

Counsel for Pursuers and Real Raisers—
R. C. Henderson. Agents—Morton, Smart,
Macdonald, & Prosser, W.S.

Counsel for Claimants and Reclaimers
Alexander C. Anderson and Others—
Murray, K.C.—C. H. Brown. Agents—
Drummond & Reid, W.S.

Counsel for Claimants and Reclaimers
Mrs Blumenthal and Others—Murray, K.C.
—C. H. Brown. Agents—Ronald &
Ritchie, S.S.C.

Counsel for Claimant Mrs Prendergast—
Leadbetter. Agents—Mackenzie & Black,
W.S.

Counsel for Claimants Robert A. Brook
and Another—Moucrieff. Agents—Web-
ster, Will, & Company, W.S.

Counsel for Claimants Edward J. B.
Craig and Another—Lees, K.C.—D. M.
Wilson. Agents—Carmichael & Millar,
W.S.

Wednesday, December 15, 1909.

FIRST DIVISION.

SCHOOL BOARD OF GLASGOW *v.* THE KIRK-SESSIONS OF THE PARISHES OF ANDERSTON AND ST MARK'S, GLASGOW, AND OTHERS.

*School—Board School—Powers of School
Board—Right of Kirk-Sessions to Use of
School-house when not in Use as a School
—Right of School Board to Change Site of
School, Reserving to Kirk-Session Same
Use as Formerly of Old School-house—
Education (Scotland) Act 1872 (35 and 36
Vict. cap. 62), secs. 36 and 38.*

Two kirk-sessions, the trustees of a
parochial school, under the powers
given by the Education Act 1872, con-
veyed a school and its site to the School
Board of Glasgow under the proviso
that the said kirk-sessions should be
entitled to the use of the school-house
when not required as a school under
the Act. In process of time the School
Board built other schools in the im-
mediate neighbourhood of sufficient
size to accommodate all the pupils
hitherto accommodated in the said
school, and in terms of section 36 of the
Act closed the school.

Held in a Special Case that the School
Board, as they offered to the kirk-
sessions the same use of the school-
house as formerly, were entitled to
close the school, *i.e.*, to change the site
of the school.

*School—Board School—Powers of School
Board—Day Industrial School—Schools
Specially Intended for Roman Catholics
—Teachers in a Certain School to be all
Roman Catholics—Education (Scotland)
Act 1872, sec. 68—Children's Act 1908 (8
Edw. VII, cap. 67), sec. 132 (24).*

Held in a Special Case that in the
circumstances therein disclosed the

School Board of Glasgow were entitled
to start and maintain a day industrial
school and a public elementary school
for defective children, both specially
intended for Roman Catholic children,
and in which the religious instruction
was to be exclusively according to the
Roman Catholic faith, and the teachers
therein all of that faith.

*Title to Sue—Kirk-Session—School—School
Board—Religious Education—Estab-
lishment of School for Roman Catholics.*

Held that a kirk-session, *qua* kirk-
session, had no title to object to the
opening by the School Board of a
school for Roman Catholic children,
to be taught by Roman Catholic
teachers in accord with the Roman
Catholic faith.

The Education (Scotland) Act 1872 (35 and
36 Vict. cap. 62) enacts—Section 36—“ . . .
A school board may with the sanction of
the Board of Education discontinue or
change the site of any school under their
management, and may sell and dispose of
any land and buildings connected with any
school so discontinued, or the site of which
is so changed. . . .”

Section 38—“With respect to schools
now existing . . . in any parish or burgh
erected or acquired and maintained, or
partly maintained, with funds derived from
contributions or donations . . . for the
purpose of promoting education, be it
enacted that it shall be lawful for the
person or persons vested with the title to
any such school, with the consent of the
person or persons having the administra-
tion of the trusts upon which the same is
held, to transfer such school, together with
the site thereof, and any land or teacher's
house held and used in connection there-
with, to the school board of the parish or
burgh in which it is situated, to the end
and effect that such school shall thereafter
be under the management of such board as
a public school in the same manner as any
public school under this Act; and it shall be
lawful for the school board with the sanc-
tion of the Board of Education, to accept
of such transference, and on the same
being made and accepted, the said school,
with the site and any land and teacher's
house included in the transference, shall be
vested in the school board, and the school
shall thereafter be deemed to be a public
school under this Act; and shall be main-
tained and managed by the school board,
and be subject to all the provisions of this
Act accordingly; and the existing teachers
. . . may be continued as such teachers by
the school board, and their continuance in
office may be made a condition of the
transference. . . . And the use of the
school-house at such times and for such
purposes as shall not interfere with the use
thereof, under the provisions of this Act
by the school board may also be made a
condition of the transference thereof to
the school board.”

Section 47 allows school boards to receive
and administer bequests “according to the
wishes and intentions of the donors.”

