charge of what he honestly believed to be his duty, and was not actuated by any malice towards the girl, and that the judgment of the Sheriff is well founded.

Then the question arises whether it is within the competency of the Sheriff to find not only this girl of 19, but also her father, liable in expenses. I have no doubt that it is quite within his competency, and I may further say, though the matter is not before us, that I see no reason to doubt that the Sheriff has exercised a wise discretion in finding both the father and the daughter liable, and that without trespassing on the question of the liability of an administrator or curator giving his consent to an action. Where the consent is merely to make an action formally competent, there may be good grounds for not subjecting him to liability for expenses, but here the matter is different.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court found the charge and whole grounds and warrants orderly proceeded with.

Counsel for the Complainer — Rhind — Baxter. Agent—William Officer, S.S.C.

Counsel for the Respondent—H. Johnston — W. Campbell. Agents — Boyd, Jameson, & Kelly, W.S.

Thursday, March 10.

SECOND DIVISION.

[Lord Kincairney.

DUNCAN AND OTHERS *v.* CRIGHTON AND OTHERS.

School Board—Election—Scottish Education Department General Order—Ultra Vires—Education (Scotland) Acts 1872 *and* 1878 (35 *and* 36 *Vict. cap.* 62; 41 *and* 42 *Vict. cap.* 78)—*Title to Sue.*

The Scottish Education Acts of 1872 and 1878 provide that during the period of office of a school board the remanent members, so long as a quorum exists, may supply vacancies caused by death, resignation, or disqualification of any member, and that in certain cases where the school board delays to nominate for a certain time, the supply of vacancies shall fall into the hands of the Scottish Education Department.

Section 13 of the Act of 1872 provides, *inter alia*—"And should any election not take place as required by this Act, and at the times hereinbefore specified, the Scottish Education Department may issue an order for an election at such time and place as the said Department shall determine, or may allow the existing school board to continue in office, or may nominate a school board for the parish or burgh in which the failure has occurred, in the manner hereinafter provided with respect to any parish or burgh which, on the expiration of twelve months from the passing of this Act, shall be without a school board."

On 1st October 1890 the Scottish Education Department pronounced a General Order to the effect that when the number of candidates nominated as members of a school board was less than the number to be elected, but sufficient to form a quorum, the returning officer should declare such candidates duly elected, "and they shall at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members."

The number of members of a school board had been fixed at nine. At the triennial election on 26th March 1891 there were only six candidates. These six candidates were declared duly elected by the returning officer, and intimation of their election was sent to the Scottish Education Department. These six members appointed three other electors to be members along with them so as to complete the number of the board, and intimated their election in the usual way by minutes of the board.

In an action by certain ratepayers and school board electors against the members of the alleged school board, and the returning officer at the election, for reduction of the return to the Department, also of the minutes of the board relating to the appointment of the last three members, *held* (1) that the pursuers had a title to sue although the election challenged was made in the manner directed by the Education Department of the Privy Council, who were not called as defenders; (2) that no election had taken place as required by the statutes, and that the Education Department should have proceeded under one of the provisions contained in section 13 of the Act of 1872.

Opinion reserved as to the validity of acts done by the alleged school board while it exercised the powers of a board.

Lord Young *dissented*, on the ground that the order of the Education Department was in accordance with the spirit and also the letter of the Education Statutes, and that in a matter concerning the public interest only, the Court should not interfere with the proceedings of a public officer acting under the control and subject to the orders of a Government Department.

The Education (Scotland) Act 1872, section 13, provides . . . "And should any election not take place as required by this Act, and at the times hereinbefore specified, the Scottish Education Department may issue an order for an election at such time and place as the said Department shall determine, or may allow the existing school board to continue in office, or may nominate a school board for the parish or burgh in

which the failure has occurred, in the manner hereinafter provided with respect to any parish or burgh which, on the expiration of twelve months from the passing of this Act, shall be without a school board; and should a vacancy occur in any board during the currency of its period of office, such vacancy shall be supplied by the board itself nominating a person to supply such vacancy, and every person so nominated shall go out of office at the same date as the school board."

