so fronting the street access can now, as formerly, be had to the defenders' feu, and I think the Lord Ordinary is right in applying to this state of matters the law as laid down by the late Lord Justice-Clerk in the case of *M'Laren*. (Fifth) Any possession which the defenders have had has been in consequence of the superior's permission, and there is nothing whatever to show that he intended to give more by such permission than a temporary convenience such as he had, many years before, granted to Mr Watson. These are, I think, the main grounds on which the Lord Ordinary proceeds in repelling the defenders' claim, and which I have perhaps unnecessarily repeated. They seem to me sufficient for the decision which has been pronounced, and in which I concur.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent

The Court adhered.

Counsel for the Pursuer—W. Campbell—Salvesen. Agents — Duncan Smith & M'Laren, S.S.C.

Counsel for the Defenders—Dundas—Constable. Agents—Dundas & Wilson, C.S.

Thursday, November 28.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

BARONY PARISH COUNCIL *v.* SCHOOL BOARD OF GLASGOW.

Poor — Assessment — School Board — Land Taken by Private Bargain—Deficiency in Poor Rates—Lands Clauses Act 1845 (8 *Vict. c.* 19), *sec.* 127—*Education Act* 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 37—*Education Act* 1878 (41 *and* 42 *Vict. c.* 78), *sec.* 31.

Sec. 127 of the Lands Clauses Consolidation (Scotland) Act 1845 enacts that "if the promoters of the undertaking become possessed by virtue of this or the Special Act, or any Act incorporated therewith, of any land charged with the land tax, or liable to be assessed to the poors rates or prison assessments, they shall from time to time, until the work shall be completed and assessed to such land tax, poors rate, and prison assessment, be liable to make good the deficiency in the several assessments . . . by reason of such lands having been taken or used for the purposes of the work, and said deficiency shall be computed according to the rentals at which said lands, with any buildings thereon, were valued or rated at the time of the passing of the Special Act."

By sec. 31 of the Education Act 1878 it is, *inter alia*, provided that "With respect to the purchase of lands by school boards for the purpose of the Education (Scotland) Acts 1872 and 1878 the following provisions shall have effect:—(1) The Lands Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, shall be incorporated with this Act."

By sec. 37 of the Education Act 1872 it is provided that, "In performing their duties under this Act, it shall be lawful for any school board to acquire by purchase or otherwise sites for schools."

Held that when a school board acquired land by private bargain, and without obtaining a Special Act, they did so by virtue of the powers conferred upon them by sec. 37 of the 1872 Act; that the incorporation of the Lands Clauses Act provided by sec. 31 of the 1878 Act did not take effect; and that consequently they were not liable under sec. 127 to make good the deficiency in the assessment for poor rates caused by their demolishing the houses on the ground acquired by them.

Section 37 of the Education Act 1872 provides—"In performing their duties under this Act, it shall be lawful for any school board to acquire by purchase or otherwise sites for schools, teachers' houses, and gardens, and to enter into contracts for the erection of schools and teachers' houses thereon, and to have such schools and teachers' houses erected, and also to acquire by purchase, or take on lease, any existing schools and teachers' houses, together with any land used, or suitable to be used, in connection therewith, not being schools, houses, and land of any description to which the provisions of this Act in the two immediately succeeding sections, regarding the transference of existing schools, are applicable, and from time to time to improve, enlarge, and furnish any school of which they have the management, and all charges and expenses consequently incurred by them shall be paid out of the school fund. *And for the purpose of the purchase by the school board of any land or building, in pursuance of the provisions of this Act, the clauses of the Lands Clauses Consolidation (Scotland) Act* 1895, *with respect to the purchase of lands by agreement, shall be incorporated herewith, and the expression 'the promoters of the undertaking' in the said Act shall, for the purposes of this enactment, mean the school board of any parish or burgh.*

[The part of the clause printed in italics was repealed by the Statute Law Revision Act 1883].