Section 68 enacts—"Every public school, and every school subject to inspection and in receipt of any public money as hereinbefore provided, shall be open to children of all denominations, and any child may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; and no child shall in any such school be placed at any disadvantage with respect to the secular instruction given therein by reason of the denomination to which such child or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects. The time or times during which any religious observance is practiced or instruction in religious subjects is given at any meeting of the school for elementary instruction shall be either at the beginning or at the end, or at the beginning and at the end of such meeting, and shall be specified in a table approved by the Scotch Education Department."

The Children's Act 1908 (8 Edw. VII, cap. 67) enacts—section 132, sub-section 24—"Subject to the provisions hereinafter contained, nothing in this Act shall be construed to repeal, alter, prejudice, or affect any of the provisions of the Glasgow Juvenile Delinquency Prevention and Repression Acts 1878 and 1896 (hereinafter referred to as the Glasgow Acts), and the commissioners and the directors acting under the Glasgow Acts shall continue to have the full rights, privileges, and powers at present competent to them."

The School Board of the Burgh of Glasgow (*first parties*), and the Reverend James Robertson and others, who were the ministers and members of the kirk-sessions of the *quoad sacra* parishes of Anderston and St Mark's, Glasgow, and who were also ratepayers within the area for which the first parties were the School Board, as such ministers and members and also as individuals (*second parties*), presented a Special Case for the opinion and judgment of the Court of Session.

The Case stated—"By a disposition dated 18th June 1836 William Kippen of Busby, for the causes therein mentioned . . . disposed . . . to and in favour of the then minister and members of the kirk-sessions of the churches and parishes of Anderston and St Mark's, in the burgh of Anderston, and their successors in office respectively, as trustees for the Anderston Parochial Schools, four steadings of ground in Catherine Street, Anderston, Glasgow. . . . On this disposition the said trustees were infett. . . . The disposition declared that the trust thereby created was for the purpose of constituting, supporting, and continuing in all time thereafter parochial schools for the parishes of Anderston and St Mark's and the rest of the burgh of Anderston (and also if found attainable for the neighbourhood thereof, but the children in the said two parishes and burgh having at all times a preference over those in the neighbourhood in the event of competition for admission thereto), which schools, under the denomination of the Anderston Parochial Schools, were to be managed and

administered in terms of the rules and regulations to be adopted for the same, and subscribed by the said trustees in the sederunt book of the directors of the said schools. . . . The said burgh of Anderston was in 1846 incorporated in and has since that time formed part of the burgh of Glasgow.

"By contract of ground-annual dated 29th October and 4th November 1840 the trustees of Anderston School, with consent of the directors of the school, sold and conveyed to Robert Marshall, cabinetmaker and joiner in Glasgow, an unbuild-on portion of the ground belonging to the trustees . . . under burden of payment to them of a yearly ground-rent or ground-annual of £8, 12s. Said ground-annual was thereafter, along with the income of a sum of £100, consisting of (1) a grant in 1858 of £50 from the trustees of the Ferguson Bequest Fund, and (2) £50 raised by subscription in fulfilment of a condition attached to the grant by the Ferguson Trustees, applied by the trustees of the said school as an investment for behoof of the school.

"Until its transference to the School Board in 1874, as hereinafter mentioned, the school was carried on in terms of and in accordance with the provisions of the trust-deed, and the religious instruction given in the school was in accordance with the formula and doctrines of the Church of Scotland.

"At a meeting of the directors of the school, held at Glasgow on 8th May 1874, duly summoned for the purpose of authorising the transference of the school to the School Board of the burgh of Glasgow, when there attended a majority of more than two-thirds of the then directors, being the 'persons having the administration of the trusts' on which the said school was held, it was unanimously agreed to transfer the said school to the School Board of the burgh of Glasgow, in terms of section 38 of the Education (Scotland) Act 1872, under the condition that the existing teachers be continued by the School Board, and also that there be reserved to the kirk-sessions of Anderston and St Mark's churches the right to the use of the school-house at all times (free of rent) when not required as a school under the Act. It was also resolved that the ground-annual of £8, 12s. belonging to the school be transferred to the School Board under section 47 of the Education (Scotland) Act 1872. The meeting requested the surviving trustees vested with the title to the school and ground-annual to carry this transaction into effect by executing the necessary deed of conveyance. The minute of said meeting . . . was delivered to the School Board, and the trustees, by conveyance dated 10th September, &c., and recorded in the General Register of Sasines 9th November 1874, (1) in virtue and in terms of the Education (Scotland) Act 1872, disposed to the School Board of the burgh of Glasgow in trust for the purposes of the said Act, and with all the powers and under the conditions, provisions, and declarations contained in the said Act, the ground and buildings of the

said school, but always with and under the burdens, conditions, provisions, and others, with the exception of the regulations of the trust for the said school specified and contained in the said instrument of sasine, but providing and declaring as a condition of the said transference that the existing teachers of the said school should be continued as such teachers by the said School Board in terms of the said Education (Scotland) Act 1872, and that the kirk-sessions of the said parishes of Anderston and St Mark's should be entitled to the use of the school-house at such times and for such purposes as should not interfere with the use thereof under the provisions of the Education (Scotland) Act 1872 by the said School Board; and (2) in virtue of the Education (Scotland) Act 1872, disposed to and in favour of the School Board, in trust for the purposes of the said Act and for behoof of the Anderston Parochial Schools, and that with all the powers, conditions, provisions, and declarations contained in the said Act, the said ground-annual of £8, 12s. There was also assigned to the School Board in November 1874 a mortgage by the Glasgow Water Commissioners for the sum of £100, being the £100 above mentioned, and said sum was thereafter invested in name of the School Board in Glasgow Corporation stock.