Section 14 provides that the candidates having the majority of votes shall be elected, and the returning officer shall decide in any case of equality. Any dispute regarding the election of a candidate shall be summarily determined by the Sheriff of the county, who shall be final, and subject to such decision the board shall consist of the members declared by the returning officer to be elected, and the acts and proceedings of the board shall be deemed to be valid, and no subsequent finding that any member was not duly elected shall affect the validity of the acts and proceedings in which such member might have taken part.

Section 15 provides—"In case the election of any person or persons shall be declared to be invalid, and the full number of members shall not without such person or persons have been validly elected, the school board, if a quorum exist," shall make the appointments necessary to fill up the vacancy, "and if a quorum do not exist, or if the school board fail for three weeks to make such nomination and appointment as aforesaid, the Board of Education may order a new election of as many members of the school board as shall be necessary to make up the full number of members."

The Education (Scotland) Act 1878, section 15, provides that in the event of a vacancy caused by resignation, the vacancy shall, "where a quorum remains, be supplied by the school board in the manner provided in section 13 of the principal Act, and if the school board fail for eight weeks to fill up the vacancy, the Scottish Education Department may nominate a person to fill up such vacancy, or may issue an order for an election of a person to fill such vacancy, at such time and place and in such manner as the said Department shall determine." Section 16 provides for the case of a vacancy arising from the non-attendance of a member of the board. Section 17 provides that "if by the death, resignation, or disqualification of any member or members of a school board there shall cease to be a quorum, the Scottish Education Department may nominate as many persons as shall be necessary to make up the full number of members, or may issue an order for an election of such number of members, at such time and place and in such manner as the said Department shall determine."

Schedule A provides—"The triennial election of a school board for any parish or burgh shall be held at such time and in accordance with such regulations as the Scottish Education Department may from time to time by order prescribe; and the Scottish Education Department may by order appoint or direct the appointment, and make regulations as to the duties, remunerations, and expenses of any officers requisite for the purpose of such election, and make regulations respecting all other necessary things preliminary or incidental to such election, and revoke or alter any previous order."

The Scottish Education Department issued a General Order, dated 1st October 1890. The 13th article of this Order was in these terms:—"If the number of candidates nominated and not withdrawn as aforesaid shall be less than the number to be elected, but sufficient to constitute a quorum of the school board, the returning officer shall, on the day fixed for election, declare such candidates to be duly elected, and shall publish a list of the names with the places of abode and designation of the persons so elected, and a copy of such list certified by the returning officer shall be conclusive evidence of the election of the persons therein named, and they shall at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members, and shall give notice of such appointment to the Scottish Education Department. If the number of candidates so nominated and not withdrawn shall not be sufficient to constitute a quorum, the returning officer shall report to the Scottish Education Department that no election has taken place."

The first rule of Schedule B annexed to the Act of 1872 provides that the number of members of a school board shall be such number, not less than five nor more than fifteen, as may be determined by the Scottish Education Department, which number may before any triennial election be changed by the Department. Under this power the Education Department determined that the number of the members of the School Board of Port-Glasgow should be nine.

The triennial election of this School Board was appointed to take place on 26th March 1891. Candidates could withdraw until 8 o'clock on the evening of 17th March. Fifteen candidates were nominated, but nine withdrew before that date. Upon the election day the returning officer appointed by the Department declared in terms of the above General Order that the six remaining candidates were duly elected, and sent intimation to that effect to the Scottish Education Department.

The six persons declared elected met upon 2nd April and elected three others, who were declared in terms of the General Order to be members of the School Board along with them. The statement that these members were duly elected was entered upon the minutes of the board, and these were approved at a subsequent meeting.