By section 31 of the Education (Scotland) Act 1878 it is, *inter alia*, provided that "With respect to the purchase of land by school boards for the purpose of the Education (Scotland) Acts 1872 and 1878, the following provisions shall have effect:—(1) The Lands Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the Special Act; and in construing those Acts for the purposes of this section the Special Act shall be construed to mean the Principal Act (1872), and this Act, together with the Confirming Act hereinafter mentioned, and the promoters of the undertaking shall be construed to mean the school board, and land

shall be construed to include any right over land. (2) The school board, before putting in force any of the powers of the said Acts with respect to the purchase of land otherwise than by agreement" [*then follow provisions dealing with the mode of acquiring land compulsorily*]. By section 127 of the said Lands Clauses Consolidation (Scotland) Act it is enacted that "if the promoters of the undertaking become possessed, by virtue of this or the Special Act or any Act incorporated therewith, of any lands charged with the land tax or liable to be assessed to the poors rates or prison assessments, they shall from time to time, until the works shall be completed and assessed to such land tax and poors rate and prison assessment, be liable to make good the deficiency in the several assessments for land tax and poors rate and prison assessment by reason of such lands having been taken or used for the purposes of the work, and said deficiency shall be computed according to the rentals at which said lands, with any building thereon, were valued or rated at the time of the passing of the Special Act, and on demand of such deficiency the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collectors of the said assessments respectively."

The School Board of the Burgh of Glasgow became possessed by private bargain, for the purpose of the erection of two public schools, of certain properties within the Barony Parish of the city of Glasgow. They demolished the buildings and proceeded to erect the schools on the sites. The Barony Parish Council thereupon raised an action against the Glasgow School Board concluding for payment of the sum of £25, being the amount of the deficiency created in the poor rates for the year 1894-95 owing to the demolition of these houses.

The pursuers pleaded—"The defenders having become possessed of and demolished the properties above referred to, and thereby caused a deficiency in the poor rates, which deficiency they are by the enactment above set forth bound to make good to the pursuer, he is entitled to decree against them for the sum sued for as craved, with expenses."

The defenders denied the deficiency, and pleaded—"2. The defenders are entitled to absolvitor, with expenses, in respect—(*a*) the defenders acquired the sites in question in virtue of their power in the Education Act 1872 to acquire sites, and not in virtue of the powers contained in the Lands Clauses Consolidation Act, or the Special Act, or any Act incorporated therewith; (*b*) *Separatim*, even supposing it were in virtue of the Lands Clauses Consolidation Act that they did acquire the sites in question, there is in regard to these sites no Special Act as defined in section 31 of the Education Act 1878, and therefore section 127 of the Lands Clauses Consolidation Act does not apply."

On 11th June the Sheriff-Substitute (GUTHRIE) allowed a proof. To his interlocutor the following note was appended:—

Note.—"By the Education Act 1872, section 37, the clauses of the Lands Clauses Act with respect to the purchase of lands by agreement are incorporated with the Act 'for the purpose of the purchase by a school board of any land or building in pursuance of the provisions of this Act.' These words occur in the section which authorises the school board to acquire sites and schools by purchase or otherwise, and appear to apply to the sixth and following clauses of the Lands Clauses Act, which give facilities for buying land from owners under disability. It is unnecessary to consider whether this incorporation included the 127th section of the Act on which this action is founded, because by the Education Act of 1878, section 31, the whole of the Lands Clauses Act, with an unimportant exception, is incorporated with the Education Acts of 1872 and 1878.

"The 127th section of the Act of 1845 (section 133 in the English Act) makes the school board liable 'to make good the deficiency' in certain rates, including poor rates, 'by reason of lands having been taken or used for the purposes of the work,' and that 'from time to time until the works shall be completed and assessed.' This action is brought for a deficiency said to arise in this way in the assessment for the year 1894-95 on lands taken for school purposes in Barony parish, the deficiency being ascertained—as I assume, though it is not stated—by comparison with the assessment of the previous year.

"The defenders object to this claim on two grounds. They say that the 127th section does not apply to them (1) because they have not bought under the provisions of the Lands Clauses Act, but under the power to acquire lands conferred by section 37 of the Act of 1872, and (2) because, in any view, the 127th section provides that the deficiency 'shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the Special Act,' and in the present case no Special Act exists in the sense of section 31 of the Education Act 1878.

"1. The Lands Clauses Act, with the exception referred to, is incorporated with the Education Act, and no reason has been suggested why the 127th section should have no effect where lands are bought by private bargain, and without any use being made in regard to the properties in question (as is alleged in argument, though not admitted) even of the powers in the 'purchase by agreement' clauses. The natural meaning of incorporation is that the whole Act, so far as not inconsistent with the Education Act (*Attorney-General* v. *Great Eastern Railway Company*, L.R., 7 Chan. 475), is embodied in the Education Act, and the School Board is not entitled to hold itself free from certain of its provisions and to take advantage when the occasion arises of others; and as it is impossible to say in such a case as this that the possession of compulsory powers (however qualified in the Act of 1878) has not indirectly benefited the defenders in bargaining about these properties, it is not unfair to say that they

should take the *incommodum* of the Act along with the *commodum*. This point, however, seems to be concluded by the very full explanation of what incorporation means in the preamble of the Act of 1845, which is to be construed 'as one Act with the Education Act.'

