

land, in 1814, that a deed written on one sheet was good although only subscribed at the end; a result which never could have been arrived at under the words of the statute, excepting on the footing that the signature of each page was only necessary to indicate the separate parts of the writing to which the subscription applied.

Something has been said as to how far this deed or settlement has been already founded on in the sense of the 38th section of the statute, so as to make it incompetent now to add the designations of the witnesses to their subscriptions. No such matter if raised under this petition, nor has been argued before us. I wish to express no opinion on the question. I am certainly not to be understood as assenting to the proposition that this settlement has been already founded on in judgment.

The Court pronounced this interlocutor:—

“The Lords of the Second Division having, along with three of the other Judges, heard counsel on the petition and answers and the proof in this case—in conformity with the opinion of the majority of the seven Judges,—Find and declare that the said last will and testament was duly subscribed by the granter thereof, the Honourable Caroline Elizabeth Conyers Norton, and by the witnesses by whom the same bears to be attested, viz., John Holland Payne, wine merchant in Madeira, and Francis Gorbell Tabb, clerk to the Brazilian Telegraph Company at Funchal, Madeira, and Frank Burridge Foy, also clerk there to the said company: Find the petitioners entitled to expenses since the reporting of the proof, and remit to the Auditor to tax the same and to report, and decern.”

Counsel for Petitioners—Dean of Faculty (Watson)—Crawford. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondents—Balfour—Hunter. Agents—T. & R. B. Ranken, W.S.

Thursday, July 20.

SECOND DIVISION.

[Lord Shand, Ordinary.]

M'CULLOCH AND OTHERS v. THE KIRK SESSION AND HERITORS OF THE PARISH OF DALRY, AND OTHERS.

Endowment—Free Grammar School—Agreement with School Board—Education (Scotland) Act 1872, §§ 37 and 38.

Funds were left in trust “for the erection of a free grammar school, and maintenance of poor scholars, with a sufficient learned able schoolmaster that can fit them for the several universities or colleges,” said school to be at a place within the parish of D. The school was erected, and the fund administered by the kirk session and heritors of the parish, failing trustees that had been nominated. From time immemorial the children of the inhabitants of the parish received education at the school free of charge. The income of the trust having become insufficient

to maintain a school such as the donor contemplated, the trustees, after the passing of the Education Act 1872, made over the school on lease to the School Board of the parish. It was specially stipulated in the lease, and the School Board were taken bound to provide, “that besides elementary, higher branches shall be taught in said school to fit scholars for a university in Scotland, if there shall be scholars whose parents or guardians wish them to receive instruction therein;” and “that poor children or, those whom the Parochial Board of D. recommend shall be taught without school fees being charged for them.” Further, by the lease, the trustees, if satisfied that the teacher appointed by the Board was capable of preparing scholars for a university in Scotland, bound themselves to pay him £50 yearly during the lease.—*Held* that the arrangement made with the School Board was a legal one under sections 37 and 38 of the Education Act 1872, but that the trustees were not entitled to delegate to the Parochial Board the nomination of those children who should have the benefit of gratuitous education, but must retain the nomination in their own hands.

This was an action at the instance of John M'Culloch and others, residents in the village of Dalry, against the kirk session and heritors of the parish, in the following circumstances:—

By last will and testament, dated 30th September, and codicil thereto dated 12th October, 1639, Robert Johnston of London gave and bequeathed the sum of £3000 sterling of lawful money of England, to be bestowed and employed upon some good, godly, and pious works within the realm of Scotland, in such way and manner as the Right Honourable the Lord Johnston, and Sir David Cunningham, of London, Knight and Baronet, supervisors of the said last will and testament, should in their wisdom think good. John Joyssie of Edinburgh, merchant, and Robert Inglis of London, merchant, were in said last will and testament nominated the executors of the said Robert Johnston. Lord Johnston having died, the sole management and disposal of the funds devolved upon Sir David Cunningham, who on 28th October 1658 executed a declaration or appointments whereby “according to the intention of the pious will of the testator, and for discharge of the trust reposed in him,” he declared, ordained, appointed, and designed the said sum of £3000 to be distributed and employed in the following manner:—*First*, £500 to be invested in lands or annual-rents in Scotland, and the income to be applied in perpetuity for the maintenance of a schoolmaster to teach a free grammar school, and maintain so many poor scholars as the rent and profits of the said £500 should conveniently do, in the town of Kilmours, in the bailliary of Cunningham and sheriffdom of Ayr. The deed then proceeds—“*Item*, Whereas the remainder of the said £3000 sterling, being £2500 sterling, some part of it may prove desperate debt, and can never be obtained, in discharge of the trust reposed in me, to the glory of Almighty God, the memory of the worthy testator, and the good of posterity, I appoint, dedicate, ordain, and think good that the said remaining sum, or so much of the said sum of £2500 sterling as can be recovered, shall be em-