"From the date of said transference the School Board took over the staff of teachers and conducted the school as an ordinary public elementary school until 28th June 1907, when it was closed with the sanction of the Scotch Education Department in terms of section 36 of the Education (Scotland) Act 1872. During that period said ground-annual and the income of said £100 were not specially applied to the increased efficiency of said school, but were merely credited to the account thereof, and the education provided by the School Board therein was precisely the same as that provided in the other public elementary schools under the management of the School Board. For some time prior to the closing of the said school H.M. Inspectors had in their annual reports reported that the said school had become unsuitable for use as an ordinary public school, and urged the School Board to close it as soon as possible. At the date of the transference the said school afforded accommodation for 530 pupils. Immediately after the transfer the School Board made additions to the school at a cost of £3906, 6s. 1d., thereby making the accommodation adequate for 886 pupils. At the date of said school being closed the attendance had been reduced to 389. The School Board in the meantime had otherwise provided sufficient additional school accommodation for the increasing population in the neighbourhood by the erection within the district of Anderston of six ordinary public schools, giving accommodation for altogether 8956 pupils.

"Anderston School having thus been closed as unsuitable as well as unnecessary as an ordinary elementary day school, the School Board proposed to adapt the build-

ing to the purposes of (first) a day industrial school, and (second) a public elementary school for physically or mentally defective children, both intended specially for Roman Catholic children, and in both of which schools the religious instruction should be exclusively according to the Roman Catholic faith, and the teachers in which should all be of that faith. At a meeting of the School Board held on 15th April 1907 a resolution in the following terms was duly proposed and seconded—'That it is deemed expedient that the Board establish in the Anderston (and Gorbals) districts of the city special schools for physically defective children, and also day industrial schools for such children as are not under the present arrangements accommodated in said schools.' While the resolution does not in terms specify the class of children under consideration, the children referred to in the resolution are exclusively Roman Catholic children, and it is a part of the scheme embraced in said resolution that the religious instruction to be given in said special schools shall be exclusively in accordance with the Roman Catholic faith, and that the teachers in said school shall be of that faith. The following amendment was also duly proposed and seconded—'That the Board do not proceed further with the proposal to establish special and day industrial schools in which the religious instruction given shall be exclusively in accordance with the Roman Catholic faith unless and until the sanction of the electorate be first obtained.' On a vote being taken the resolution was carried by nine votes against six. Reasons of dissent and answers thereto were thereafter submitted on behalf of the minority and majority respectively of the Board. Further, the Board received protests against said proposal from the ministers of the parishes of Anderston and St Mark's, from the kirk-session of St Mark's, from the Presbytery of Glasgow, and from the Glasgow Landlords Association, Limited.

"The Education Acts and the code of the Scotch Education Department contain no regulations for the religious instruction of children in public schools except what is known as the 'Conscience Clause' of The Education (Scotland) Act 1872, viz., section 68, and no regulations for the examination in religious knowledge of teachers qualifying for a certificate of competency, or inquiry as to the religion of teachers, and no such examination or inquiry is in fact made by the Department. In accordance with a resolution passed at a meeting of the School Board held on 8th December 1873, which is in the following terms—'Whereas it has been the custom in the public schools in Scotland to give instruction in religion to children whose parents do not object to the instruction so given, and whereas the Education (Scotland) Act declares it to be expedient that the managers of public schools should be at liberty to continue the same custom, and whereas in the judgment of this Board the said custom ought to be continued, they direct the teachers to give, subject to the "Con-

science Clause," instruction in religion from the Bible and Shorter Catechism, except in the case of any school where it may appear that such instruction may be contrary to the wishes of the parents of the great body of the children in attendance"—the School Board have all along directed religious instruction from the Bible and Shorter Catechism to be given in the schools under their charge, and the Syllabus of Religious Instruction has been in use in the Board schools in Glasgow for twenty years. Religious instruction in accordance therewith is at the present time given in all schools under the charge of the School Board except to the Roman Catholic children in the 'Truant' School referred to in the next paragraph but two, who receive religious instruction according to the Roman Catholic faith, and except in two special schools in Govan Street, (a) a day industrial school, and (b) a school for physically and mentally defective children, and in a special school in Elliot Street also for physically and mentally defective children, all intended specially for Roman Catholic children. The religious instruction provided in the special schools in Govan Street and Elliot Street is exclusively in accordance with the Roman Catholic faith, and the teachers therein are also all of that faith. The special schools in Govan Street and Elliot Street were established by the School Board in 1908 after the questions herein submitted had been raised, and the second parties do not admit the legality of their institution on the basis described. The Syllabus of Religious Instruction above mentioned is not acceptable to Roman Catholics.