"2. It is, perhaps, a more arguable question which is raised on the proviso in the Lands Clauses Act as to computing the deficiency already quoted, taken along with the provisions of section 31 of the Education Act 1878. The latter introduces a rather peculiar and cumbrous procedure regarding the taking of land compulsorily, consisting of an application to the Education Department for an order, which becomes final only by a confirming Act of Parliament. Subsection 1 of section 31 enacts that in construing the Lands Clauses Acts and Amending Acts 'for the purposes of this section, the Special Act shall be construed to mean the Principal Act (1872) and this Act, together with the Confirming Act hereinafter mentioned.' The contention made is that as there is no Confirming Act in regard to the purchase of the subjects condescended on, there is no Special Act at the passing of which the rental can be completed, and therefore, as I understand the argument, the conditions necessary for the operation of section 127 of the Lands Clauses Act do not exist. The assumption is that in all cases the deficiency to be made good depends on a comparison of the rental of the present year with the year in which the Special Act was passed. I am not satisfied that this is a sound construction of section 127. It rather appears that the main provision is that until the works are completed and assessed the promoters shall make good the deficiency in rates by reason of their taking and using the lands, and that the provision as to computation is merely ancillary. In most cases there is no doubt or difficulty, because the Special Act is easily ascertained and is of no remote date, while here the definition above given refers us to an Act which has never come into existence, and but for the definition above given we should have to look to 1872 or 1878 for the passing of the Special Act. It seems to me, however, that the intention of the Legislature is that the deficiency shall be made good in all cases where lands are taken and the work not yet completed, and that the subsidiary provision does not limit the general enactment, but is applicable only where there is a special Railway or Canal Act, or the like, authorising the taking of specific lands—the *species facti* which no doubt was directly contemplated by the framers of the Act of 1845. In more recent times the taking of land has been authorised in a variety of ways, and by classes of promoters not then thought of, and general powers have been given to proceed under the Lands Clauses Act. I cannot doubt that all these 'promoters' must make good the deficiency, and that the special subsidiary proviso as to computation must receive effect in those cases only to which it is applicable. Many cases of 'beneficial' construction of statutes are found which go further than this, *e.g.*, *Cortis* v. *Kent Waterworks*, 7 B. and Cr. 314, illustrates the principle, and I think that the adaptability of this very clause to circumstances apparently not contemplated is shown by *Bristol Guardians* v. *Mayor of Bristol*, 18 Q.B.D. 549, and the earlier case of *Wheeler & Stratton* v. *Metropolitan Board of Works*, there cited.

"As the deficiency is not admitted, there must be a proof."

The defenders appealed, and argued—(1) Section 31 of the Education Act of 1878 did not apply to purchase of lands by private bargain, and accordingly section 127 of the Lands Clauses Act did not apply. The land had been purchased by the appellant not in virtue of the 1878 Act at all, but by the powers conferred upon School Boards by section 37 of the 1872 Act. Accordingly they had no occasion to refer to the Lands Clauses Act for any of the powers about agreement contained therein. There were no compulsory powers given by the 1872 Act, but it was simply to enable willing purchasers and sellers to buy and sell. That part of the 37th section which incorporated the Lands Clauses Act had been repealed, and accordingly section 127 of the latter Act did not apply to this purchase. (2) The Board had obtained no Special Act here, which was required in order to ascertain the date and the nature of the undertaking. It was necessary to ascertain the date in order to fix the liability of the promoters. It was shown by a fair reading of section 31 of the 1878 Act that this was the only means provided by statute for fixing the date of liability, and the absence of the Special Act showed that the provisions of the Lands Clauses Act had not been put in force by the Board, and that accordingly they were not liable under section 127. The Sheriff had arrived at his conclusion only by ignoring the force of the words in section 127, "The assessment shall be computed . . . at the time of the passing of the Special Act."

Argued for the respondents—(1) Section 31 of the 1878 Act took the place of the repealed portion of section 37 of the 1872 Act, which incorporated the Lands Clauses Act. Accordingly it must be held that land acquired under the earlier Act must be subject to the conditions of section 127 of the Lands Clauses Act. The natural meaning of incorporation must be that the whole of the Lands Clauses Act, so far as not inconsistent with the Education Act, was embodied therein, and the Board was not entitled to hold itself free from certain of the provisions of the incorporated Act and take advantage of others. (2) With regard to the Special Act, the provision as to computation was merely ancillary to the main provision that until the works were completed the promoters would have to make good the deficiency in the rates, and the ancillary provision would receive effect only when it was applicable. The Court would construe a section of this kind liberally, in order to give effect to the obvious intention of the statute, and would adapt it to meet the circumstances,

as had been done in the cases of *Bristol Guardians* v. *Mayor of Bristol*, February 28, 1887, 18 Q.B.D. 549, and *Stratton* v. *Metropolitan Board of Works*, November 25, 1874, L.R., 10 C.P. 76.

