

clusion that the part of the section libelled does not apply to gas supplied by meter, and that therefore the second objection fell to be sustained."

The question for the opinion of the Court was—"Does the complaint set forth a relevant charge of a contravention of the Gas-works Clauses Act 1847, section 18?"

Argued for the appellants—It was not necessary to take as the antecedent to "such gas" the immediately preceding word "gas" in section 18 of the Act. "Such gas" might quite properly be read as referring to the words "the gas" occurring in the heading appearing before section 18, and which was itself a part of the statute. Read in that way, the objection to the relevancy of the complaint disappeared.

Counsel for the respondent was not called upon to reply.

LORD JUSTICE-CLERK—This is a most unfortunate case, for I cannot doubt that if the authorities had taken a different course a perfectly good and valid charge could have been made in the circumstances alleged in the complaint. The offence charged is that of improperly using and burning gas, and the complaint is brought under section 18 of the Act (Gas-works Clauses Act 1847—10 Vict. cap. 15). Now section 18 deals with a variety of matters. The first is—"Every person who shall lay, or cause to be laid, any pipe to communicate with any pipe belonging to the undertakers without their consent." I think that is quite plain and simple. Whether that is what the respondents did I do not know; if they did, that would be an offence, whether the gas was supplied through a meter or not. But that is not the offence with which the respondents are charged. The section further says, "or shall fraudulently injure any such meter as aforesaid," which plainly refers back to the previous clauses, because, so far, there is no reference to a meter in section 18.

Then the section goes on—"Or who, in case the gas supplied by the undertakers is not ascertained by meter, shall use any burner other than such as has been provided or approved of by the undertakers, or of larger dimensions than he has contracted to pay for, or shall keep lights burning for a longer time than he has contracted to pay for, or who shall otherwise improperly use or burn such gas." When you look back in the clause you find that the word gas occurs only once, and it occurs in this connection—gas supplied by the undertakers not ascertained by meter. It seems to me that the Sheriff-Substitute was right in holding that "such gas" did not refer to gas ascertained by meter. It is unnecessary to consider the rest of the clause, which has no bearing on the question before us.

It seems to me that the words "or otherwise" are intended to cover acts of a similar nature to those specified, just as such words do when used in an indictment. They cover the same kind of offence as using any burner other than such as has been provided or

approved by the undertakers, or any burner of larger dimensions than has been contracted for. But in every case it is the use of such gas as he has to pay for by a contract for a fixed sum by day or month, or whatever the arrangement may be, and, so far as I can see the clause has no application to gas supplied by meter, as it was in this case. If there were a meter, the undertaker would have no interest in limiting the amount of gas used, because the more it was used, either for power or for lighting purposes, the better it would be for the undertaking. Therefore I think it not unreasonable to hold that "such gas" means gas of which the undertakers have no means of measuring the amount used from day to day. They have to rely on the consumer carrying out his contract honestly, and if he does not, he lays himself open to prosecution.

Therefore I have come to the conclusion that the Sheriff-Substitute's judgment here cannot be impugned. He has rightly decided that the complaint here made is not a relevant complaint in the circumstances.

LORD DUNDAS—I am of the same opinion.

LORD SALVESEN—I also concur.

The Court answered the question in the case in the negative, and dismissed the appeal.

Counsel for the Appellants—Morison, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—M'Robert. Agents—Kinmont & Maxwell, W.S.

COURT OF SESSION.

Tuesday, June 20.

FIRST DIVISION.

WAUCHOPE AND OTHERS
(ANDERSON FEMALE SCHOOL
TRUSTEES), PETITIONERS.

School—Endowed School—Transfer to School Board subject to Conditions—Power of School Board to Accept Transfer—Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sec. 47.

Trustees of a school acting under a deed of mortification, finding it impossible with the funds at their disposal to carry on the school in accordance with the requirements of the Scotch Education Department, presented a petition, under section 47 of the Education Scotland Act 1872, for authority to transfer the school buildings and the pecuniary endowments to the school board of the parish under the following conditions, namely—(1) that the founder's name should be retained by the school, (2) that the endowment should be reserved for the locality in question, and (3) that

the services of the teacher then in office should be retained. The deed of mortification provided, *inter alia*, that the trustees should have power, should they in their absolute discretion consider it expedient, to devolve the execution of the trust upon such *ex officio* trustees as they might think proper to appoint, and the terms of the teacher's engagement were not different from those prescribed by the Act of 1872. The School Board had expressed their willingness to accept the transfer.

Held (diss. Lord Johnston), that the School Board had power, under section 47 of the Act of 1872, to accept the transfer, and petition *granted*.

The Education Scotland Act 1872 (35 and 36 Vict. cap. 62), sec. 47, enacts—"Every school board shall be at liberty to receive any property or funds which may from time to time be conveyed, bequeathed, or gifted to such board for behoof of any school or schools under the management thereof, whether generally or for the promotion of any particular branch or branches of education or instruction; or for increasing the income of any teacher; and it shall be the duty of the board to administer such property, funds, or money according to the wishes and intentions of the donors, and in such manner as to raise the standard of education, and otherwise increase the educational efficiency of the school or schools intended to be benefited."

On 10th February 1910 David Alexander Wauchope and others, trustees acting under deed of mortification by Miss Christina Anderson of Moredun of the "Anderson Female School," Gilmerton, presented a petition to the Court for authority to transfer to the School Board of the Parish of Liberton, under certain conditions, the said school and the endowment effeiring thereto.