"In practice the School Board are in use, when dealing with applications for the post of a teacher in an ordinary public school, to send to applicants the said scheme of religious instruction and ask them whether they are prepared to teach the same. The same application form . . . is issued to all applicants for appointment as certificated teachers under the Board, and in the case of appointments in the said schools in which the religious instruction is exclusively according to the Roman Catholic faith the reference to the Board's Syllabus of Religious Instruction in Question (18) is deleted, and applicants are asked whether they are prepared to give religious instruction in accordance with the doctrines of the Roman Catholic Church.

"The religious instruction in the Glasgow Board Schools is given at the beginning of each school day from 9:15 to 10 o'clock when the school roll is called, and thereafter the school instruction is wholly secular. While Roman Catholic children who might attend the ordinary public schools under the management of the School Board would be entitled to the protection of the 'Conscience Clause,' and would only require to attend from the calling of the roll, very few Roman Catholic children attend the public schools in which religious instruction is given in accordance with the scheme of the Board above

referred to, and nearly the whole of the 23,000 Roman Catholic children estimated to be within the School Board area receive their education at Roman Catholic voluntary schools which earn a parliamentary grant under section 67 of The Education (Scotland) Act 1872.

"The School Board of Glasgow, by virtue of the powers conferred upon them by The Education (Scotland) Act 1872, section 41, has established, and has for two years maintained, an industrial school certified in accordance with the provisions of The Industrial Schools Act 1866, in which Protestant religious instruction is provided for Protestant boys, and Roman Catholic religious instruction for Roman Catholic boys. Only truants are committed to this school.

"The parties are at issue as to which Acts, or Orders made relative thereto, regulate the powers of the first parties with respect to day industrial schools. The second parties maintain that the first parties' powers are contained only in the Glasgow Juvenile Delinquency Prevention and Repression Act 1878, as amended by the Glasgow Juvenile Delinquency Prevention and Repression Amendment Act 1896, and in an Order by the Secretary of State dated 9th August 1881, issued in pursuance of powers conferred on him by section 30 of said Act of 1878, and not also in the Day Industrial Schools (Scotland) Act 1893 and the Children Act 1908. The first parties maintain, on the other hand, that their powers are contained in the Day Industrial Schools (Scotland) Act 1893 and the Children Act 1908, as well as in the said Acts of 1878 and 1896 and said relative Order. By said Act of 1878 two statutory bodies are created—(1) the Commissioners, whose duty it is to levy assessments for the purposes of the Act and to distribute the same as thereby directed, and (2) the Directors, whose duty it is, *inter alia*, to carry the Act into execution as regards Protestant industrial schools only. The Commissioners are, *inter alia*, directed by section 38 of the Act of 1878, as amended by said Act of 1896, section 5—(1) to make payment to the directors of such sums as are required and expended by them for the purpose of the Act, (2) to make contributions of 78s. *per capita* per annum for the support of certain classes of inmates remitted to certain specified Roman Catholic reformatory and industrial schools or any schools that may be substituted therefor. After satisfying the objects above specified the Commissioners may make payment to the managers of the Roman Catholic reformatory schools and the Roman Catholic industrial schools of such sums as the Commissioners may consider necessary or expedient to enable the managers to extend their operations or more effectively carry on the same. By the said Order of the Secretary of State there was conferred, subject to the conditions therein mentioned, upon the School Board of Glasgow power (a) to contribute sums of money towards the establishment, extension, enlargement, and rebuilding of

a day industrial school, or towards the support of the inmates of such a school, and (b) to establish, build, and maintain day industrial schools. The Act further provides that a day industrial school so established, built, and maintained by the School Board of Glasgow is to be subject to the jurisdiction of the Secretary of State and not of the Education Department. The Day Industrial Schools (Scotland) Act 1893 and the Children Act 1908 conferred upon school boards in Scotland powers of establishing and maintaining certified day industrial schools, but as before stated the parties are at issue as to whether the first parties are excluded from the provisions of said Acts of 1893 and 1908 in respect of the provisions in section 132, sub-section 24, of the latter Act. Several day industrial schools have been established by said directors under the Act of 1878 for Protestant children. No day industrial school specially intended for Roman Catholic children has been established in Glasgow except said day industrial school in Govan Street, established by the School Board of Glasgow in August 1908.

"In consequence of the proposal of the School Board to convert said Anderston School into (a) a day industrial school, and (b) a school for defective children, both intended specially for Roman Catholic children, and in both of which religious instruction according to the Roman Catholic faith only shall be given, and all the teachers in which it is intended shall be of the Roman Catholic faith, the questions hereinafter set forth have arisen between the parties, and the opinion of the Court is respectfully requested thereon.