At advising—

LORD PRESIDENT—This claim is rested upon the 127th section of the Lands Clauses Consolidation (Scotland) Act, and it is necessary, first of all, to see what is the relation of this School Board to the Lands Clauses Act under the several statutes which deal with the matter. In the Act of 1872 there was a partial incorporation of the Lands Clauses Act, but in 1878 a different system was substituted. Without expressly repealing the provisions in the Act of 1872 the Act of 1878 did this—it incorporated the whole of the Lands Clauses Act with the Act of 1872. But then it provided that before putting in force any of the powers of the Act with respect to the purchase and taking of land otherwise than by agreement, certain procedure was to be gone through. That procedure may be shortly stated thus:—a Provisional Order was to be obtained, and a confirming Act of Parliament following upon that. Now, in one view, the position of the School Board was strengthened, and in another it was weakened by this. But that the two systems were inconsistent the one with the other, or rather that the system of 1878 was intended to supersede and sweep away the system of 1872, is shown by this, that the Legislature subsequently, holding the one to supersede the other, formally repealed the provisions of the Act of 1872 in this regard. Now, that being the net result of these statutes, we have to consider, in the matter now in hand—Has the School Board exercised the powers of the Lands Clauses Act vested in them by the Act of 1878? And we have to regard that in relation to the very definite terms of this section 127. We are told by section 127 that if lands have been taken in virtue of the Lands Clauses Act, and a deficiency has arisen in the assessments, that shall be made good, but that the deficiency shall be computed according to the rentals at which said lands, with any buildings thereon, were valued or rated at the time of the passing of the Special Act. There is no other way of ascertaining the liability of the promoters than by a reference to that particular date. Now in this case there is no Special Act at all. And it thus appears to be a practical test that the provisions of the Lands Clauses Act, so far as competent to the School Board, have not been put in force. They have not obtained a special confirming Act which, on a fair reading of section 31 of the Act of 1878, might be regarded as fixing the date.

It appears to me that their proceedings are referable to a much simpler and more primary power. Under the 37th section of the Education Act of 1872 it is provided that in performing their duties under this Act it shall be lawful for any school board to acquire by purchase or otherwise sites for schools. That is what they have done. They have not had occasion to refer to the Lands Clauses Act for any of the powers about agreement contained in it. Almost all the powers in that Land Clauses Act about agreement relate, as Lord Kinnear pointed out, to the sellers of property if persons under disabilities; but, as I have said, the proceeding we have here to deal with is plainly referable to section 37 of the Education Act. And the practical difficulty in the way of adopting any other view seems to me insuperable, viz., that this pursuer cannot recover the amount which alone the statute enables him to get under section 127, because there is no Special Act to fix the date.

LORD M'LAREN—In dealing with a case of this kind, in which the Lands Clauses Act, or any part or division of it, has to be construed, we may take note of the fact that it is not the practice of Parliament to delegate unlimited powers for the purchase of lands either to public or private corporations. In the case of a private corporation, such as a railway company, the lands which may be purchased are strictly defined in the Special Act as those which are delineated and described. In the case of public bodies—such as school boards and parochial district boards connected with the local government of the country—it has, I think, been usual to define their rights in acquiring lands by reference to the purposes of the Act. For example, clause 37 of the Education Act 1872, which gives this power to school boards, has empowered the purchase of lands for the erection of schools, schoolmasters' houses, and gardens; and, so far as I can find, for no other purpose whatever. Then it is provided with reference to that power of purchase that the machinery of the Lands Clauses Consolidation Act relating to purchase by agreement shall be applicable. That plainly means that those powers of the Lands Clauses Acts may be used if necessary. But it is not said in the record that the persons from whom the site of the school in question was purchased were persons under any disability to sell, or that, as matter of fact, the powers of the Lands Clauses Act applicable to voluntary purchases ever were put into operation. The Education Act gives ample power, qualified only by the purpose for which it was to be exercised, to acquire lands by voluntary purchase without any reference whatever to the machinery of the Lands Clauses Act. Now, on that view of the case it appears to me that we are altogether outside this section 127, which has been invoked for the purpose of adding something to the assessment on the school buildings. If it had been necessary to use the powers of the Lands Clauses Act, we should then have had to consider that the qualified power given by the Education Act of 1872 has been repealed, and a more general power substituted for it by the Act of 1878. Of course it would be quite unnecessary, and therefore, as I think, inappropriate, to give any opinion as to the question which would then be raised with reference to the applicability of section 127; and it is per-