The *trust purposes* and the *circumstances* in which the application was made appear from the report of Mr J. H. Millar, Advocate, to whom on 10th March 1910 the Court remitted the petition.

The reporter stated—"The petitioners are the acting trustees under a deed of mortification executed by the late Miss Christina Anderson of Moredun of this date (December 14, 1885). From the narrative of that deed it appears that about 1848 a school had been established in the village of Gilmerton, Midlothian, by Miss Anderson, along with her brother and sisters, for the purpose of promoting female education in the village and neighbourhood, and that at a subsequent period she and her sister had, at a cost of over £2600, erected a new schoolhouse and other premises for the accommodation of this school. Being desirous of giving effect to her own wish and that of her sister (then deceased) that the school should be maintained in all time coming, she granted the deed of mortification, by which she conveyed the school and other buildings, with the piece of ground on which they were situated, and the furniture and plenishing, to certain trustees, and bound and obliged herself to pay to

them a sum of £2100 for the trust purposes therein set forth. This obligation to pay has been duly implemented, the said sum, or an equivalent security, having been handed over to the trustees, who now hold it.

"The trust purposes so far as material are set forth in the petition *ad longum*, and may be thus summarised—The school is to be called 'The Anderson Female School'; it is to be used in all time coming for the purpose of promoting the education of females in the village of Gilmerton and neighbourhood; and the said sum of £2400 is to be held, and its income applied, for the maintenance and endowment of the school. There is an expression of Miss Anderson's wish that 'special attention shall be paid to the moral and religious training of the pupils attending the said school,' and there is a declaration that, notwithstanding that the primary purpose of the school shall be the education of females, the trustees shall have power 'in the event of the accommodation in the school being at any time more than sufficient for said purpose, to admit boys to the said school in such numbers and with such limit as to agree as the school trustees shall think proper.' These directions exhaust purposes *first* to *third* inclusive.

"By purposes *fourth* to *sixth* provision is made for the management of the school, but this need not be explained in detail. By purposes *seventh* and *eighth* the trustees are empowered to build, to rebuild or alter the existing premises, to sell the furniture, and to apply the capital of the endowment, or to borrow money for these objects. A discretion is given to them as regards expenditure in the event of the income from the endowment proving inadequate, and there is an express exclusion of any teacher appointed to the school from any share in its management. There is a farther provision and declaration which will be most conveniently dealt with later on.

"Such being in effect the trust purposes of the mortification, the object of the present petition is to obtain your Lordships' authority to the transference upon certain conditions of the school buildings and of the pecuniary endowment to the School Board of the parish of Liberton, within whose district the school is situated. The petitioners aver that the School Board are willing to accept of such transference upon the terms proposed, and that this course will meet with the approval of the Scotch Education Department. The reporter has had a meeting with the chairman of the Liberton School Board, and has had the opportunity of perusing certain correspondence passing between the petitioners and H.M. Inspector of Schools for the district, and he has satisfied himself that these averments are correct.

"The ground upon which the petitioners justify their application is the view at which they have arrived that, 'with the funds at their disposal it is impossible to continue the school in a manner which will meet with the requirements of the Scotch

Education Department.' The significance of this appears from their averment that two-thirds of the income of the trust for the past ten years have been derived from various Government grants. Since 1908 the Department have been urging the petitioners to provide courses of instruction in cookery, laundry-work, etc., and to do this will of necessity involve the erection of additional buildings and the engagement of additional teachers. The petitioners accordingly represent themselves as placed in this dilemma. If they comply with the demands of the department, the whole, or the greater part of their endowment fund will be swallowed up in erecting new buildings, and to meet a considerably increased annual expenditure they will have a correspondingly diminished income. If, on the other hand, they refuse to comply with the demands of the Department, the Government grants, upon which they are to so great an extent dependent, will certainly be withheld. In either case, they point out, they would be left with an annual revenue quite insufficient to enable them to carry on the school.

"The reporter has examined the accounts of the petitioners for the last ten years, and would respectfully report that in his opinion the petitioners' contentions are well founded. Taking the accounts for the last financial year, ending 28th February 1910, as an example, he finds that the total expenditure for that year amounted to £213, 10s. 1d. This was met by Government grants to the following extent:—aid grant, £8, 11s.; fee grant, £48, 4s.; general aid grant, £9, 19s. 6d.; and parliamentary grant, £75, 5s. 9d.—in all, £142, 0s. 3d. The balance of expenditure is met by a sum of £70 from the income of the trust, which amounts *in toto* to only a few shillings more than that sum. The figures for previous years are not of course absolutely identical, and the sums applied out of the income of the endowment vary from year to year. But they all point to the same conclusion, and the accounts just referred to may be taken as typical of the whole period. The reporter ventures to think it not open to serious dispute that the petitioners have practically no margin to work upon, for it would not take long to swallow up the balance of £134, 12s. 11d., consisting of surplus revenue, which is partly in their hands and partly in the hands of the committee through whom the school is managed. In other words, the failure of the trust purposes is already in sight. The petitioners are not in a position to face the substantial diminution of their income from the endowment fund which building would inevitably involve. Still less can they face the withdrawal of the Government grants. In either eventuality they would be compelled to close the school and leave the buildings derelict. Even were the pressure of circumstances and of the Department less urgent, the reporter entertains grave doubts whether the petitioners could carry on the school as they do at present for more than a very few

years. The superiority of buildings, plant, apparatus, and teaching which a school board with the school fund and the school rate behind them can command must tell sooner or later, and would drive the petitioners out of the educational field as competitors. In all probability they would find before very long that they were maintaining and conducting a school with no pupils.

