been established, and therefore I concur in the result of his Lordship's opinion.

LORD CRAIGHILL was absent.

The Court adhered.

Counsel for Reclaimer — Mackay — Dickson. Agents—Davidson & Syme, W.S.

Counsel for Respondents—D.-F. Mackintosh, Q.C.—Jameson. Agents—F. J. Martin, W.S.

Wednesday, December 1.

SECOND DIVISION.

[Sheriff of Argyle.

HUNTER *v.* THE SCHOOL BOARD OF THE PARISH OF LOCHGILPHEAD AND OTHERS.

School—School Board—Power to Regulate Use of School Buildings—Ultra vires—*Sheriff—Jurisdiction—Education (Scotland) Act* 1872 (35 *and* 36 *Vict. cap.* 62).

Held (1) that a school board have power, due regard being had not to interfere with educational purposes, to grant the temporary use of one of their schools for a purpose not falling within the Education Acts; and (2) that the Sheriff has no jurisdiction to interfere with the mere discretion of the board in the use of their schools so long as such use is not illegal. *Held*, therefore, in a question between the majority of a board and the minority, that it was not *ultra vires* of the board to lend a school during part of the vacation for the use of a trip from a neighbouring city, and that a petition to the Sheriff for interdict against such use fell to be *dismissed.*

At a meeting of the School Board of Lochgilphead, held on the 4th May 1885, it was agreed by a majority of the members of the School Board to grant the use of the old school of Lochgilphead to the Glasgow Foundry Boys' Religious Society from the 17th to 22d July for their summer trip. Dr Hunter, a member of the board, was present at this meeting, and "on sanitary grounds" moved to the effect that the use be not granted, but on a division his motion was lost. The period from 17th to 22d July was part of the school vacation.

At another meeting of the board on 6th July Dr Hunter moved again that the school be not granted, but the board carried an amendment to adhere to their former decision. The amendment was only carried by the casting-vote of the chairman.

Dr Hunter then presented a petition in the Sheriff Court of Argyleshire to have the School Board interdicted from granting the use of the school for the "trip" in question, or for any purpose other than that authorised by the title to the site thereof and by the Education (Scotland) Act 1872. He averred that by a disposition dated 23d, 24th, and 28th April and 24th June 1851 Alexander Campbell of Auchindarroch had granted to the Presbytery of Inverary and to the minister and heritors of the *quoad sacra* parish of Lochgilphead a piece of land, to be held for the purposes specified in an Act intituled "an Act to facilitate the foundation and endowment of additional schools in Scotland 10th August 1838," as a site for a school for the education of poor persons in the said *quoad sacra* parish, and for the residence of schoolmaster and schoolmistress of the said school, and for no other purpose whatever; that the school in question which had been built upon the said piece of ground, and had a playground attached, was now vested in the School Board of the parish of Lochgilphead by virtue of the 23d section of the Education (Scotland) Act 1872, and that the dispositive clause of all charters and dispositions

granted in favour of School Boards since the passing of the Education Act 1872 bore that the old school was disponed to the School Board "for a public school within the meaning of the said Education (Scotland) Act 1872 in the parish of , and for a playground for the scholars, and for a residence for the teacher or teachers in the said school, and for no other purpose whatever," and this was the form of clause approved of and revised by the Educational Department. He therefore founded on section 23 of the Education Act 1872, which provides that the parish and other schools established in any parish and the teacher's houses shall be vested in and managed by the School Board, with all the powers, obligations, and duties vested in the heritors according to the law existing before the Act. He also averred that the Glasgow Foundry Boys' Religious Society had on several previous occasions been granted the use of the school on their summer trip, and that on these occasions they had done damage to the school-house and furniture. On sanitary grounds, also, the pursuer averred that he considered the school ought not to be granted, looking to the risk of infection and disease which would be caused by the lending of the building to a large number of children coming of the class of those to whom the permission was proposed to be given.

The respondents answered that they admitted the school was vested in and was the property of the School Board, but that the board were in the habit of lending the school when not wanted for school purposes to various bodies for the purpose of holding meetings of various kinds, as for example, for religious purposes on Sunday evenings, lectures, and soirees, and that such a permission was within the power of the School Board. They also averred that the board had in arranging with the managers of the Society provided against damage being done to the furniture, &c., of the school-house, and that arrangements were to be made for having all things put right when the boys went away.