ployed upon lands or annual-rent, upon good security, for the erection of a free grammar school and maintenance of poor scholars, with a sufficient learned able schoolmaster that can fit them for the several universities or colleges; and the said school to be in or near the place anciently called Saint John's Claughan, within the parish of Dalry and stewardry of Kirkcudbright, in Galloway." The place anciently called Saint John's Claughan is now the village of Dalry. Further, Sir D. Cunningham, on the ground that it was uncertain how much of the said sum could be recovered, and that in consequence he could not regulate its disposal, appointed John Joyssie of Edinburgh, merchant, William Moorhead of Farnham, Surrey, gentleman, and William Moorhead of New College, Oxford, his son, and Robert Spense, London, gentleman, nephew of the testator, to administer the said sum of £2500, charging them "to see the same truly, faithfully, fully and wholly, and well disposed to the purpose and upon the place before mentioned;" and he desired and did testify "that this my declaration appointment and determination may be in everything expounded [and interpreted in the largest sense and best form, to the interest aforesaid, though not herein fully expressed." The power thus delegated seems not to have been exercised, and the matter was taken in hand by the kirk session and heritors of the parish of Dalry, the kirk session being the natural superintendents of sums mortified for pious uses within their parish, failing specially nominated trustees and administrators. It does not appear how the heritors came originally to be associated in the matter with the kirk session, but in point of fact they were so from time immemorial. They recovered certain portions of the trust funds and invested them on heritable property and otherwise. The free school seems to have been established in Dalry previous to the year 1691, and from that time till 1873 the children of the inhabitants of Dalry, and of the parish at large, obtained education without charge. The defenders maintained that this exemption from the payment of fees on the part of the children or their parents, other than in the case of poor scholars, was entirely a matter of option or favour within the discretion of the trustees, and not in consequence of any obligation incumbent upon them. They denied that the inhabitants of Dalry (rich as well as poor) had any legal right under the mortification to have their children educated at the school free of charge. In 1873 a School Board was elected for the parish of Dalry under the Education Act of 1872. At that time the property of the trust under the management of trustees consisted of about 12 acres of land near the village of Dalry, on which a school and schoolmaster's house had been erected; and the sum of £1150, 12s. 5d. invested in the names of the defenders in trust for the school. The annual income of the trust in 1872 amounted to about £50, and the emoluments of the teacher were £34 yearly and the use of the ground and house before mentioned. The defenders considered the annual income of the trust insufficient now-a-days to keep up a school such as the donor contemplated, and they resolved to enter into an arrangement with the School Board of Dalry for the purpose of securing a schoolmaster of learning and ability to continue and carry on