"These considerations would alone appear to justify the petitioners in coming to the Court with this application. But the reporter would further point out that the conjuncture which has now arisen was distinctly foreseen and expressly provided for by Miss Anderson and her advisers. The deed of mortification contains this remarkable clause—'And I hereby expressly provide and declare, notwithstanding anything to the contrary hereinbefore written, that the school trustees shall have power at any time, should they in their absolute discretion consider it expedient, to devolve the execution of the trust hereby created upon such *ex officio* trustees as they may think proper to appoint, to act either in succession to or along with the school trustees or any of them; and the school trustees shall have power to execute all deeds which may be necessary for fully vesting the said subjects hereby conveyed, and the foresaid sum and investments at the time representing the same, in such *ex officio* trustees to act as aforesaid; and any *ex officio* trustees who may be appointed as aforesaid, and their successors in office, shall thereafter (either in succession to or along with the school trustees or any of them, as aforesaid) act as trustees under these presents, and shall hold the said subjects, and the foresaid sum and investments representing the same, in trust upon the conditions and for the uses and purposes and with the powers, privileges, and immunities hereinbefore written, to the same effect as if they had been appointed trustees by these presents.' These words, coupled with the state of the facts as already explained, leave no doubt in the reporter's mind that, *quoad* the petitioners at all events, the application is both competent and expedient.

"It is also necessary, however, to consider the petition from the point of view of the School Board, and here it is obvious that the proposal to transfer may not be so plain-sailing a matter. Two questions naturally arise—the first as to the power of the School Board to accept such a transference; the second as to their power to agree to the conditions upon which it is proposed that the transference should be made.

"Your Lordships are aware that section 38 of the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62) authorises the transference by trustees to school boards of schools 'erected or acquired and maintained or partly maintained with funds derived from contributions or donations (whether by the members of a particular church or religious body or not) for the purpose, or authorised by the contributors

or donors to be applied for the purpose, of promoting education.' It has indeed been held that the terms of that section apply only to 'subscription' schools and not to 'endowed' schools, within which latter category the Anderson Female School unquestionably falls—*M'ulloch, &c. v. Kirk-Session and Heirs of Dalry*, July 20, 1876, 3 R. 1182, 13 S.L.R. 717. But the point really decided in the *Dalry* case was that a school board has a 'freer hand,' as it may be called, in dealing with the trustees of an endowed school than in dealing with the trustees and managers of a subscription school. There is nothing in that decision, nor in any other so far as the reporter is aware, to suggest that it is *ultra vires* of a school board to agree to take over an endowed school which the trustees are desirous of making over to them. With regard to the endowment as distinct from the school, section 47 of the Act of 1872, which is relied upon and quoted by the petitioners, appears to be conclusive in their favour. It may be said that the section seems to contemplate that the funds which it empowers the School Board to receive are 'gifted to such board for behoof of a school or schools under the management thereof,' and that the Anderson Female School is not as yet under the management of the Liberton School Board. But if your Lordships take the view that the transference of the school itself may be carried through, this objection, which at the best would seem to be of doubtful validity, will disappear.

"The remaining question, with respect to the conditions to be adjoined to the transference, naturally resolves itself into two branches—(1) How far do they safeguard the founder's intentions? and (2) Assuming that the answer to the former inquiry is satisfactory, to what extent is it competent for the School Board to assent to them?"

"The proposed conditions are in these terms—1. That the present school or any other school in the village of Gilmerton which may be substituted therefor shall be named in all time coming 'The Anderson School.' 2. That the endowment fund shall be retained for school buildings at Gilmerton alone (*i.e.*, the capital shall not be applied towards meeting the cost of school buildings outside the village of Gilmerton). Until the capital is required for building, the income therefrom shall be applied towards current expenses of board schools in the village of Gilmerton. 3. That the present headmistress of the Anderson Female School shall be retained in the service of the Board on the same terms and conditions as at present, and at a salary not less than that which she receives at present, and that so long as she remains in the Board's service she shall have the occupancy of the teacher's house, or, in the pleasure of the Board, an annual sum of £ shall be paid in lieu of the house.

"The first condition secures the perpetuation of the founder's name, as provided or by the first trust purpose of the deed

of mortification. This appears to the reporter to be eminently reasonable and proper, and he ventures to think that the condition may competently be agreed to by the School Board.

"The second condition seeks to confine the scope of the bequest to the village of Gilmerton. In terms of the deed of mortification the 'village of Gilmerton and neighbourhood thereof' are to be the scene of the founder's beneficence, and it would be a singular result if it were incompetent for a school board to accept such an endowment as we have here except upon condition of communicating its benefits to the whole district under their administration. The reporter knows of no rule of public policy which points in any such direction. On the contrary, section 47 of the Act of 1872, as above mentioned, contemplates the permanent association of an endowment with a particular school or schools, and enacts that 'it shall be the duty of the board to administer such property, funds, or money, according to the wishes and intentions of the donors.' Many school boards are the governing bodies of endowments attached to schools or localities in virtue of a scheme under the Educational Endowments (Scotland) Act of 1882 (45 and 46 Vict. c. 49), and your Lordships, keeping in view section 7 of that statute, have ever been vigilant lest the range of a founder's beneficence should be extended beyond the area to which he had destined it. (See *Governors of Bell's Trust, Petitioners*, June 9, 1896, 23 R. 780, 33 S.L.R. 591).