"The parties of the first part maintain that the School Board of Glasgow having had the said school transferred to them in accordance with the education statutes, are entitled to use it and the funds similarly transferred to them as freely as any other buildings or funds acquired and owned by them for the general purposes of the Education Acts, and that they are therefore entitled to use the said school buildings in the way and for the purposes proposed by them without any restrictions except those imposed by said Acts, and the right of use for meetings reserved to the said kirk-sessions. They further maintain that their powers with regard to day industrial schools are contained not only in the Glasgow Juvenile Delinquency Prevention and Repression Act 1878, as amended by the Glasgow Juvenile Delinquency Prevention and Repression Amendment Act 1896 and relative Order, but also in the Day Industrial Schools (Scotland) Act 1893 and the Children Act 1908. They further maintain that the provisions of section 68 of the Education (Scotland) Act 1872, which applies equally to public and voluntary State-aided schools, regulate the conditions of religious instruction to be given in the portion of the said school intended for defective children. The parties of the second part maintain that the School Board are not entitled to establish and use the said school as a day industrial school either wholly or partly

or to establish or carry on an ordinary public school or a day industrial school or a public elementary school for defective children, specially intended for Roman Catholic children, and where the religious instruction should be exclusively according to the Roman Catholic faith, all the teachers being to be of that faith, and that in regard to the said Anderston School which was transferred to the School Board along with an endowment under section 38 and section 47 of the Education (Scotland) Act 1872, the School Board are not entitled to adapt and use it as for a day industrial school either wholly or partly, and further, that they are not entitled to adapt and use it partly as a day industrial school and partly as a public elementary school for defective children specially intended for children of the Roman Catholic faith, the religious instruction being to be exclusively according to the Roman Catholic faith, and the teachers in which shall all be of the Roman Catholic faith as proposed by them, and that the School Board are not entitled to use said school otherwise than as a public school under the Education (Scotland) Act 1872. They further maintain that it is the duty of the School Board in the circumstances which have arisen to sell said school, and to invest the proceeds of such sale and apply the income of such investment and also said ground-annual and the income of the said £100, for the benefit of a public school or schools in the Anderston district, and in that event to make suitable provision or compensation to the second parties for the said right reserved to them in said disposition to the School Board. They further maintain that the School Board is precluded from exercising the powers conferred in the Day Industrial Schools (Scotland) Act 1893 and the Children Act 1908 by section 132, sub-section 24, of the latter Act."

The questions of law for the opinion of the Court were—(1) Is the School Board of the burgh of Glasgow entitled to adapt and use the said school for a day industrial school either wholly or partly? (2) Is the School Board of the burgh of Glasgow entitled to adapt and use said school partly as a day industrial school and partly as a public elementary school for defective children, both specially intended for Roman Catholic children, and in which the religious instruction shall be exclusively according to the Roman Catholic faith, and the teachers therein all of that faith? (3) If the answer to question (2) be in the affirmative, is it the duty of the School Board to apply the said ground-annual and the income of the said £100 for the special benefit of an ordinary public school or schools in the Anderston district, or to treat it as part of the general school fund? (4) If the answer to question (2) be in the negative, is the School Board entitled to sell the said school and ground-annual, and if so, is it their duty to invest the proceeds of the same and apply the income thereof, along with the income of the said £100, for the special benefit of an ordinary public school or schools in the Anderston district,

or to treat it as part of the general school fund? (5) In the event of the School Board of the burgh of Glasgow being found entitled to sell and selling the said school, would the School Board be bound or entitled to compensate said kirk-sessions or either of them in respect of their being deprived of the right of use of the school for meetings under said powers reserved to them respectively in said conveyance?"

The arguments of parties appear sufficiently from their contentions stated in the case. Reference was made to the following cases—*M'Culloch and Others v. Kirk-Session of Dalry*, July 20, 1876, 3 R. 1182, 13 S.L.R. 717, and *Sutherland and Others (Gateside School Managers) v. School Board of Beith*, February 3, 1903, 5 F. 424, 40 S.L.R. 345.

At advising—

LORD PRESIDENT—This is a Special Case presented by the School Board of the Burgh of Glasgow on the one part, and certain gentlemen who are the ministers and members of the kirk-sessions of the *quoad sacra* parishes of Anderston and St Mark's, Glasgow, respectively, on the other part; but the latter present their case not only in that character but also as individuals and ratepayers of Glasgow.

Now the first observation which I have to make is that although there is no possible objection to their doing this, yet their title as members of the kirk-session and as individuals is perfectly distinct, and you cannot pray in aid the one position to help the other. Accordingly I think their objections—for that is what the case asks us to determine—to certain actings of the School Board of Glasgow, which I shall presently mention, must be considered absolutely separately as put forth by them as kirk-sessions and as put forth by them as individuals.

The circumstances which give rise to the question are these. In 1836 one William Kippen of Busby made over in favour of the ministers and members of the two kirk-sessions specified a certain piece of ground to be held by them in trust. The trust was declared to be created for the purpose of constituting and starting parochial schools for the parishes of Anderston and St Mark's. As is well known, the burgh of Anderston afterwards came to be incorporated in the burgh of Glasgow. There seems to have been more ground than was necessary for the school which was put upon the ground so disposed; and that ground seems to have been sold, with the result that the trustees became creditors in a ground-annual of £8, 12s. This modest income was afterwards raised by a grant of £50 from the trustees of the Ferguson Bequest Fund, and £50 was raised by subscription.