An action was brought by Archibald Duncan and Others, ratepayers in the burgh of Port-Glasgow, against the members of the School Board and the returning officer, for reduction of the declaration of the

result of the election of members of the School Board upon 26th March, and the two minutes of the School Board appointing three persons to be members with them, and approving of their election. The pursuers averred—"(Cond. 9) The returning officer ought not to have declared the election, in terms of article 13 of said General Order. It was the duty of the Scottish Education Department in the said circumstances to have taken one or other of the three courses indicated in the portion above quoted of said 13th section of 'The Education (Scotland) Act 1872,' and to have exercised their discretion by selecting whichever of the said three courses they deemed most expedient and appropriate to the particular circumstances of the said burgh at said time. They did not do so, however, although the circumstances had been fully made known to them as early as 18th March 1891 by the returning officer and clerk to the School Board. Article 13 of said General Order was passed several months before said circumstances arose, and not with a view to these circumstances, but as a General Order applicable to all cases, irrespective of the particular circumstances and requirements of each case. The said 13th article was *ultra vires* of the said Department, and illegal. Neither under the Education (Scotland) Acts 1872 and 1878, nor otherwise, had the said Department power or authority to pass an Order in the terms of the said article for all future cases, irrespective of the circumstances of each case. The said article has no force or effect, and it ought not to have been given effect to nor followed by the said returning officer and the said six defenders. The election and appointment foresaid were invalid and ineffectual. There was no election on said 26th March 1891. The six defenders then declared elected, and the three thereafter appointed, were not lawfully elected or appointed. They do not constitute the School Board of the said burgh, and they never had any right to assume office or to act as such."

The pursuers pleaded—"(1) The pursuers are entitled to decree of reduction and declarator as concluded for, in respect there was no valid election on 26th March, nor any effectual appointment on 2nd April 1891. (2) There having been no election on 26th March 1891, and none of the courses prescribed by section 13 of 'The Education (Scotland) Act 1872,' having been adopted, the said pretended School Board was never validly constituted. (3) The full number of members required to constitute a School Board for the said burgh not having been elected on 26th March 1891, *et separatim*, there not having been a sufficient number of candidates to fill the nine places in said School Board for which members fell to be elected, there was no election, and the declaration of the returning officer was *ultra vires* and illegal."

The defenders pleaded—"(1) The action is incompetent (1st) in respect of the terms of section 14 of the Education (Scotland) Act 1872, *et separatim*, (2nd) in respect that it is an attempt to review in the Court of Session an Order of a Committee of the Lords of the Privy Council. (2) All parties interested are not called. (4) These defenders having been, along with the said Rev. Mr M'Carthy and Mr M'Laughlan, duly and validly elected and appointed as the School Board of Port-Glasgow, ought to be assoilzied. (5) The whole actings of the defenders having been in conformity with law, and the documents of which reduction is sought being legal, proper, and effectual, the defenders should be assoilzied."

Upon 12th December 1891 the Lord Ordinary (KINCAIRNEY) reduced, declared, and decerned in terms of the conclusions of the summons.

"*Opinion.*—[*After narrating the facts and statutory provisions above set forth*]—These are, I think, all the provisions in the Education Acts expressly relating to vacancies in school boards. Generally speaking, they confer the power of supplying the vacancies on the remanent members of the school board so long as there is a quorum, but provide that, in certain cases, when the school board delays to nominate for a certain time, the supply of the vacancy shall fall into the hands of the Education Department. The statutes define very carefully when and how the Department shall perform the duty and exercise the right of filling up the vacancies.

"These sections provide for filling up vacancies in the board caused, during the currency of its period of office, by the death, resignation, or disqualification of any member. But none of them provide for the completion of the board when the full number of members has not been nominated. Section 15 of the Act 1872 comes very near to that case, but cannot by any legitimate construction be stretched beyond the special case mentioned of the election of a person or persons being, after election, declared invalid. The statutes have not provided in express terms for a deficiency in the number of candidates.

"It cannot be maintained that in that case the persons elected, whatever their number may be, form the school board. The 14th section of the Act of 1872 did not apply to that case, but only to disputes between two candidates or more, each claiming to be elected, implying an excess of candidates over the fixed number of the school board. That section, besides, has been repealed by section 53 of the Corrupt Practices Act 1890 (53 and 54 Vict. cap. 55). Accordingly, the pursuers maintained that, when the number of candidates falls short of the fixed number, there can be no election at all; and they referred to the case of *Kidd* v. *Magistrates of Anstruther Wester*, December 17, 1852, 15 D. 257, in which it was decided that an election of town councillors is void altogether where one of the persons elected is disqualified. They maintained that that part of the 13th section of the Act applies which provides for the case where an election does 'not take place as required by this Act.' It is there provided that when that happens the De-

partment may (1) issue an Order for an election; or (2) may allow the existing school board to remain in office; or (3) may themselves nominate a school board.