the Dalry Endowed School. To effect this, a lease, dated 15th December 1873, was entered into, whereby for the consideration therein mentioned the trustees let to the School Board for four years from and after 6th February 1874, the school, teacher's house and garden attached, known as the Endowed Grammar School of Dalry. This arrangement was approved of by the Scotch Education Department, and Government grants have since been given to the school. It was specially stipulated and conditioned in said lease, and the School Board of Dalry were taken bound to provide *inter alia*, "that besides elementary, higher branches shall be taught in said school, to fit scholars for a university in Scotland, if there shall be scholars whose parents or guardians wish them to receive instruction therein;" and "that poor children, or those whom the Parochial Board of Dalry recommend, shall be taught without school fees being charged for them." Further, by said lease the trustees, if satisfied that the teacher appointed by the Board was capable of preparing scholars for a university in Scotland, and that the other conditions of agreement were fulfilled, agreed to pay the teacher appointed by the School Board £50 yearly. The School Board entered into possession of the premises under the lease, and implemented the conditions thereof to the satisfaction of the trustees. The schoolmaster, besides the elementary branches, taught Latin, Greek, French, and mathematics, and his salary in 1873 was £120. The Board also appointed a female teacher at a salary of £60 per annum. Poor scholars and children whose parents the trustees considered unable to pay fees were educated free of charge. After this arrangement was entered into, the trustees sold to the School Board part of the 12 acres of land before mentioned belonging to the endowed school, for the purpose of erecting thereon a female school and teacher's house, amounting in extent to about one-fourth of an imperial acre, at the price of £50 sterling and a yearly feu-duty of 2s. 6d. The remaining portion of the 12 acres was let on lease for ten years at a yearly rent of £22 sterling. In consequence of these arrangements the income of the trust was increased from £50 to £67, 12s. 1d. The pursuers maintained that the trustees acted wrongfully and illegally in ceasing to provide a free school. They averred that the schoolmasters of the endowed school had been men of ability and position, and had taught in addition to the ordinary English branches, Latin, Greek, and French. The defenders explained in their answer that the schoolmasters had incomes from other offices which they held, inconsistent with their position as schoolmasters, such as inspector of poor, &c. The pursuers further stated that no part of the income of the trust was being expended on educational purposes; that the School Board declined to admit any scholars except on payment of fees; that the pursuers are all in poor circumstances, and their children "poor scholars" in the meaning of these words, as contained in Sir David Cunningham's said declarator or appointment; and that the School Board had expelled from the school the children of those who refused to pay fees. In these circumstances they raised the present action, and concluded (1) for declarator that the kirk session and heritors of the said parish of Dalry, as trustees and managers of the funds destined for the

erection of a free grammar school and maintenance of poor scholars, with a sufficient schoolmaster, in or near Saint John's Claughan of Dalry, conform to the said last will and testament, codicil, and declaration or appointment, are bound now and in all time coming to use and employ the said funds in the upholding of a free grammar school and maintenance of poor scholars with a sufficient schoolmaster, in or near the place anciently called Saint John's Claughan, in the foresaid parish of Dalry, and which place anciently called Saint John's Claughan is now the village of Dalry foresaid, and are bound to establish now, and in all time coming maintain and uphold, a free grammar school with a sufficient schoolmaster in or near the said village of Dalry; (2) that the defenders, the kirk session and heritors of the said parish of Dalry, as trustees and managers foresaid, ought and should be decreed and ordained by decree of our said Lords to establish, and now and in all time coming to maintain and uphold, a free grammar school with a sufficient schoolmaster, in or near the said village of Dalry; (3) that such of the pursuers, inhabitants of the said village of Dalry, as have children, are entitled to have their children educated free of cost at the grammar school which the kirk session and heritors of the said parish of Dalry are, as trustees and managers of the said funds, bound to maintain and uphold in or near the said village of Dalry; (4) that the defenders should be ordained, if necessary, to exhibit and produce a full and particular account of the said funds, and our said Lords should find and declare the present amount of said funds, and make such orders in regard thereto as they shall deem proper, and in the event of the said funds not being sufficient for the support of a free grammar school, it should be found that the kirk session and heritors are bound to apply the funds in such way as our said Lords may declare and appoint, and the kirk session and heritors should be ordained so to apply them; (5) that a pretended lease or other deed, dated on or about 15th December 1873, entered into between William Alexander, Esquire of Glenhowl, in the parish of Dalry, chairman, and as acting for the heritors, ministers, and kirk-session of Dalry, trustees of the Dalry Endowed School, alleged to be duly authorised by them in a minute of the said trustees, dated the 26th day of August 1873 years, and the School Board of the parish of Dalry, was and is invalid and illegal.