"The third proposed condition is conceived in the interests of the present teacher of the school, and at first sight might seem not wholly free from objection. If the 'terms and conditions' on which the teacher is at present engaged were different from the only terms and conditions on which a school board are entitled to employ teachers under section 55 of the Act of 1872—if, for example, she held her office *ad vitam aut culpam*—it would be impossible, the reporter apprehends, for your Lordships to sanction this condition. In point of fact, however, as he has ascertained, the teacher may be dismissed by the petitioners or their committee of managers at any time upon three months' notice; so that the terms of her engagement are really identical with those prescribed by the Act of 1872, as interpreted by the Court—*Morrison v. Abernethy School Board*, July 3, 1876, 3 R. 945. It may furthermore be observed that section 38 of the Act of 1872, in authorising the transference to school boards of subscription schools, allows the continuance of teachers in their office to be made a condition of the transference, but enacts that their position when so continued shall in all respects be the same as that of teachers appointed under the Act. This difficulty of principle once removed, no valid objection appears to remain to the school board agreeing to give the teacher the remuneration stipulated for in the condition.

“Two further matters call, in conclusion, for consideration. It has already been mentioned that the founder declares it to be her wish ‘that special attention shall be paid to the moral and religious training of pupils attending the said school.’ The School Board are fully prepared to give effect to this wish, as indeed they do in all the schools under their management. The reporter has no doubt that is competent for them to do so, more especially in view of the well-known passage in the preamble of the Act of 1872 which throws the sanction of the Legislature over what is popularly known as ‘use and wont’ in religious teaching. It is true that a difficulty might arise if at some future date a Liberton School Board should resolve that no moral or religious training whatsoever be given to pupils attending the schools under their management. But this contingency appears to the reporter to be so remote as to be practically negligible.

“The last point for comment is, that according to the terms of the transfer, the Anderson School is not dedicated exclusively, or even preferentially, to the education of females. The primary object of the founder was the promotion of the education of females in the village of Gilmerton and neighbourhood thereof; and it might be contended that in this respect the founder’s intention runs the risk of being ignored. The reporter cannot help thinking, however, that this objection is deprived of its sting when it is borne in mind that the founder herself provided for the reception of boys in the school if there should be sufficient accommodation for them. At present the school can accommodate 110 pupils. The number of girls actually in attendance is 73, and there are also 12 boys. While the School Board may reasonably be expected to use the school in such a manner as shall best fit in with their scheme of education for the locality, there would appear to be no ground for apprehension that the interests of the female pupils for whom they are responsible will be subordinated to those of pupils of the other sex.

“In these circumstances the reporter would respectfully venture to submit that the petitioners are amply justified in making this application to your Lordships, and would humbly recommend that the prayer of the petition be granted. If your Lordships should be of this opinion, and should approve the report, your Lordships may be disposed to remit back to the reporter in order that the necessary deeds may be adjusted at his sight and to his satisfaction.”

The case was heard on 21st June 1910 by a Court consisting of LORD KINNEAR, LORD DUNDAS, and LORD JOHNSTON, and taken to *avizandum*.

On 8th July their Lordships continued the case in order that it might be heard before a full Court of the Division, at which the Lord President would be present.

The case was accordingly further heard on 4th March 1911 before the LORD PRESIDENT and LORDS KINNEAR, DUNDAS, JOHNSTON, and SKERRINGTON.

Argued for petitioners—The proposed transfer was not inconsistent with the trust purposes. *Esto* that the School Board would not be bound to continue religious teaching, the probability was that they would do so. So, too, with regard to the position of the school—the probability was that it would remain in Gilmerton. *Esto* that in future the transferred funds might be devoted to purposes inconsistent with the trust, it was impossible to provide against all future contingencies. The probabilities were that the trust purposes would be carried out, and that was sufficient to justify the transfer. The fact that the transfer might involve relief to the rates did not render the transfer illegal, in respect that (1) relief of rates was the necessary result of the carrying on of the school from the first, and (2) the testatrix must be held to have anticipated such a contingency by authorising a transfer to *ex officio* trustees. That being so, the cases of *The Kirk-Session of Prestonpans v. School Board of Prestonpans*, November 28, 1891, 19 R. 193, 29 S.L.R. 168; and *The Governors of Jonathan Anderson’s Trust*, March 12, 1896, 23 R. 592, 33 S.L.R. 430, were inapplicable. It was clearly competent for the School Board to accept the transfer, for a school board had power to accept gifts of lands, houses, &c.—The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), secs. 37, 38, and 39. Further, section 47 expressly recognised trusts. A school board was entitled to take a lease of a school provided by an ancient endowment—*M’Culloch v. Kirk-Session and Heritors of Dalry*, July 20, 1876, 3 R. 1182, 13 S.L.R. 717. The case of *M’Lean*, November 4, 1898, 1 F. 48, 36 S.L.R. 46, was distinguishable, for there the trustees seeking to transfer were an *ex officio* body of a permanent character. So, too, was the case of *Sutherland*, February 3, 1903, 5 F. 424, 40 S.L.R. 345—[*vide also its sequel*, May 12, 1905, 7 F. 634, 42 S.L.R. 561]—for that was a gratuitous conveyance of trust purposes, not a transference as here under conditions. In *M’Grouther’s Trustees*, December 23, 1910, 48 S.L.R. 220, the Court had sanctioned a transfer of an educational endowment to a body of a permanent character. The School Board was such a body, and the petition should therefore be granted.