When the Education Act of 1872 came to be passed the trustees considered their position, and at a meeting in Glasgow in 1874 they came to the determination by a majority to transfer the ground which they held to the School Board under the powers of section 38 of the Act of 1872. No

question was raised and no question is raised as to the validity of the transfer; we therefore take it that the transfer was duly effected. In the same way no question is raised as to what happened at the same time, namely, that the same trustees handed over what I have called this modest little endowment in terms of section 47.

The School Board having got possession of the school, proceeded to enlarge it, and then for a long time maintained it as an ordinary public school. But the premises were condemned, or at least critically disapproved of, by the Education Department; and in process of time the School Board, having built other schools in the immediate neighbourhood which were of sufficient size to accommodate all the pupils who had hitherto been accommodated in this school, closed the school in terms of section 36 of the Act of 1872. Having thus closed the school they then proceeded to consider what they would do with the building, and they came to the conclusion that they would utilise the building, which was no longer wanted as an ordinary public school, for two purposes, namely, first of a day industrial school, and secondly of a public elementary school for physically or mentally defective children; and it was given out at the same time that these schools were to be appropriated for a certain specified class, namely, children whose parents were of the Roman Catholic religion; and it was settled that the religious instruction given should be instruction in accordance with the tenets of the Roman Catholic religion, and also that the teachers who should be appointed to both these schools should be only persons professing the Roman Catholic faith.

Now the question, generally put, that is raised in this case is whether the School Board are within their rights in doing what they have done.

I now revert to what I said, that the objection so far as raised upon the title of the kirk-sessions must be kept quite distinct from the objections so far as raised by these persons as individuals and ratepayers; and I deal first with the objections raised by them as kirk-sessions.

Now as kirk-sessions it is quite clear they have no title whatsoever to object to anything that the School Board chose to do, except in so far as their title lies upon the deed of transfer. The section which allowed them to transfer is, as I have already mentioned, section 38 of the Act of 1872. It is a long section, and I need not read it all. Leaving out the words not necessary for my meaning, it says that it shall be lawful for the persons vested with the title, with the consent of the persons having the administration of the trust, to transfer a school, together with its site, to the school board of the parish, to the end and effect that such school shall thereafter be under the management of such board as a public school in the same manner as any public school under this Act; and then it is expressed that it is to be lawful for the school board, with the sanction of the Board of Education, to accept the transfer.

But then there is a clause at the end of the section stating that the use of the school-house at such times and for such purposes as shall not interfere with the use thereof under the provisions of this Act by the school board may also be made a condition of the transfer thereof to the school board. There was a clause of that sort put into the conveyance in question, which clause was in the following terms—"Provided that the kirk-sessions of the said parishes of Anderston and St Mark's shall be entitled to the use of the school-house at such times and for such purposes as shall not interfere with the use thereof under the provisions of the Education Act by the School Board."

It seems to me that in a transfer of that sort, with a clause of that sort, the transferring trustees and their successors—where, as here, there is a body of successors—can take objections of two kinds, and of two kinds only. The one, and the more general one, is that they can raise objection to the building not being used in terms of the transference, and indeed in terms of the only condition on which the Act of Parliament allows a transference, namely, as a public school. I have no doubt that supposing, for instance, the School Board of Glasgow, having accepted the transfer, then and there without more ado proceeded to use the building for purposes other than a public school they could have been restrained. But it is quite clear from the words of the section I have read that, once transferred, it is in the same position as any other public school under the Act—it follows the same fate. As it is quite lawful with regard to any other public school under the Act to discontinue the building although the school itself is kept up, so I think it is perfectly possible in a case like this—if you keep up the school by providing sufficient accommodation for pupils of the same sort in another building—to shut the building of the school—in fact, to change the site. I therefore think that the School Board of Glasgow are clearly within their rights when, having made due provision for the scholars that were in the school in another building in the same neighbourhood, they proceeded to shut the doors of this particular building. It is quite obvious that any other result would be almost absurd, because it would mean that however unsuitable the premises became they never could be discontinued *in sacula seculorum*.

The other class of objection is that which is appended to the particular conditions which I have read. That seems to me to be practically equivalent to what I may call for analogy—for I am not using accurate language—a sort of real burden on the building, and it seems to me that it makes it impossible for the School Board to use that building in any way not consistent with giving due scope to the provision in favour of the kirk-sessions. But in this case that question does not arise, because it is stated that the same use is offered to the kirk-sessions of the building now as

was offered before. I think it would be childish to say that the kirk-sessions are entitled to say we are not getting the same use of the building in the evening hours because during the daytime hours when we are not there the school is being used for Roman Catholic children instead of being used for Protestant children. Therefore inasmuch as the School Board offer the use of the school as fully and freely to the kirk-sessions as they had it before, the kirk-sessions get all they are entitled to. This condition, I think, puts a difficult embargo upon the question of selling. Curiously enough, that question is mentioned more than raised. It is in one sense raised in one of the questions, and is raised I think, if I may so express it, quite at the wrong end. It is pleaded by the kirk-sessions that the School Board must sell. I do not see the slightest indication of that, and I do not think any argument was really addressed to us upon any tangible basis in favour of such a proposition. I do not think that the School Board could sell unless they arranged with the kirk-sessions to give them some equivalent for their partial right of occupation. It is not a thing that can be worked out at law, as hinted in the case, by simply saying that here is a thing which I think is equivalent to a real burden upon the building; if they want to sell they must come to terms with the people who have a right to maintain a limited right of occupation. That disposes of the objections which the kirk-sessions as kirk-sessions have raised.