The defender pleaded *inter alia*:—“(5) The arrangements condescended on and entered into with the School Board of Dalry and others, for the efficient carrying on of said Endowed Grammar School, rendered necessary by the altered circumstances of the times, having been within the powers and discretion of the trustees, in accordance with the intentions of the donor, and lawful and expedient, the same ought not to be set aside or disturbed.”

The School Board of the parish of Dalry having been sisted as parties to the action for their interest, the Lord Ordinary heard counsel, and on the 16th February 1876 pronounced the following interlocutor, with note appended:—“Finds that having regard to the amount of the funds and estate now belonging to the trust administered by the defenders, the kirk session and heritors of Dalry, as trustees and managers of the funds and

estate destined for the erection of a free grammar school and maintenance of poor scholars, conform to the last will and testament of Robert Johnston of London, Esq., dated 30th September 1639, and codicil thereto dated 12th October of the same year, and relative declaration of appointment by Sir David Cunningham of London, Baronet, dated 28th October 1658, and also to the means of education now provided by the defenders, the School Board of the parish of Dalry, under the Education (Scotland) Act 1872, the arrangement entered into between the kirk session and heritors as trustees foresaid, and the School Board, in regard to the use of the schoolhouse and schoolmaster's house and garden belonging to the said trust, and the application of the income of the trust-estate, as set forth on record and embodied in the agreement and lease No. 32 of process, are lawful, and within the powers and discretion of the said trustees; sustains the defenders' fifth plea-in-law, and assoziates the whole defenders from the conclusion of the action, and decerns; and finds them entitled to expenses, of which allows accounts to be given in, and remits the same when lodged to the Auditor to tax and report.

“*Note*.—The School Board having been made parties to the action as defenders, a renewed discussion has taken place, and I have had the benefit of a fuller argument than was previously submitted on the pleas maintained by the defenders. As the result, I have come to the conclusion, contrary to the opinion I formerly entertained, that the arrangement complained of by the pursuers, entered into between the kirk session and heritors as trustees under the late Mr Johnston's settlement and the School Board of the parish of Dalry, is not liable to objection as being in violation of the provisions of the Education Act, but is within the powers and discretion of the trustees. I continue to think the arrangement is on the whole, at least in its general provisions, probably the best mode of carrying out the purpose of the foundation under which the trustees act which in the circumstances can be adopted.

“The trust-property and estate consist of a schoolhouse and schoolmaster's house and garden, and adjoining property of about 12 acres in extent, and a sum of upwards of £1100, invested in three per cent. consols, and which produces about £34 a-year. The ground adjoining the school subjects has been let as an agricultural subject for ten years, at an annual rent of £22. The income of the trust is thus a sum of £55; and that sum, or somewhat less, if allowance be made for annual expenses of management, and repairs on the school buildings, in addition to a free house and garden, is the whole amount available to the trustees as the means of remuneration of any schoolmaster they might appoint. The trust estate has been derived almost entirely from the fund bequeathed by Mr Johnston in 1639; but small contributions have been made to the trustees from time to time for the purposes of the trust.

“Prior to the passing of the Education Act, it appears, as stated by the pursuers, that the school at Dalry established by the heritors and kirk session as trustees under Mr Johnston's settlement and relative instructions, was the only school available for the inhabitants of the village of Dalry, consisting of about 600 persons. The

other schools, which supplied the wants of other parts of the parish, were at a distance of five miles and seven miles respectively from the village. The trustees gave the schoolmaster the free income of the trust. This afforded a very limited remuneration; for, the school being free, the only return received from the children consisted of voluntary offerings at Candlemas, amounting to about £12 annually. The schoolmaster's income was generally enlarged by his obtaining the appointments of inspector of poor and collector of rates, and the like; but over these appointments the trustees had no control. So long as there was no other means of education in the immediate neighbourhood, the trustees acted on the view that it was their duty to keep up the school according to the system which had lasted for many years, although it was kept up under considerable disadvantages, from the limited means at their disposal.