"The argument for the pursuers is that there was no valid election, that therefore one or other of the methods directed in section 13 ought to have been adopted, and that the method actually adopted, viz., the election of members to fill the vacancies by the members elected, is not one of those sanctioned by the 13th section, and is unwarranted by the statutes.

"I understand the defenders to maintain that there had been an election, that therefore the 13th section does not apply, and that the case, if not provided for by section 15, has not been provided for by the statutes at all.

"But whether the case falls under the 13th section, or is a case unprovided for, it follows equally that the validity of this election cannot be supported on the statutes alone.

"Accordingly, the defenders do not rest their defence on the statutes alone, but rest the validity of the election on a General Order issued by the Scottish Education Department, dated 1st October 1890, by which it is directed that if the number of candidates nominated be less than the number to be elected, but sufficient to form a quorum, the returning officer shall declare such candidates duly elected, 'and they shall at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members.' The Order further directs that if a quorum be not elected 'the returning officer shall report to the Scotch Education Department that no election has taken place.'

"It is admitted that the directions of the Order were followed, and that the election was valid, if the Order was within the powers vested in the Education Department. The pursuers maintain that it was *ultra vires*.

"The powers of the Education Department in regard to the election of school boards are, of course, contained in the Education Acts, and there only. They are contained in the various sections which have been quoted, which confer special powers in particular circumstances, and in the schedule annexed to the Act of 1878, which confers general powers. It provides that the 'triennial election of a school board . . . shall be held at such time and in such manner and in accordance with such regulations as the Scotch Education Department may from time to time by order prescribe,' and that the Department may 'make regulations respecting all other necessary things preliminary or incidental to such election, and revoke or alter any previous order.'

"The defenders maintain that the General Order was authorised by those general words.

"The pursuers maintain that the powers conferred by this schedule do not relate to the constitution of the board, or to the persons by whom a board is to be elected, and only to matters of detail in the conduct of an election.

"Having regard to the special and limited powers conferred on the Department in the sections which have been quoted, I am unable to hold that the general words of the schedule confer power on the Education Department to alter any provision in the statutes in regard to the election of a board, or to issue any Order at variance with the statutes. For example, the Department could not give directions as to the supply of vacancies which would deprive the remanent members of the school board of their statutory power of appointment, or would warrant the intervention of the Department at earlier periods than those specified in sections 13 of the Act of 1872, and 15 of the Act of 1878.

"In like manner, where there has been no election, the powers of the Department appear to be expressly pointed out by the 13th section, and I think the Department could not extend them, nor adopt any other methods than those allowed in that section, and that an Order which disabled the Department from adopting any of these methods. and which substituted a different method from all of those sanctioned in the section, would not be covered by the general words of the schedule, and would be *ultra vires*. It is true that the language of the 13th section is permissive, and seems rather to confer a power than to impose an obligation, but the inference is legitimate that the Department has not under the statute any other power in the matter in question than the powers conferred.

"Now I have come to be of opinion that the present is a case to which section 13 applies. I think that it cannot be maintained that an election of a number of candidates under the fixed number is an election of a school board; and that therefore when such an election takes place it is the fact that 'an election has not taken place as required by the statute.' Further, there is no other clause of the Acts or schedules which applies to the case of a deficiency of candidates, and it is not to be easily assumed that that case was overlooked.

"It has not been overlooked, it may be remarked, in the English Education Acts, for there is a provision in article 6 of the second schedule of the Act 33 and 34 Vict. cap. 75, which meets the case expressly.

"The General Order issued by the Education Department purports to introduce in regard to school board elections in Scotland a provision substantially the same as that contained in the English Act, and it purports to extend the provisions of the 15th section of the Scotch Act of 1872, to circumstances different from those mentioned in that section.

"I have no doubt that the Order is a very salutary one indeed, and I see nothing in it inconsistent with the general scope or spirit of the Education Statutes, but if it be true that the case in question is provided for by the 13th section of the Act of 1872, it appears to me that the Order is nothing

but an amendment of the statutes, and is of the character of an act of legislation. That is, I apprehend, *ultra vires* of the Education Department.