There was no appearance for the School Board.

At advising—

LORD PRESIDENT—This is a petition by the trustees under the deed of mortification of the Anderson Female School granted by Miss Christina Anderson of Moredun, to sanction the transfer of the property of that school at Gilmerton, founded by that lady and her brother and sister, to the School Board of the parish of Liberton.

Your Lordships remitted the matter for inquiry, and we have had a very full and satisfactory report from Mr Hepburn Millar.

I do not need to trouble your Lordships with the contents of that report at any length, but I merely summarise it thus—The report brings out that the continuance

of the school under present circumstances is really a practical impossibility owing to the increased requirements of the Education Department. In other words, the funds of the mortification are not sufficient to conduct the school without the aid of the various grants which can be earned by any school which is providing education within the meaning of the Education Acts, and these grants cannot in the future be earned unless the school is prepared to make certain additions and alterations, and to strengthen its staff and its equipment in a way which, owing to want of funds, it is impossible for it to do.

That is the leading fact with which we are faced, that here the trust, if it is left alone, is really reduced to a state of inanition. And I need scarcely remind your Lordships that a trust to carry on a school is not like, for instance, a trust for giving a bursary, where, if there were not funds enough at any time, you might wait for a time until the funds accumulate and then begin again. A school cannot be carried on intermittently—it cannot be given up for some years while funds accumulate, and then be started again. Accordingly the reporter has shown us in a way which I think does not admit of a doubt that something must be done if the trust is not really to come to an end altogether; and his only doubts are as to the power of the School Board, to whom it is to be transferred, to accept the gift upon the terms under which it is proposed to be made. The terms under which the trustees propose to make the transference to the School Board are really three in number. They are (first) that the present school, or any other school in the village of Gilmerton which may be substituted therefor, shall be named in all time coming “The Anderson School.” The reporter finds—and I agree with him—that there is nothing in that that the School Board may not accede to. And then the other terms are (second) that the endowment fund shall be retained for school buildings at Gilmerton alone, and then (third) there is a small matter about retaining the services of the present schoolmistress.

Now the only doubt that the learned reporter has was upon the question of the power of the School Board under the Education Act. The two sections which are appealed to are sections 38 and 47. I do not think that section 38 helps, because I think it is quite clear from the section itself, and it has been settled by authority in the past, that that section does not refer to an endowed school of this sort. But, on the other hand, section 47, I think, gives the School Board the power which is necessary. That section is this—“Every school board shall be at liberty to receive any property or funds which may from time to time be conveyed, bequeathed, or gifted to such board for behoof of any school or schools under the management thereof, whether generally,” and so on; “and it shall be the duty of the board to administer such property, funds, or money according to the wishes and intentions of

the donors, and in such manner as to raise the standard of education and otherwise increase the educational efficiency of the school or schools intended to be benefited.”

I have just one or two observations to make upon that. In the first place, although I do not say that I find this in decision, I think there has crept into the argument in these matters an assumption which I do not think is well founded, namely, that section 38 is the only section which has to do with the transference of a school, whereas section 47 has to do with the transference of endowments. I do not myself see any reason why one of the forms of property which may be conveyed under section 47 should not be, among other things, a school building. Section 38, with its concomitant section 39, was introduced for quite another purpose. I have already mentioned that it did not apply to this class of schools. But the purpose of it was to allow, in respect of the schools to which it did apply—which are commonly called subscription schools—the trustees of such subscription schools to transfer in a way in which they certainly could not have transferred at common law, because section 39 allows them to do it by a majority, and to do it by a majority is necessarily, so to speak, breaking the original terms of their trust. That was the scope, I think, of this section.

Section 47 is the general authority which allows a school board to take anything which is transferred to it—nay, more, I think it puts upon the school board a duty of administering such property, funds, or money according to the intentions of the donors. In other words, I think section 47 really authorises the school board, so to speak, to become bound by the terms of the trust subject only to this exception—which it is quite necessary to lay down—that a school board could not accept a trust the terms of which were antagonistic to the duties of school boards as laid down in the Act. In particular, there is a very good illustration in this case. I think it is quite right and proper that they should be allowed to say “We will take over the services of the schoolmistress”; but I do not think they could have come under an obligation that they would maintain that schoolmistress there *ad vitam aut culpam*, because that would be against the terms of their own Act, which says that any schoolmaster in their employment should be dismissible at pleasure.

Accordingly I think that here it is not really so much the transference of a school as a going school as the transference of a certain amount of property which is to be used for the purposes of education in Gilmerton; and although the case is a narrow one, still I think, looking to the great necessity of the situation, that your Lordships may grant this application, and that in doing so we are not going against the statute.

LORD KINNEAR— I am entirely of the same opinion. I think the real difficulty in the case, such as it is, arises from the

limitation of the power of the trustees. But that, I think, we can remove by authorising them to transfer the school in the manner proposed, inasmuch as the carrying on of the school according to the exact terms of the will of the testator is practically impossible. If we can put the trustees in a position to make over the trust funds, then I agree with your Lordship, for the reasons you have stated, that there is nothing in the Act to prevent the School Board accepting the transference and complying with the conditions on which it is made.

LORD JOHNSTON—The petitioners, under the deed of mortification of Miss Christina Anderson of Moredun, hold in trust the property of a school at Liberton founded by that lady and her brother and sister, consisting of ground with school buildings and teacher's house and an endowment of £2600.