"After the passing of the Education Act of 1872, the School Board of the parish appointed a schoolmaster at a salary of £120 a-year, who, besides giving instruction in the elementary branches of education, has taught also Latin, Greek, French, and mathematics. They also appointed a female teacher at a salary of £60 a-year. The defenders, the trustees under Mr Johnston's settlement, have, under these circumstances, thought it proper and expedient in the discharge of their duty to discontinue the occupation of their school buildings by a separate master in competition with the School Board. They have arranged with the Board that the school and schoolmaster's house should be given up to the Board on a lease of four years, which expires on 6th February 1878, at a stipulated rent of £12; and they have agreed to contribute towards the salary of the Board's schoolmaster a sum of £50 annually, subject to the condition that the teaching in the school shall not be simply of an elementary character, but shall embrace those higher branches which are necessary to fit such of the scholars as may desire it for entering a university. The present action has for its purpose to put an end to this arrangement. The pursuers, inhabitants of the village of Dalry, apparently all subsisting by their manual labour, claim as matter of right that the defenders shall revert to the old system so that they may have the children educated free of charge. They maintain that the trustees are bound to do so, because the trust-deed and relative instructions under which they act imposes an obligation on the trustees to keep a free school, such as formerly existed, and separately; because the present arrangements being illegal, as a violation of the provisions of the Education Act, and at common law as a violation of the trust, the defenders must cease to act on it, and open their school as formerly. I have come to the conclusion that the pursuers' claim and pleas are not well founded.

"The settlement of the truster Mr Johnston did not define the particular purpose to which the fund bequeathed by him was to be applied, but directed the money 'to be bestowed and employed upon some good, godly, and pious works within the realm of Scotland,' in such a way and manner as the Right Honourable Lord Johnston and Sir David Cunningham of London, Knight and Baronet, and supervisor of the said last will

and testament, should in their wisdom think good. Sir David Cunningham, the survivor of these two persons, by a declaration or appointment dated 28th October 1658, directed that such reversion of the funds as might be recovered from the debtors by whom it was due should be employed 'upon lands or annual-rent, upon good security, for the erection of a free grammar school and maintenance of poor scholars, with a sufficient learned able schoolmaster that can fit them for the several universities and colleges; and the said school to be in or near the place anciently called St John's Claughan, within the parish of Dalry and stewartry of Kirkcudbright, in Galloway.' It has been already stated how the fund really was employed. The primary intention of the instructions just quoted evidently was not the foundation of a school at which elementary education only should be given, and to which all the children of the immediate neighbourhood should have right to resort for education free of charge. The intention was that the school should be of a higher class—a grammar school; that there should be foundationers or scholars 'maintained' in connection with it, and that the schoolmaster should fit these scholars for the several universities or colleges in the country. It was probably because the funds proved to be of smaller amount than was anticipated that this purpose could not be literally carried out; and the trustees in these circumstances seem to have exercised a fair discretion in providing such a school as they did. It appears to me, however, to be clear that if at any time the funds of the trust had become so enlarged as to enable them to establish a different and higher class of school, for the benefit of a limited number of poor scholars to be trained for admission to the universities, they would have been at least entitled, if not bound, to provide such a school, even although this should have involved the discontinuance of the free school for elementary education which had previously existed.

"Keeping in view the general nature of the trust as now explained, it has to be next considered whether the arrangement which the trustees actually made with the School Board, in the altered circumstances resulting from the passing of the Education Act, was either a violation of the provisions of that Act or the trust under which the defenders act.

"Immediately on the passing of the statute it became the duty of the Board to provide a public school which should meet the wants of the parish and village, and at which they could compel the attendance of children whose education might otherwise be neglected. The trustees thus found that the Legislature had made provision out of the public funds and local rates for the establishment of a school which would supply, for payment of small fees, that elementary education which they, in the absence of such a provision, had for a long time thought it right to provide. The existence of such a Government school entirely altered the circumstances. If the trustees had made no change, an unfortunate competition would have arisen between a Government school, at which fees were payable, and the school maintained by the trustees, with the probable result of injuring both. Moreover, it became apparent that the purpose which the trustees had hitherto designed to serve would be equally well, if not

better, performed by the public school; and it could not be regarded as a hardship on such of the parents as could afford to pay for education that they should be required to pay the small fees of the public school; while children whose parents were unable to do so would be educated at the cost of the ratepayers contributing to the poor-rates. In these circumstances I think the trustees were right in regarding it as their duty to discontinue the school on the footing on which it had been hitherto carried on, and to endeavour with the funds at their disposal to promote that higher education which it was the object of the trust to provide.