"My view is that section 13 of the Act of 1872 covers the case of a deficiency of candidates at a school board election, and that section 15 does not apply, and I do not need to determine whether the Order would be *ultra vires* if the 13th section did not apply, and if a deficiency of candidates were a *casus improvisus*. But I do not think that in that case I could come to a different conclusion. I think that the powers conferred by the schedule relate to matters of form and detail, and not to the persons entitled to elect. That appears to be the true construction of the words, having regard to the special and detailed provisions of the Act in relation to the circumstances in which the intervention of the Department in a school board election is authorised. As illustrative of this point, the pursuers referred to *Hamilton* v. *Police Commissioners of Dunoon*, 15th January 1875, 2 R. 229.

"But the defenders have stated certain prejudicial pleas which it is necessary to notice. The plea founded on section 14 of the Act of 1872 is admittedly a mistake, because, as already noticed, that section has been repealed, and no other provision to the same effect was pointed out. But it is further pleaded that the action is incompetent because it is an attempt to review an Order of a Committee of the Lords of the Privy Council. But no authority was referred to which appeared to support this plea, which indeed is plainly untenable; for the Education Department has no powers but statutory powers, and the Court is bound to consider, when necessary in order to decide any question between two litigants, whether an act of the Department is within its power or is beyond them, and therefore without authority or validity. See *Macfarlane* v. *Mochrum School Board*, November 9, 1875, 3 R. 88, and see, *per* Lord President, p. 98; *School Board of Lochgilphead* v. *School Board of South Knapdale*, June 30, 1877, 4 R. 389; *Denny & Brothers* v. *Board of Trade*, June 25, 1880, 7 R. 1019.

"It was further pleaded that this action involved in reality, although not in form, a reduction of the Order of the Education Department, and that it ought therefore to have been directed against the Department. The pursuers, however, declined to call the Department. They considered that they had no question with the Department, and no title to conclude for the reduction of the Order; that they had no concern except with the particular election of the School Board of Port-Glasgow, which they challenged; and that they required only to establish that an act, otherwise without authority, was not legalised by the Order.

"I do not see that the Department is a necessary party in this case, or that there are any equitable considerations which make it proper to call it. Nor does it appear to be necessary to make any forma intimation of the dependence of this action, of which I understand the Department is aware."

The defenders reclaimed, and argued—The action ought to be dismissed as all persons were not called. The Scottish Education Department ought to have been called as defenders, as this was really an action for reduction of their Order. But no Order of the Department could be challenged by ratepayers as such—*Ewing and Others* v. *Glasgow Commissioners of Police*, August 16, 1839, M. & R. App. Cas. 849. (1) The Department had power to issue the Order. The Department by section 13 of the Act 1872 were authorised to appoint the time at which the election was to take place, by a General Order which was to subsist until a new one was issued. By the schedule of the Act 1878 the Department were authorised to "make regulations respecting all other necessary things preliminary or incidental to such election." The 13th article of the General Order related to a matter "incidental to the election." The action of the defenders was warranted under the authority of the General Order. (2) There had been a valid election in the sense of the statutes. A quorum of the school board was elected. These, acting under section 15 of the Act of 1872, met and appointed three new members, who completed the proper number of the board. The ward "election" did not necessarily mean an effective election, because if that was the case a school board might be elected all of whom except a quorum might resign or be disqualified, and then the quorum could appoint persons to fill their places. That was admitted to be lawful, and the appellants were in exactly the same condition. The law laid down in the case of *Kidd* v. *The Magistrates of Anstruther Wester* (cited *infra*) had been altered by the Vacancies in Town Councils of Burghs Act 1853 (16 Vict. cap. 26). All the cases provided for by sec. 13 were on the basis that no election of any kind had taken place. That was not the case here. It was admitted that if an election had taken place the elected members were entitled to fill up their number as had been done by this Board.