The deed of mortification contained a carefully drawn and very distinct set of trust purposes and directions, of which the more important were as follows—1st, The school premises and the sum of £2400 were to "be held in perpetuity by the school trustees," and the school was to be styled "The Anderson Female School" in all time coming. 2nd, The primary purpose of the foundation was declared to be the promotion of the education of females in the village of Gilmerton and neighbourhood, it being the founders' wish "that special attention shall be paid to the moral and religious training of the pupils attending the said school." But though this was the primary purpose, discretion was given to the trustees in the event of their being surplus accommodation to admit boys, with such limit of number and age as they thought proper. 3rd, The £2400 was to be held for the maintenance and endowment of the school, and the income to be applied accordingly. 7th, Power was conferred upon the trustees to alter or rebuild the school buildings, and for that purpose to apply the whole or any part of the £2400.

The school has been successfully carried on under Miss Anderson's deed since 1885, but really from a date thirty years earlier. It can accommodate 110 children, and there are at present about 85 in attendance.

The reason of the present application is this—Though the school is still well attended and earning Government grants in supplement of the endowment, the trustees are face to face with a situation in which they must succumb to the requirements of the Scottish Education Department. They have received intimation that they must add certain supplementary courses to the school curriculum, and for this purpose must provide additional buildings and add to the teaching staff. Though these supplementary courses are beyond the means at the disposal of the trustees, they are quite within the lines indicated by the trust, whose idea of education included "industrial instruction." But the pressure of the Department amounts to an indirect closing of the school. For the

trustees are placed in this dilemma—they must either consume their endowment in building, or they must forfeit the various education grants which they are at present earning. In either case their income is reduced below the point at which they can continue to carry on the school.

In the dilemma in which they are thus placed the petitioners propose to hand over the school and endowment to the School Board of the parish on the following simple conditions—1. That the present or any substituted school shall be always named "The Anderson School." 2. That the income of the endowment shall, until the capital is required for building, be applied towards current expenses of Board schools in the village of Gilmerton, and that the capital shall be retained meantime, and when required for building shall be applied towards the cost of the school buildings in the village of Gilmerton and not outside. 3. That the services of the present headmistress of the Anderson Female School shall be retained by the School Board.

As they cannot at their own hand so dispose of the subject of their trust, the petitioners have applied to the Court for authority, and a remit having been made to Mr J. Hepburn Millar to report, we have had the benefit of the information supplied by him, and have now to consider his recommendation that the authority be granted.

I am, in common with your Lordships, satisfied on Mr Millar's report that by the operation of the Education Act 1872 and the action of the Department, the petitioners are placed in a position in which they can no longer carry on the school.

They must either comply with the behests of the Department, in which case they will exhaust the endowment, or they must carry on as they are, in which case they will forfeit the various education grants; and in neither case would they have the means to continue to maintain the school. In these circumstances it was right that they should apply themselves to the consideration of a scheme whereby the property in their hands might continue to be devoted to educational purposes, and they were bound to come to the Court for authority. For neither could they hand over their property to the School Board, nor the School Board accept it on the present trusts.

That any proposal of the trustees should receive the sanction of the Court it is at least necessary that the altered scheme of administration, which they propose, should have in view the terms of the original bequest, and should be one which the School Board can bind themselves to carry out in perpetuity. I do not think that the proposals of the trustees really amount to what can be called a scheme. It appears to me that they are rather an admission that to frame a scheme is beyond them. For the transfer of the endowment fund on the conditions, such as they are, which the trustees propose, would not, in my opinion, conserve the trust's intention.

They would, on the contrary, be nothing but a pure gift to the School Board of Liberton parish to the saving of the rates; while, on the other hand, the transfer of the property of the endowment, even on the conditions such as they are, would not in my opinion be competent for the School Board to accept.

Differing, as I am aware I do, from your Lordships, I think that I am bound to state my reasons. For this is not a mere administrative matter, but one in which the principle of the Education Act is involved.

There are only four sections of the Education Act 1872 which require attention. There were in existence at the time of its passing three different classes of schools other than parish schools—1st, subscription schools; 2nd, endowed schools; and 3rd, schools which were neither subscription schools nor endowed schools, but were private schools or otherwise free of trusts and alienable.

Section 37 provides not merely for the acquisition by school boards of school sites and for the erection of schools, but for the acquisition, where desirable, of schools of the third class, or private schools, by sale or lease.

Sections 38 and 39 provide for the transfer by arrangement of schools of the first class or subscription schools, in which case "the school shall thereafter be deemed to be a public school under the Act and shall be maintained and managed by the school board."

In either of these cases the school must be acquired or transferred absolutely and free of trusts and conditions. I refer to what is said by your Lordship in the chair in the *Anderson* case (1910 S.C. at p. 203). That case is a good example of what may be the future history of a school so transferred. It may and must be put to any use which the policy of the Department and the exigencies of the School Board for the time being require, or it may be wholly suppressed.

But I do not find that there is any provision in the Act for the transfer of endowed schools. And the reason is obvious. An endowed school must always from its nature be the subject of a trust, and any general provision for the transfer of such schools, at the discretion of trustees and school boards, so as to void the trust conditions, would have been inconsistent with the sacredness of charitable trusts. Equally, the transfer of an endowed school, maintaining the trust conditions, would, at least in my opinion, have been inconsistent with the scheme of the Act for providing a uniform class of public or board schools. For I do not think that it is consistent with the powers and duties of a school board to acquire or accept school buildings, not as a mere revenue-producing piece of property, but as a going school, and for school purposes, unless entirely untrammelled by conditions, as in the case of the private and subscription schools, the acquisition of which is provided for by sections 37, 38, and 39. It was probably foreseen, and at any rate it was found, that

the creation of the school board system would indirectly affect existing educational foundations, rendering their reorganisation desirable in many cases. Accordingly the Education Act 1872 was followed by the Educational Endowments Act 1882. But the Anderson Female School is too recent a foundation to fall under the operation of that Act, having been formally founded after the passing of the 1882 Act.