"The arrangement into which they entered with the School Board had this end in view; for while, on the one hand, the trustees gave over the school and its pertinents at an apparently small rent, and contributed £50 a-year to the school funds, on the other they stipulated, in the words of the agreement, 'that besides elementary, higher branches shall be taught in said school, to fit scholars for a university in Scotland, if there shall be scholars whose parents or guardians wish them to receive instruction therein.' This arrangement is of a temporary character only, being subject to revision and alteration at the end of four years—that is at February 1876.

"The arrangement is objected to, first, as a violation of the Education Act, and particularly of sections 37 and 38 of that statute. The former of these sections gives power to the School Board to acquire heritable property by purchase or lease for the erection of schools and teachers' houses, and to take leases of now existing schools and teachers' houses, and land used in connection therewith, 'not being schools, houses, and land of the description to which the provisions of this Act in the two immediately succeeding sections regarding the transference of existing schools are applicable.' The pursuers maintain that the school and its pertinents belonging to the trustees are of the description to which these succeeding sections apply; and if this were so, the lease would be one which it was beyond the power of the parties to enter into. The succeeding 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 (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,' enacts 'that it shall be lawful for the person or persons vested with the title of any such school, with consent of the person or persons having the administration 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 or used in connection therewith, 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 the Act.' The language here used is certainly of a very general and comprehensive nature. It may fairly be maintained that it is broad enough in its terms to cover such a case as the present; and I was formerly strongly disposed to hold that it included schools and teachers' houses,

which, like the present, had been erected and maintained by means of a fund originally given as a donation *mortis causa*. If that view were sound, it would follow that while such existing schools and teachers' houses might be given over absolutely to the School Board, the Board would not be entitled to take them on any other terms, and so could not acquire right to them by purchase or lease. I have, however, on further consideration become satisfied that on a sound construction of the statute the section (38) has not this meaning—that it does not apply to what may shortly be described as mortified or endowed schools, and applies only to that class of schools of which a very large number existed throughout the country when the statute passed, which may be described as subscription schools, whether maintained by the members of a particular church or religious body or not. When the statute passed there was a large number of schools throughout the country, mostly in connection with particular religious denominations, which had been erected, and were maintained, by donations and contributions from persons living in the parish or district in which the schools existed. The effect of the statute was to make those persons liable for the first time to a local rate for the maintenance of new schools and schoolhouses. The purpose for which the existing schools had been erected was about to be served in a great measure, if not entirely, in most cases by the new schools, which were to be partly supported by funds provided by Government. It was reasonable to suppose that the persons who had hitherto voluntarily maintained the existing schools would think it unnecessary longer to bear that burden, particularly as they had now become liable to pay a school-rate. The schools and schoolhouses had, however, in the meantime been dedicated to the purposes of education; and it seems to have been thought reasonable by the Legislature that, on the one hand, this property should not be made the means of profit to the subscribers by being sold or leased to the different School Boards throughout the country; but that, on the other, the subscribers should be relieved of further burdens in connection with the school property if they were willing to give it over for the purposes of education, for which it had been previously used. Accordingly, if the subscribers to the schools, in consequence of the new arrangements of the Legislature, desired to discontinue the use of them, and so to be freed from the burden of maintenance which they had hitherto voluntarily undertaken, the statute authorised them, through the persons in the management, or a majority of not less than two-thirds of their number, to give over the property to the School Board. The explanation of the prohibitive words of section 37 evidently is, that it was not thought proper that school buildings of the nature referred to, dedicated to education and maintained by subscriptions, and thus so far a burden on their supporters, should become a source of profit to those who built or supported them; and it seems to have been assumed that sufficient inducement to give over many school buildings, as authorised by section 38, was to be found in the fact that another provision for education had been made, and that, generally speaking, the subscribers to voluntary schools would be obliged to contribute as rate payers