They contended that being a corporate body, and having as such the entire management and control of the school, no one had a right to interfere with that management or the manner in which they might use the school on special occasions provided that they did nothing to interfere with the educational interests of the district.

The pursuer pleaded—"(1) The defenders are not entitled to use the said school-house and ground for other than educational purposes, or such as are sanctioned by the title thereto and the Acts of Parliament above quoted. (2) In any case the defenders are not entitled to grant the use of the said school to the Glasgow Foundry Boys' Religious Society, or to the Fair Week Trip Committee of said society, for affording accommodation to the Foundry Boys during their annual summer trip. (4) The pursuer, as a ratepayer within the said parish of Lochgilphead, is entitled to insist in the present process, and is entitled to interdict as craved."

The defenders pleaded—"(1) The pursuer having delayed his application for interdict until all arrangements had been fully completed in good faith between the School Board and the society that the school was to be occupied by the society for the occasion asked, and the time being now past for which the school had been granted, the present petition for interdict is unnecessary and incompetent. (6) In the whole circumstances, the pursuer is not entitled to interdict as craved in the present action, and the defenders the School Board are entitled to be assoilzied from the action, with expenses."

The Sheriff-Substitute (CAMPION), after hearing parties' procurators, assoilzied the defenders from the conclusions of the action. He stated in a note that he declined to adjudicate upon the general question, and that as the time of the society's trip had passed before he gave his decision, he refused interdict upon that ground, and not on the merits of the petition.

The pursuer appealed to the Sheriff, who on May 25th issued this interlocutor—"The Sheriff having heard parties' procurators, and considered the appeal for the pursuer against the interlocutor of 26th October 1885, and whole process, recals said interlocutor: Finds (1) that at a meeting of the School Board of Lochgilphead, held upon 4th May 1885, in answer to an application by the Glasgow Foundry Boys' Religious Society, permission was granted to them to use the old school for the purposes of their holiday trip, from 17th to 22d July 1885; (2) that the pursuer was present at said meeting, and made a motion to the effect that the use of the school be not granted, which motion was rejected; (3) that on the 6th July following the pursuer again moved to the same effect; (4) that he subsequently raised the present petition for interdict: Further, sustains the sixth plea-in-law stated for the defenders: Assoilzies them from the conclusions of the action: Finds them entitled to expenses, including the expenses of this appeal, &c.

"*Note.*—In this cause the Sheriff has come practically to the same conclusion with the Sheriff-Substitute, although on somewhat different grounds.

"He cannot consider the interdict here sought by the pursuer as limited to the single occasion now in question. It seems to him to be rather of the nature of a continuing interdict, and that it is thus necessary for its satisfactory disposal, to some extent at least, to go into the merits of the question here raised. As to the title to the ground on which these school buildings stand, and to the conditions and restrictions imposed there and in the Act of 1872, bearing on the uses to which alone these buildings may properly be applied, it seems to the Sheriff that these provisions are directed rather against permanent alienations of the school-house for purposes opposed to their proper and primary use rather than against a temporary employment of that building for a limited and casual purpose like that in question, and therefore that they do not go very far towards solving the question here at issue.

"Nor does it appear that there exists anything in the shape of cases adjudged in the Courts of law to aid in this solution. In default of such authority it might perhaps be thought that decisions of these Courts as to the legality of proposed applications of churches to other than their primary uses, of which some well-known instances are found in the books, might at least supply something by way of precedent or analogy, but here again the principles of decision are different. It is true that church buildings are not

now as they were in former times devoted by consecration to the uses of public worship and the administration of the sacraments; yet a dedication of them, either actual or constructive, is recognised by our law, 'though the formal consecration of things to sacred uses,' writes Mr Erskine, ii. 1, 8, 'hath not yet been practised by the Church of Scotland since the Reformation (M'Kenzie, sec. 4 h t), yet churches, communion cups, and other things destined to sacred purposes, retain to this day so much of the character of sacred that they are exempted from commerce, and so cannot be applied to the uses of private property while they continue in that state.' See also the opinion of Lord Medwyn in *Kirk-Session of St Andrews* v. *Magistrates of Edinburgh*, January 31, 1835, 13 S. 391. So Sir George Mackenzie, in the passage referred to by Erskine, includes among things that do not fall under commerce, 'things that are said to be "no man's," but are *juris divini*, which are either sacred, such as the bells of churches; for though we have no consecration of things since the Reformation, yet some things have a relative holiness and sanctity, and so fall not under commerce—that is to say, cannot be bought and sold by private persons.'