The respondents argued—The pursuers were not bound to call the Scottish Education Department as defenders, because all they were interested in was getting the particular election annulled, and that could be done by calling the parties directly concerned in the election. Although the previous decisions had not been consistent, it was now settled law that any individual ratepayer could challenge the election of any body which had power to deal with the rates, having an interest to prevent maladministration of the burgh funds although no patrimonial interest was alleged—Mackay's Practice, i., 298, 299; *Hill* v. *Montrose*, January 28, 1824, 2 S. 652, 1st ed., 549, 2nd ed.; *M'Baynes* v. *Innes*, March 2, 1827, 5 S. 505; *Aitchison* v. *Magistrates of Dunbar*, February 4, 1836, 14 S. 426. The

pretended election at which the original six members had been declared elected was void at common law—*Kidd and Others* v. *Magistrates of Anstruther Wester*, December 17, 1852, 15 D. 257. The General Order of the Scottish Education Department, under which the defenders averred they acted, was *ultra vires* of the Department, and could not give the authority claimed. First the Department, by the schedule annexed to the Act of 1878, had power to make orders "incidental" to the election. The Order here affected the whole matter of the election. Second, there was an express decision in the 13th section of the Act of 1872 which governed this matter. The Department acquired its power only from the statutes, and could not make any General Order annulling a special provision of the Education Statutes. The 13th section provided that if no election took place the Department could do one of three things specified in the section. It had been shown that no election had taken place either at common law or under the statutes, because the whole number of persons who were to form the school board had not been nominated as was necessary. The Department had not proceeded under the terms of the Education Acts, but under the provisions of a General Order which they had no power to issue; the election was therefore void, and the deeds relating to it ought to be reduced as craved—*Keay* v. *Magistrates of Dundee*, March 9, 1830, 8 S. 688; *affirmed in Magistrates of Dundee* v. *Lindsay*, March 17, 1831, 5 W. & S. 152.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether a school board has been properly elected for the burgh of Port Glasgow.

The number of members of each school board is fixed by the Scottish Education Department, and for this burgh the number was fixed at nine. At the recent election the number of candidates nominated was only six, and the course taken was under a General Order of the Department by which it is declared that when the whole number of members of a school board shall not have been elected, but a quorum has been elected, then that quorum shall meet and elect others to fill the vacancies. That was what was done here, and that is what is complained of.

The pursuers say that there was no election, and that there could not have been one, because a sufficient number of candidates did not come forward to make up the whole board. That contention appears to me to be sound. I agree entirely with Lord Rutherfurd Clark's opinion, and therefore limit myself to stating shortly the reasons why I think the Lord Ordinary's judgment is right.

I think that the Scottish Education Department had not power to make a General Order that if a sufficient number of candidates should not come forward to fill all the seats in a school board, that a quorum should be elected, and that that quorum should then fill the vacancies by electing others. The Department's powers are regulated by the provisions of the Education Acts, and it was said by the defenders that they derived power to make this Order from the schedule annexed to the Act of 1878. I admit that that schedule has the force of statute, but then it only gives power to the Department to make rules for the purpose of carrying out the provisions of the statutes; it does not give them power to annul its directions, or to substitute something entirely different from what it really says.

Now, it seems to me that the machinery necessary in this case was fully provided for by the statute, because I think if the returning officer had acted rightly he would have returned his declaration to the Department that no election had taken place, and then the Department could have dealt with the matter under the 13th section of the Act, under which they could have either (1) appointed a new election, (2) directed the old school board to continue to act, or (3) appointed a school board themselves. That seems to me to be the course that should have been followed. I am of opinion that the Lord Ordinary's judgment should be affirmed.

LORD YOUNG—The first observation I would make is that this case regards only a matter of public interest and concern, as distinguished from a matter of private interest and concern. It relates to the procedure of a returning officer at a school board election, in declaring that certain persons were elected as members of a school board contrary, as is alleged, to what was his duty, but what is sought to be reduced is his declaration to the Scottish Education Department that six members of the Board were duly elected. The pursuers say there was no election, and that therefore he ought not to have made that declaration. This declaration is the first of the deeds we are asked to reduce. These six members who had been declared to be duly elected as forming the School Board, met and supplied the deficiency in their number by electing three other members so that the whole number of nine was complete. The minute of the meeting at which these three other members were elected is the second deed which we are asked to reduce.