to the new system. It is very difficult, however, to suppose—comprehensive though the language of section 37 be—that the Legislature intended that trustees in the administration of endowed schools throughout the country should be entitled to divest themselves of their school buildings, with the result of defeating the trust under which these are held. If the pursuers' argument were sound, the schoolhouses and teachers' houses belonging to Heriot's trust, and similar mortifications, might be thus disposed of. Any reasonable interpretation of the statute which would avoid this result must, I think, be adopted. The schools which may lawfully be given over are those 'erected, or acquired and maintained, or partly maintained, with funds derived from contributions or donations for the purpose of promoting education;' and this general description receives light from the farther expression, 'whether by the members of a particular church or other religious body.' There is no provision entitling trustees of a mortification to part with the funds or estate other than the school buildings to the Board, which there would have been had the statute been intended to apply to such cases. The words used are not apt or fitting to describe properly endowed schools under the administration of trustees. The provision for the erection and maintenance of the schools referred to is stated to be 'funds derived from contributions or donations,' and these words, apparently used in the plural with design, appear properly to refer to subscription schools only, as distinguished from schools founded by a mortification. The apparent reason of the enactment, as already stated, the difficulty in supposing that it could be intended to give the trustees of proper endowed schools the power of transferring the school property, and the absence of any provision for transferring the school funds, are elements which appear to be decisive against the view maintained by the pursuers.

"Holding, therefore, that there is nothing in the Education Act to prevent the School Board from taking a lease of the school under section 37 of the statute, the only other question is, whether the arrangement is a violation of the defenders' trust? By section 47 of the Education Act, the School Board are entitled to receive property or funds for the promotion of higher education, and are bound to apply funds for that purpose if so given. For the reasons already stated, in dealing with the particular terms of the trust-deed, I am of opinion that the defenders, as trustees, are not bound in the altered circumstances to continue the maintenance of the school on the old system. They are thus left with property and funds of an extent which is not sufficient to enable them to found or maintain a separate institution to promote the higher education of poor scholars. They can only promote that general purpose by such an arrangement as they have made with the School Board, and I think the general terms of that arrangement are not only within their powers and discretion, but are in accordance with the general purposes of the trust. It was maintained in the argument for the pursuers, that, at all events, the arrangement made by the defenders is liable to objection, because there is no provision in favour of 'poor scholars,' which would give them the advantage of such education, as it was the purpose of the

trust to promote, on more favourable terms than others having ample means to pay. The agreement entered into provides 'that poor children, or those whom the Parochial Board of Dalry recommend, shall be taught without school fees being charged for them.' If this provision be read, as I think it fairly must be, as merely relieving the Parochial Board of the obligation imposed by the statute, of paying for the education of children whose parents are unable to bear the expense, and not even giving to the trustees themselves the power of nominating poor scholars to be educated free of charge, I think it is open to serious objection. It was not the intention of the trustor to relieve the rate-payers of any obligation which might be imposed upon them by statute. At the same time, the purpose of this action, as its whole conclusions shew, was to have the free school again opened for the benefit of the whole neighbourhood, and not to state or enforce an objection to a point of detail of this nature in the agreement entered into. I do not therefore regard that objection as being here properly raised. At the same time, the defenders will do well in considering whether now, or in any new arrangement to be made at the expiry of the existing agreement, the provision to which I have referred should not be altered to the effect of making the trustees the nominees of any poor scholars whose interests they desire to advance, so as to give them a higher education than they can otherwise obtain free of charge."

The pursuers reclaimed.