"The law is similarly laid down by Bankton, ii. 69, secs. 169 and 196. Reference may also be made to the cases of *MacNachtan* v. *Magistrates of Paisley*, February 7, 1835, 13 S. 432, and *Easson* v. *Lawson*, July 20, 1843, 5 D. 1430. It would, however, appear that even as to the use of such buildings more freedom was sometimes allowed. 'It frequently happens,' says Mr Dunlop (Parochial Law, p. 60), 'that public meetings for objects totally apart from anything relating to religion or to the affairs of the parish are held in the church, and that it is likewise used for meetings of courts of law, and formerly of freeholders for the election of members of Parliament. This use of churches is certainly contrary to an ancient law which prohibited holding of courts of law within churches and churchyards (Quoniam Attachiamenta, cap. 86), but how far since the Reformation our Courts would interfere to prevent such use of a church seems doubtful.'

"As already said, there do not appear to be decisions of the Courts fixing with certainty the allowable uses of school buildings, but from the very absence of such judgments it may not be too much to infer that these questions are usually left to the discretion of those who are responsible for the due and proper care of the fabric itself to grant or to refuse its use as they may seem fit, and where granted to impose such regulations and restrictions as may be necessary for the prevention of injury or for the repair of any damage that may be done.

"Cases of abuse may from time to time arise, but these, where gross or clamant, will no doubt be corrected by the Courts. But the use here granted seems a charitable or at least an innocent one, and it does not appear to the Sheriff to call for the intervention of the law for its prevention."

The pursuer appealed to the Court of Session, and argued—(1) The action of the School Board in giving the use of the old school for this Foundry Boys' Society trip was *ultra vires*. The School Board held this school under the title which had vested in them, and also as trustees for the inhabitants of Lochgilphead for the purposes only which were mentioned in the Education Act 1872. The purpose was illegal, because it was outwith the purpose for which the School Board hold it. The purposes for which the school was held, and for which it had power to levy assessments, were educational only. That was shown by the cases which had been decided in regard to the right to hold meetings in churches. The churches were for religious services and the benefit of the parishioners, but the decisions in those cases were given not on account of the sanctity of the building, but because the purposes for which the churches were to be used were against the purposes for which they were originally intended—*Kirk Session of St Andrew's, Edinburgh* v. *Town Council of Edinburgh*, January 31, 1835, 13 S. 391; *MacNachtan* v. *Magistrates of Paisley*, February 7, 1835, 13 S. 432; *Easson* v. *Lawson*, July 20, 1843, 5 D. 1431; Sellars' Education Act, p. 178. (2) The desired purpose was beyond the discretion of the School Board.

The defenders argued—As regards the discretion of the School Board in allowing the use of this school, the Court would only interfere in gross cases of abuse of the discretion of an elected body subject to the review of their constituents. The board had made arrangements whereby all risk of infection or damage to the school itself would be avoided. If the principle contended for by the opposite party was properly carried out, it would prevent the School Board giving the use of the school-house even for harmless and laudable purposes if they did not fall strictly under the purposes of the Education Act, and would cause inconvenience all through the country. As regards the objection that it was *ultra vires* to use the school for this purpose under the title, it was to be observed (1) that the prohibition in the title applied only to the question of sale of the school; (2) that the question could only be raised by the superior of the ground. There was no direct prohibition of such a use as this in the Education Act, and the implication that any other purpose than an educational one was forbidden should not be carried further than that nothing should be done inconsistent with the purpose of the statute. The doctrine that if a building had been built for a certain use it was to be used exclusively for that purpose had been applied by the law of Scotland only to a limited body of buildings, and did not apply to any other kind of buildings except churches. All the cases quoted as to churches were mixed up with the question of support to the Established Church—Erskine, ii. 1, 8.

At advising--

Lord Young—This is an appeal by a member of the School Board of Lochgilphead against a judgment of the Sheriff of Argyleshire refusing interdict against carrying into effect a resolution of the majority of the School Board with respect to the use of the old school and playground in the village of Lochgilphead as premises vested in the School Board. The resolution related to granting the use of the old school to the Glasgow Foundry Boys' Religious Society, to allow the members of that society to have the use of the old school on the occasion of their

annual trip during the period from the 17th to the 22d July 1885. It appears that the charitable managers of that society provided an outing for the members of the society every summer, usually to some seaside place where they could remain for a few days, and that they had applied to this School Board for the use of the old school as a sort of camping-ground where the boys could be put up at night. This use was granted by the resolution of the majority of the School Board. The pursuer presented this petition for interdict, and maintained that the use to which the school was thus put was illegal. He maintains that to put the school-house to any other use than an educational one is illegal, as he states in his plea-in-law thus—"The defenders are not entitled to use the said school-house and ground for other than educational purposes, or such as are sanctioned by the title thereto and the Acts of Parliament above quoted."