Now we come to their objections as individuals. There we get free of the question of the conditions of the deed of transfer and of the trust, and we get into the simple question as to whether the actings of the School Board are *ultra vires*. There are a variety of Acts which deal with day industrial schools. Nobody doubts that the School Board is entitled to maintain a public elementary school for defective children, but questions have been raised upon their powers to maintain a day industrial school. There are various Acts which deal with day industrial schools and fall into two groups. There is the group of Acts referred to as the Glasgow Acts, which allow certain commissioners to found day industrial schools. There are also two Acts—the Children's Act of 1908 and the Day Industrial Schools Act of 1893—which allow the educational authority to maintain an industrial school. In the Glasgow Acts the educational authority are allowed to contribute although they themselves are not the managing body.

It is said in the case that section 132, sub-section 24, of the Children's Act 1908 prevents the Glasgow School Board from taking advantage of these two Acts. I did not hear any argument by counsel in support of that proposition. When I look at that section I do not wonder at that, because I cannot imagine that any such argument could possibly be raised. The section in question is this—" . . . [The Lord President here quoted that portion of sub-section 24 which is quoted above.] . . ."

And then there is a long proviso allowing the Secretary for Scotland to make alterations or amendments. How a saving clause in favour of the Commissioners and the Directors is to be construed into a clause which prevents the School Board from doing what the Act in its body says they may do is certainly beyond my comprehension. I think it is a preposterous contention, and consequently I was not at all surprised that counsel never opened their mouths in favour of such a proposition. If that is so, it is quite clear that the School Board of Glasgow were acting within their powers in starting and maintaining a day industrial school and a public elementary school for defective children.

But the question remains, Was it *ultra vires* of them to do the two things they have done—first, to say that the religious instruction in these schools shall be according to the Roman Catholic faith? and secondly, Was it within their powers to give out that they would not elect teachers to these schools who were not persons of the Roman Catholic community? I am of opinion very clearly that so far as the religious instruction is concerned the only question in law is, Have the provisions of the section which is known as the conscience clause been attended to? The conscience clause, as your Lordships are well aware, lays down two things—first that no child shall be instructed in religious education against the wishes of its parents, and second, that religious education of any sort shall not be given in the middle of the curriculum in the middle of the day, but shall come at the beginning or at the end of the secular education. Provided that the School Board do not infringe that proposition, it seems to me that so far as the law is concerned they may teach any religion they like, and if they teach any religion which is very distasteful to the ratepayers the remedy is to have a new school board.

As a matter of fact, very fortunately for us, as we all know, there has been almost no religious difficulty, as it is termed, in this part of the country. There has been a very sensible and good *modus vivendi* between the various churches, and religious education has gone on on the whole exceedingly smoothly. But there are one or two instances in the Western Highlands where the Roman Catholic faith is taught; and so far as the law is concerned I do not think that the powers of the School Board are limited to Roman Catholic teaching or Protestant teaching. They may teach any other religion that is known on the face of the earth, although I am certain that if they do they will not remain long a school board of any Scottish burgh.

So far as the other matter is concerned, when I look at the statute I find that the only thing that it says is that masters must have a certain qualification. If they have that, then I think school boards are entitled to appoint them; and if they choose they may put, as part of the condition under which they will appoint, any other and further qualification that they

choose. Of course this must be conditioned by common sense and by the consideration that their first duty is to find capable people to educate the children. Supposing a school board were to say that they would not elect anybody as a public schoolmaster who had not been a Senior Wrangler of Cambridge, it is quite evident that the supply would not be equal to the demand; and I have no doubt they would be restrained from putting forward such an absurd resolution. But so long as the resolution is not such as to show upon the face of it that they are really failing in their duty of providing education for the children, it seems to me that they may do what they like, subject again always to the consideration that the constituency will have a right to get rid of them.

As to the question of the expediency of making it a condition that masters in a certain school should be of the Roman Catholic faith, I do not think it is really for us to express any opinion upon it. It is not a matter of law; but I should like merely to make this one observation, that the question of whether it is a proper and right regulation to be made must, I think, be a very different one in a place like Glasgow, where there are many such children to be provided for, and where side by side with these schools there are, as the Special Case discloses, other schools of precisely the same character open to Protestant children—it must be a different question there from what it would be if such a stipulation were made in a small parish, where obviously there could only be one school of the kind proposed to be put there.