fectly possible that one might come to a different result if the lands were acquired under the clauses applicable to the taking of lands by agreement, because then it would be extremely difficult to apply the provision which depends upon a date fixed by a Special Act, while if it were a case of compulsory purchase the same difficulty would not arise. But another difficulty, to which I need not further allude, would arise upon the construction of the somewhat carefully worded definition of a Special Act contained in the Act of 1878. But on the question which we are considering, my opinion is, that the conditions of the case are entirely different from those upon which the Sheriff-Substitute has based his argument, and that the appeal ought to be sustained.

LORD KINNEAR—I am of the same opinion. Counsel for the respondent concedes that part of the 31st section of the Act of 1872, which effected a partial incorporation of the Lands Clauses Act, has been repealed, and that in place of the partial incorporation there is substituted a total incorporation by the provision of the 31st section of the Act of 1878. Now, that section incorporates generally the Lands Clauses Consolidation Act, and the Acts amending it, with the Education Act. But then the incorporation is subject to this condition—that before any of the powers of the Act of 1845 are to come into operation a certain procedure is to take place, and therefore the statute is not effectively incorporated until that procedure has been followed out, the result of it being that after a Provisional Order has been obtained from the Privy Council there may be obtained a confirming Act. When that has been done, the Act of 1872, the Act of 1878, and the confirming Act, all taken together, are to become the Special Act with which under the 31st section the Lands Clauses Act is to be incorporated. Now, no part of that procedure has been followed; and it appears to me to follow that the Lands Clauses Act, notwithstanding the general incorporation of the 31st section, has not been brought into effective operation for the purposes of this School Board. Now, if that has not been brought into effective operation at all, it follows that the clauses from 6 to 16, which had been incorporated by the previous repealed enactment of 1872, are not applicable to any transaction which the School Board may carry out. Under the Act of 1872 the School Board had the benefit of these provisions, notwithstanding that they were not in a position to satisfy the conditions under which, by the Lands Clauses Act itself, those provisions were brought into effect, because by the 6th section of the Lands Clauses Act they are only to be applicable in cases where the promoters have by a Special Act obtained authority to take lands by compulsion. Under the 1872 Act the school boards have the benefit of those clauses although they had no such power. But according to the concession of the respondents' counsel, there is substituted for that power a new incorporation of the Lands Clauses Act itself under the conditions of that Act. Therefore it seems to me to follow of necessity from the concession, that until the School Board has obtained authority to take land, it has not been brought within the scope of the Lands Clauses Act of 1845 at all. Now, that being so, I agree with your Lordships that none of the conditions under which section 127 would be brought into operation have been satisfied. The promoters or the School Board have become possessed of land, but not by virtue of the Lands Clauses Act, because that has not yet been brought into operation, nor by virtue of any Special Act or Act incorporated therewith, because the Special Act has not yet come into existence. They might obtain a Special Act by following certain procedure, but they have not, and therefore I agree with your Lordships in thinking that they are possessed of the land by virtue of the powers conferred upon them by the 37th section of the Education Act of 1872, and not otherwise. For these reasons I agree that the interlocutor of the Sheriff-Substitute should be recalled, and that the appeal should be sustained.

LORD ADAM concurred.

The Court sustained the appeal and recalled the interlocutor of the Sheriff-Substitute.

Counsel for the Appellants—Dickson—Sym. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Respondents—Dean of Faculty, Q.C.—Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

GIBSON *v.* CLARK.

Landlord and Tenant—Lease—Sheriff—Jurisdiction—Desertion of Farm—Judicial Manager.

An application for the appointment of an interim judicial manager upon a farm was granted by the Sheriff on the application of the landlord, who alleged that the farm had been deserted by the tenant. No appearance was made to oppose this appointment on behalf of the tenant. The manager entered upon his duties, and by subsequent interlocutors the Sheriff approved of his intromissions and granted him a discharge.

In an action of reduction of the appointment and the proceedings following thereon at the tenant's instance, it was proved that the pursuer had left this country on 24th August, and returned on 22nd September; that before leaving he had sold off the greater part of his stock, and that his family, who had been left at the farm, had informed the landlord, in answer to inquiries by his agent, that they were not aware