His second ground is, that even if the granting the school for that purpose is not illegal, it was an indiscreet act of the School Board, and should be prevented. His contention on that ground is thus stated in Cond. 8—"The pursuer considers that on sanitary grounds the use of the school should have been refused; and looking to the classes from which the foundry boys are drawn, he is of opinion that there is danger of infection and disease to the children attending the said school as well as the risk of damage to the board's property." So that the pursuer asked interdict on two grounds—first, that the proposed use of the school was illegal, as it could be only used for the single purpose stated in the Educational Acts, viz., for education; and secondly, that the granting of the school for the purpose stated in the resolution of the board was an improper use of the discretion vested in the School Board. With respect to the first of these grounds my opinion is that the pursuer's contention is unfounded, and that there is nothing illegal in itself in allowing the children of this society, under proper charge, from having the shelter of this school. Indeed, the only ground of illegality alleged is that the use of the school for this purpose was not a purpose under the Education Act. But see how far that would go. That would forbid the use of a school-house in a village for any meeting whatever for such a thing as a flower show, for instance, a very common use to put it to, but not a purpose falling within the Education Act. There is nothing illegal in such a thing, and to say that it becomes so because that is not a purpose mentioned in the Education Act approaches to nonsense. Indeed, large rooms in which meetings for perfectly good and harmless purposes may be held are not frequent in villages, and the school-house is very commonly used. I think I mentioned during the discussion that when I was Sheriff of a northern county I had held the Small Debt Court in a school. That was not an educational purpose, but it was a useful and harmless one. Therefore I think there was no illegality in the action of the School Board.

The question of discretion in managing public property is another thing. There is a discretion in the managers, who are really guardians for the interests of others. We know that there is a large discretionary power vested in this Court to interfere with the powers of public bodies who act as managers of the property of others. Take the right of the magistrates of a burgh to use the property of the burgh, for instance. Where the magistrates have power of selling or feuing the property of the burgh, this Court has always interfered to prevent a use of the burgh's property which we thought indiscreet. But I never heard of a Sheriff doing such a thing. The Sheriff may be called upon to prevent something that is illegal being done, but the Sheriff is never called on to determine as to the discretion and propriety of a course pursued by some public body—that would be a new idea. I am not called upon in this case to form an opinion as to whether the majority or the minority of the School Board was in the right. Often the difference between the two parties is very slight. But in cases where it does signify, then one party will be in the right and the other in the wrong, and it would be the general interest only that would make us interfere. Either party here might be right. If neither party is doing anything wrong, then the Sheriff cannot be called upon to decide as to the propriety of the School Board's decision, and I am not called upon for a decision. As regards the infection, I am not greatly alarmed, but that was a matter for the School Board to decide. So also in the writing upon the black-board. I daresay the writing could be rubbed out again, and it was said that on the last occasion some of the children had unscrewed a form, but the managers said those things would not happen again. All these things might be interesting for debate by the School Board, but the Sheriff is not called upon to interfere. I agree with the Sheriff-Principal that there is no ground for the intervention of the law here.

I would wish to repeat what I have said before, that on the mere matter of expediency the Sheriff is not the person to appeal to.

Lord Rutherfurd Clark—I agree with Lord Young in thinking that we should affirm the interlocutor. The point which I had some doubt about at first is, whether the School Board could grant the use of any premises under their control for any other than an educational purpose? But I have come to think that they are not so restricted in their right as the complainer here thinks. I should be sorry to prevent the schools being turned to profitable and harmless uses by limiting themselves to educational purposes only, and I have nothing further to add.

Lord Justice-Clerk—I concur in your Lordship's opinion.

Lord Craighill was absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Pursuer—Moncreiff—Low. Agents—M'Neill & Sime, W.S.

Counsel for Defenders—D.-F. Mackintosh, Q.C.—J. A. Reid. Agent—J. & A. F. Adam, W.S.