There is nothing, certainly, so far as I am concerned, that suggests to me that in any way the School Board of Glasgow have not acted according to the most strict dictates of propriety and rectitude; but if it is looked upon as a matter of policy, then that is a matter for the electors in choosing the men whom they send to represent them on the School Board. That seems to me to deal practically with the matters raised in the case.

So far as the questions are concerned, I think the first and second ought to be answered in the affirmative, but with the addition of "in the circumstances as disclosed in the case." The third question I really think is purely academic, and need not be answered at all. I have no doubt that the small endowment mentioned there was made for the special benefit of a public school in the Anderston district; but what difference it can make whether that particular £100 is ear-marked and by that means £100 less is needed to be raised by the rates, or whether the £100 is put into the general body of the rates, I entirely fail to see; because it is not as if the £100 was handed to a special trust to do something over and above what an ordinary public school gets; it is merely for ordinary public school education. Accordingly I do not think we ought to answer the third question at all. The fourth question does not arise, because there is no proposal at

present to sell the school, although I have said certain things in the opinion I have delivered which I think may be a guide to the parties in regard to the future. The fifth question is conditional, and I do not think it ought to be answered at all. We are not asked to answer the sixth and seventh questions.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court answered the first and second questions of law in the affirmative in the circumstances as disclosed in the case, found it unnecessary to answer the remaining questions of law, and decerned.

Counsel for the First Parties—Blackburn, K. C. — Black. Agents — Macandrew, Wright, & Murray, W.S.

Counsel for the Second Parties — M'Lennan, K.C.—D. P. Fleming. Agents — Laing & Motherwell, W.S.

Thursday, January 27, 1910.

FIRST DIVISION.

(SINGLE BILLS.)

FORTH BRIDGE RAILWAY COMPANY
v. DUNFERMLINE GUILDRY.

(Reported *ante*, February 2, 1909,
46 S.L.R. 399.)

Process—Recal of Interlocutor—Interlocutor Dismissing Action as Irrelevant Recalled of Consent, and Interlocutor Finding for the Pursuers with Expenses against Defenders Pronounced.

The Court of consent and in terms of a joint-minute recalled an interlocutor dismissing an action as irrelevant, and found for the pursuers with expenses against the defenders, an intervening judgment of the House of Lords in a cognate case having meanwhile been pronounced.

The case is reported *ante ut supra*.

On 2nd February 1909 the First Division, following the decision of the Second Division in *The North British Railway Company v. Budhill Coal and Sandstone Company*, 1909 S.C. 277, 46 S.L.R. 178, held that whinstone was a mineral in the sense of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), and affirmed the interlocutor of the Lord Ordinary (Dundas) dismissing the action.

On 15th November 1909 the House of Lords reversed the judgment of the Second Division in the *North British Railway Company v. Budhill Coal and Sandstone Company*, and held that sandstone is not a mineral in the sense of the above-mentioned section.

The parties to the present action presented a joint-minute to the First Division, craving the Court to pronounce an interlocutor

recalling the interlocutor of 2nd February 1909 and the interlocutor of the Lord Ordinary dated 4th June 1908, and declaring in terms of the first conclusion of the summons for the pursuers (reclaimers), with expenses against the defenders (respondents).

The Court pronounced an interlocutor in the terms craved.

Counsel for Pursuers — Clyde, K.C. — Cooper, K.C.—Hon. W. Watson. Agents — Robson & M'Lean, W.S.

Counsel for Defenders—Dean of Faculty (Dickson, K.C.)—Constable, K.C.—Macmillan. Agent—John Stewart, S.S.C.

Friday, February 4.

SECOND DIVISION.

[Sheriff Court at Airdrie.

DICKSON v. HYGIENIC INSTITUTE.

Contract — Breach — Reparation — Dentist — Unregistered Dentist — Negligence — Requisite Skill — Failure to Display Ordinary Skill.

An unregistered dentist, if not known to the person operated upon to be unregistered, must attain the standard of skill of the registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, then the skill which he professes to have.

Circumstances where held that defenders in an action had held out themselves and their employees as competent to perform dental operations with ordinary skill, and were liable in damages in respect of a grossly careless operation performed by one of their employees.

Bethia C. Dickson, 32 Commonhead Street, Airdrie, brought an action of damages in the Sheriff Court at Airdrie against the Hygienic Institute, Main Street, Coatbridge.

The pursuer averred—" (Cond. 1) . . . The defenders carry on business under the style and name of the 'Hygienic Institute' in Glasgow and elsewhere, and have a place of business in Coatbridge. They supply artificial teeth on the instalment system, and employ, *inter alios*, assistants who are not qualified 'dentists' or 'dental surgeons.' (Cond. 2) The defenders during the autumn of 1907 issued circulars to the public inviting them to purchase artificial teeth from them at the rates and under the conditions set forth in said circulars. . . . The pursuer, during the said advertising period, on 30th November 1907 entered into an arrangement with defenders whereby they undertook to extract her teeth, both in her upper and lower gums, and to supply her with a full set of false teeth set on ebonite and gold. . . ."

The pursuer further averred that she was operated on by employees of the defenders,