Now, a returning officer is an officer appointed or directed to be appointed by the Scottish Education Department, which is a Government Department charged with the care of all these matters. The Department prescribes his duties and makes regulations for his conduct in carrying out these duties, and it was conceded that what he did on this occasion was in accordance with the rules issued by the Department to which he was subject. To my mind it would be a very serious thing for us to interfere, in a matter which concerns the public interest only, with what was done by a public officer acting under the control and subject to the orders of a Government Department. I admit that the Government Department is restrained by the rules of

law, and cannot withhold or violate the legal rights of individuals, and that a court of law will vindicate the legal rights of an individual if they are invaded by a Government Department. It is, however, a matter of great delicacy for a court of law, acting in an affair of public interest only, to interfere with the action of a Government Department in a matter where it is charged with the whole conduct of the business.

The Navy is under the charge of the Admiralty, the Army under the Board of Ordnance, and the Horse Guards, and many other Government departments are charged with the care of matters which concern the public interest. It would be a matter of great delicacy for us to interfere with the actings of these departments in the public interest because we as a court of law thought that they had acted contrary to the letter of some statute. In all matters of a department in which the law of the land is concerned, the department has the assistance of the law officers of the Crown appointed for that purpose, and in order that the Scottish Education Department may proceed regularly in these matters one of the Scottish law officers of the Crown is attached to it. Now, we must assume that the Order which was obeyed by the public officer in this case, the returning officer, was issued in the public interest and with the approbation of the law officer of the Crown attached to the Department. The Lord Ordinary says—and I think we all concur in this—"I have no doubt that the order is a very salutary one indeed, and I see nothing in it inconsistent with the general scope or spirit of the Education Statutes." Now, in this matter of exclusively public interest, and with regard to an Order of the Department which is a very salutary one and not inconsistent with the scope of the Education Statutes, we are asked to set it aside, and that in the absence of the Department. Do we know how many school boards have been elected and are now proceeding under this Order which we are now asked to say is invalid and to be set aside?

Your Lordships are of opinion that the Department has no authority to issue orders to their own officer for his guidance. It is a curious thing for a court of law to say to the officer of a public department—"You cannot rely on the Department giving you proper orders unless they have first received the authority of a court of law." The schedule which gives power to the Department to make rules for school board elections is worthy of notice. Provision was made for this purpose both in the Act of 1872 and of 1878. I take the authority as given in the Act of 1878.—[*Here his Lordship read the schedule*]. Does that include giving regulations to the returning officer as to his duties? He is appointed by the Department, or it gives orders for his appointment, and the rules for his government of the election are prescribed by the Department, and now we are asked to tell him that they are illegal. I cannot assent to that. It is contrary to my idea of what is the duty of a court of law, and I think such procedure may be attended with very serious danger indeed in public matters.

Now, what is the question? The question is, whether, there having been a nomination of six members only when the full number was nine, an election could take place at all, or whether it was not the duty of the returning officer to refuse to proceed to an election, or if six members were voted for and no more, he ought to have abstained and made his return that no election had taken place under the 13th section of the statute? Now, it would never have occurred to me to doubt that the provision as to what was to be done in the case of no election taking place applied solely to a case of contumacy. It certainly was so at first. A contumacious absence on the part of those who objected to school boards altogether, and who by their absence might prevent a board being formed. Then the Education Board was authorised to appoint a school board for the district. It never occurred to anybody that it would apply to the case of a smaller number coming forward for election than would form the whole board. That case was provided for by section 15, and the Lord Ordinary in considering the different sections of the Acts says—and I agree with him—that "section 15 of the Act 1872 comes very near to that case."