But section 47 of the Act of 1872, which is the last section I need consider, deals with "property or funds which may from time to time be conveyed, bequeathed, or gifted" to a school board "for behoof of any school or schools under the management thereof." It presupposes a school board and a school or schools under its management, and contemplates endowments for general or special purposes, for behoof of such school or schools, and these may be accepted as trusts and administered "according to the wishes and intentions of the donors." This a school board could do quite consistently with the conception of the school board system originated by the Act. For the statute contemplates, to write it short, an endowment which can coexist with a school board school managed on statutory lines. But an endowed school, that is, an existing school established by a foundation or trust deed, with its buildings and appurtenances, could not, unless treated as a mere revenue-producing piece of property, be brought under the purview of the section without limiting the freedom of action of the school board as regards such school. And on the other hand I am unable to see how trustees of an endowed school could possibly be allowed to hand over the school, as a school, to a school board without some conditions, and, *inter alia*, without conditions limiting the school board's inherent power to suppress or modify any school which comes under their statutory charge. I must very respectfully dispute the suggestion, which I understand finds favour with your Lordships, that section 47 of the Act has anything to do with a going school, or that the term "property" covers the site and buildings of a going school, and that for two reasons—first, it is impossible to understand how the site and buildings of a going school can be conveyed for behoof of another school already in existence; and second, if that difficulty could be got over, it would be impossible for the school board, in view of its statutory powers and duties, to accept such property under the obligation to administer it according to the trusts on which it was formerly held. The statute in section 47 clearly contemplates new gifts or foundations direct to school boards. It never had in view the transfer of an existing foundation, else why the Act of 1882? It is impossible that the existing foundation should be transferred without breach of trust. That is why this Court is now asked in substance to alter the terms of the trust on which the endowment is held in order that it may be transferred, and therefore the proposal has, I think, to be very strictly scrutinised.

In truth, section 47, read in relation to the whole scope of the Act, really refers to endowments, and nothing else, which it is quite competent for school boards to accept subject to trust conditions, either original or as altered in adjusting a scheme to meet the exigencies of the situation without any conflict with their statutory powers and duties. In the conception of the statute an endowment is in direct contrast to a school. If school buildings of an endowed school are to be transferred to a school board, this can only in my opinion be as part of the endowment to be realised or treated as revenue-producing subjects, and as such to be accepted by the school board under trusts of the endowment, which they can bind themselves to carry out, and not as a going school which they cannot bind themselves and their successors to carry on on any particular lines, or in fact at all. Now it is not proposed to transfer to the School Board the Anderson Female School as a piece of property, but as a going school to be continued on definite lines as a school. This I hold to be incompetent.

Assuming, then, that the sanction of the Court could, with due regard to the terms of the foundation, be given to the trustees' proposals, which I dispute, it might, I think, be competent to the School Board to accept the Anderson endowment, but not, I think, the Anderson Female School except as a piece of property.

Reference is made by the reporter to the *Dalry* case, 3 R. 1182. But I do not think that he has correctly appreciated the bearing of that case. He reads it as deciding "that a school board has a 'freer hand,' as it may be called, in dealing with the trustees of an endowed school, than in dealing with the trustees and managers of a subscription school." I think that the parties and the Court had a more exact conception of the situation, and that it is precisely the reverse of that assumed by the reporter.

The *Dalry* case was on all fours with the present. There was a school building and master's house and a small endowment. The school had been going for more than two hundred years, and had been the only school for its limited district. It was on the eve of succumbing to the effects of the Education Act 1872. But the trustees of the foundation did not, as here, propose to hand it over to the School Board. They had treated it as property of the endowment, had leased it to the School Board, added the rent to the income of the endowment, and then dealt with its income as they conceived in terms of their trust, or at least *cy pres*. It was held that this arrangement was, with an important qualification, within their discretion. I confess to some doubt to the soundness of the decision as reported. However reasonable the course pursued by the trustees, I doubt whether they were entitled to follow it at their own hand. And my doubt receives support from the fact that there is a sequel to the case, not easily recognisable, as it is reported two years later under a different name, in the case of *Forbes*

v. Dalziel (5 R. 328, 15 S.L.R. 183), which resulted in a remit "to frame and report to the Court a scheme for the future administration of the funds in question, having in view the terms of the original bequest and the proceedings in this and the former process." That is exactly what is wanted here, and what has not, in my opinion, yet been done. When the *Dalry* case, with its sequel (which was evidently not before the reporter) is fully understood, it becomes, I think, a direct authority for the views I have expressed, regarding the terms and effect of section 47 of the statute.