Now, there can be no invalid election. There may be an improper declaration that an election has taken place when in fact it has not, but that is an invalid declaration, not an invalid election. Consider the two cases. Here nine is the full number of the board. Suppose eight members duly nominated and duly elected—I say duly without any prejudice to the question of law involved—it is said there is no election, and the declaration is not merely an invalid declaration, but is not the declaration of an election at all. Then if the declaration had stated that the whole nine members had been elected, but one of them had died before the declaration, and the returning officer was in ignorance of that fact, so that he returned nine members as elected, what happens in that case? The eight surviving members being a quorum of the board, meet under the 15th section of the statute, and elect some-one to fill the vacant place. But if this man who died had never been declared elected at all, because the returning officer heard of his death before he made his declaration, then the case is said to be different in the public interest. Can anybody say there is any difference? I think the two cases are identical, and in the language of the Lord Ordinary I think that the Education Department is only declaring what is salutary and not inconsistent with the general scope and spirit of the Education Acts when it declares that the two cases are identical, and that the duty of the returning officer is the same in both cases. I think that that is the reasonable and sensible course, and that any other would not be. Perhaps this is made more emphatic by the fact that the schedule of the English Act uses words which exactly express it, and I

have not heard any argument that that showed the Legislature intended there should be a different rule in Scotland to what obtained in England.

I cannot agree to the proposed judgment of your Lordships, and what does this case result in? The power of appointing the board lies with this very Education Department. Take it that the pursuers are successful, that there has been no election, and the case falls under the 13th section. What does that section say?—[*Here his Lordship read the section*]. Well, the Department is of opinion that the six persons who have obtained the votes of the constituency are the proper members and nominates them, and it is further of opinion that the three others who were elected to be members are proper members and nominates them; the whole Board is filled, and where is the good of all this litigation and interference with the work of a public department.

I am of opinion that if we were to have any question of public interest the Department ought to have been here at least to support their view of what they did, and I therefore think all parties are not called. But I have applied my mind to the merits of the case, and I am of opinion that this Order is in accordance not only with the spirit and scope of the Education Act, but also the letter, and I think that the defenders should be assoilzied.

LORD RUTHERFURD CLARK — In March 1891 the burgh of Port-Glasgow had to elect a school board. The purpose of this action is to declare that the election was not validly and legally made.

The pursuers are ratepayers in the burgh, and among the electors of the school board. It is maintained that they have no title to sue, because the election which is challenged was made in the manner directed by the Education Department of the Privy Council, and therefore with their sanction.

In my opinion this argument is not well founded. The sanction of the Department cannot validate an election which is not made in terms of the statute, nor is the Department entrusted with the duty of determining whether the election has been validly made. The decision of that question rests, I think, entirely with the Court.

Again, a school board which has not been duly elected is no school board at all, and the ratepayers are not bound to submit to its authority. The pursuers therefore seem to me to have a good title to try the question whether a school board was duly elected in 1891. Of course it will be understood that I am giving no opinion with respect to the validity of the acts done by the School Board before the legality of this election was challenged, or before that question has been finally determined. In such matters other and different considerations are involved than those with which we have to deal in the present action.

I have now to consider the merits of the question. I may say at once that I agree with the Lord Ordinary, and I have very little to add to what his Lordship has said.

It seems to me that the 13th section of the Act applies to the case which has occurred. The School Board of Port-Glasgow must consist of nine persons. In March 1891 there were only six candidates. Therefore, in my judgment, there could be no election. With six nominees only it was impossible to proceed to the election of a board which must consist of nine. Nor, in my opinion, can any person be returned as a member of a school board which does not exist.

I do not think that the 15th section applies. It deals with the case where the election of any person or persons is declared to be invalid. It assumes therefore that there was an election of a board in apparent compliance with the provisions of the Act. It is said that there is no difference between this case and the case which has occurred. To my mind there is a plain distinction. In the one case there can be no election at all. In the other there is an apparent election. But it is sufficient to say that the statute has dealt differently with the two cases, and that we must follow its provisions.

If the case falls under the 13th section, it is not disputed that the election was invalid. But if the case which has occurred be a *casus improvisus*, I agree with the Lord Ordinary in thinking that the Order of the Department is *ultra vires*. I do not think that the schedule of the Act of 1878 empowered the Department to create an electing body.

LORD TRAYNER — In my opinion the judgment which the Court is to pronounce does not infringe at all upon the authority of the Scottish Education Department.

In my opinion also this is not a question that can be decided upon considerations of expediency, but upon our opinion as to the legal effect of the Education Statutes.

The only question is, whether this alleged election of a school board for Port-Glasgow has been carried through in harmony with the provisions of the Education Act, and upon that matter I agree entirely with Lord Rutherfurd Clark.

The Court adhered.

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