The course which was taken in the *Dalry* case requires, I think, to be followed in the present, and is not met by the petitioners' very simple proposals, which merely shirk the question. My reasons for rejecting their proposals are these—1st, The present School Board cannot undertake and bind their successors either to carry on the present school or any substituted school in the village of Gilmerton. Nor can they undertake to carry on such school on any particular lines. With regard to any school they and their successors must be guided by their views of what is necessary and proper from time to time in the exercise of their statutory duties, and they must bow to the changing views of the Department, unfettered by the terms of any endowment or scheme. 2nd, To take the income of the endowment (whether or not by realisation that includes also the value of the school buildings) and apply it simply towards current expenses of Board schools in Gilmerton, would not, in my opinion, be to apply it according to the wishes and intentions of the donors. It would be simply a diversion of the bequest to save the rates. It is quite open to a benefactor to give or bequeath to a school board to relieve the rates, as it is to give or bequeath to the Chancellor of the Exchequer to relieve the Inland Revenue, though I do not think that any such benefactor has yet been found. But I find no authority for taking the bequest of a benefactor who had no such purpose and applying it to that end. If the Anderson bequest is applied to the upkeep of schools in Gilmerton, as regards its effect that is just the same as saying applied for general School Board purposes, whatever from time to time these may be. There neither is nor can be any obligation on the School Board to keep up a school at Gilmerton. But so long as that is deemed proper, it is a duty of the School Board to maintain it, and to subsidise it as proposed is simply to relieve the rates. If the object of a charitable bequest has failed, as admittedly this is on the eve of failing, the funds ought to be applied for objects as nearly analogous to those of the foundation, and as completely adapted to carry out the intention of the founders, in circumstances not contemplated by them, as is found possible. To devise such a mode of application is not impossible, and I think that the Court would be lending themselves to a mere avoidance of duty on the part of the trustees if they sanctioned

this easy road to escape a difficult task, viz., to hand over the funds to the School Board on conditions which are really no conditions but result merely in relief of the rates.

To sacrifice the opportunity of maintaining in a locality something having the mark of individuality, whether in the form of bursaries, provision for education in special subjects, or otherwise, and merely to throw the funds, so generously provided by a testator not forty years ago, into the general purse of the School Board, would, I think, be a very grievous local misfortune. Accordingly I have come without hesitation to the conclusion that this application should be refused, as fortunately it is not warranted by anything in the Education Act and is inconsistent with the practice of the Court in such matters. I refer, as the most recent authority in *pari casu* of which I am aware, to the *Governors of Lady Burnett of Leys School* (1911), 48 S.L.R. 667, which when read along with a complete account of the *Dalry* case, appears to me to indicate the lines on which the case ought to have proceeded, instead of those on which it has. Nor can I altogether reconcile the course taken here with much that was said in the *Alloa* case (1 F. 48).

LORD PRESIDENT—LORD DUNDAS and LORD SKERLINGTON agree in the judgment I have proposed.

The Court pronounced this interlocutor—

“Approve of the said report: Authorise the petitioners, as trustees acting under deed of mortification by Miss Christina Anderson of Moredun, of ‘The Anderson Female School,’ to transfer to the School Board of the parish of Liberton, under the conditions set forth in the appendix to the petition, the area of ground conveyed by said deed of mortification, with the whole buildings thereon, and the balance of funds now belonging to the endowment, after deducting the expenses of the present application and relative proceedings, and for that purpose to execute such conveyances and transfers and all other deeds which may be necessary for fully vesting the said School Board of the parish of Liberton therein; and decern: Further, remit to the reporter to adjust the necessary deeds.”

Counsel for Petitioners—Fleming, K.C.—
Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, June 20.

FIRST DIVISION.

[Court of Lord Lyon
King of Arms.

ROYAL COLLEGE OF SURGEONS,
EDINBURGH v. ROYAL COLLEGE
OF PHYSICIANS, EDINBURGH.

*Jurisdiction—Lord Lyon King of Arms—
Right to Precedency.*

The jurisdiction of the Lord Lyon King of Arms in regard to matters of precedency is purely ministerial and does not entitle him to determine the legal right to precedency.

One of two colleges presented a petition to the Lord Lyon King of Arms craving him to find and declare that it was entitled “in all time coming to precedency” over the other. The Court dismissed the petition, holding that the Lord Lyon had no jurisdiction to determine the question.

On 11th February 1911 the Royal College of Surgeons, Edinburgh, presented a petition to Sir James Balfour Paul, Lord Lyon King of Arms, in which they craved his Lordship to “find, decern, and declare that the petitioners are entitled in all time coming to precedency over the Royal College of Physicians of Edinburgh on all public or ceremonial occasions, or otherwise to grant unto the petitioners such precedency.”

The petition stated—“That the petitioners claim, on various grounds, and, in particular, by virtue of the Royal, Parliamentary, and other grants in their favour, produced herewith, as well as by virtue of usage, that they are, on all public or ceremonial occasions, entitled to precedency over the Royal College of Physicians of Edinburgh, or otherwise that such precedency ought to be granted to them. That this claim is disputed by the said Royal College of Physicians. That on 13th March 1901 the Right Honourable Alexander Hugh, Lord Balfour of Burleigh, then Secretary for Scotland, on representations by the said Royal College of Physicians, and without affording to the petitioners any opportunity of being heard thereon, intimated to the petitioners that he had decided that on the occasion of the presentation of Addresses to his late Majesty King Edward VII precedence over the petitioners should be given to the said Royal College of Physicians, and further, that this decision would be acted on by the Scottish Office until disturbed by any higher authority. A copy of the letter of Sir William C. Dunbar, then Assistant Under Secretary for Scotland, making the fore-said intimation, is herewith produced. That no power to deal with such matters has been committed to, or is possessed by, the Secretary for Scotland, and that the said decision, which subverted the existing usage, was *ultra vires* of the said Right