At advising—

LORD JUSTICE-CLERK—In this case the summons, which is in the instance of certain inhabitants of Dalry against the kirk-session and heritors, contains this conclusion:—"And our said Lords ought and should, in the course of the present process, declare and appoint the way and manner in which the said funds are to be applied." We have had an elaborate and able argument on the whole of the arrangements made by the trustees of the fund. The result at which we have arrived is, that, with one exception, no substantial objection can be taken to that arrangement. We do not think that the terms of the 38th clause of the Education Act put any restriction on the School Board in regard to the particular contract which they have made with the kirk-session and heritors. We do not think that an endowed school of this kind falls under the terms of that clause. Further, we do not think that there is any breach of trust in the way in which the kirk session and heritors purpose generally to carry out the founder's intentions, viz., by a payment to the School Board. But there is one part of the arrangement which not only amounts to a delegation of their powers by the trustees beyond their competency, but a delegation to persons who have or may have an interest adverse to the intentions of the trustor. I refer to that clause of the agreement by which the children who are to have the benefit of gratuitous education in the higher branches are to be nominated by the Parochial Board. In the first place, I think that the trustees could not put this matter out of their own control; and in the second place, the obvious result is, that the Parochial Board by nominating pauper children, would substantially relieve themselves, or rather the ratepayers, from the obli-

tion to provide elementary education for such pauper children. Both parties have asked us to indicate our opinion as to the proper course to be followed. We think that the agreement entered into by the kirk session and heritors with the School Board should be altered by retaining the nomination of children to the benefits of the endowment in the hands of the kirk session and heritors. If the parties put a minute in process to that effect, and also make it a condition that poor scholars are to have the benefit of the higher education, we shall be able to interpose our authority to the same, which will avoid the necessity of a procedure under the Trust Act.

The other Judges concurred.

The parties having put in a minute accordingly, the Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming note for John M'Culloch and others against Lord Shand's interlocutor of 16th February 1876, in respect of the joint minute No. 60 of process, Find that the heritors and kirk session of Dalry, acting as trustees under the will of Mr Johnston, are not entitled to delegate to the Parochial Board the right to nominate poor children who are to have the benefit of the endowment: Find that the nomination of such poor children must remain with the heritors and kirk session as trustees, and that on such nomination the School Board, while the agreement libelled on exists, are bound to have the poor children so nominated instructed in the higher as well as in the elementary branches of education, so as to fit them for one or other of the universities, and to that effect alter the interlocutor of the Lord Ordinary: *Quoad ultra* adhere thereto: Appoint the pursuers to lodge in process an account of the expenses incurred by them, and decern.”

Counsel for Pursuers—Fraser—Rhind. Agents—Rhind & Lindsay, W.S.

Counsel for Defenders—Dean of Faculty (Watson)—M'Kie. Agents—J. & J. Milligan, W.S.

Counsel for School Board of Dalry—Burnet. Agent—W. Scott Stuart, S.S.C.

Saturday, July 8.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

STEELE & CO. v. BYRNE AND OTHERS.

Ship—Owner—Ship's Husband—Repairs—Liability.

When a vessel is in a home port, a managing part-owner may bind the other part-owners for ordinary repairs, but he is not entitled to bind them without specific authority for unusual and structural alterations, nor for work to fit the vessel for a new employment on which the part-owners have not resolved.

This was an action raised by Robert Steele & Co., shipbuilders in Greenock, against R. C. Byrne & Co., shipowners in Cardiff, Messrs Dixon of Liverpool, Lieut. Thomas P. Powell, 83d regiment, and Ambrose Parsons, solicitor, London—all registered owners of the ship “Brazilian;” and the summons concluded for payment by the defenders, conjunctly and severally, of (1) £5664, (2) £820, 1s. 2d., with interest from August 31, 1875. The action was raised to recover the first of these sums, as the value of certain repairs and alterations on the “Brazilian,” executed by Steele & Co. under orders from R. Byrne & Co. in April 1875. The second sum, £820, 1s. 2d., was made up of five different accounts for repairs since April 1875. The facts of the case are given in the note to the Lord Ordinary's interlocutor given below.

After a proof the following interlocutor was pronounced by the Lord Ordinary:—

“Edinburgh, 15th February 1876.—The Lord Ordinary, &c., assolzies the defenders Charles E. Dixon, Alfred Dixon, Thomas Pery Powell, and Ambrose Parsons from the whole conclusions of the action, and decerns: Finds the pursuers liable in expenses, &c.

“Note.—The pursuers Robert Steele & Company, shipbuilders in Greenock, have raised the present action against the registered owners of the iron steamship ‘Brazilian,’ lying in the Garvel Park Graving Dock at Greenock, and against the firm of R. Byrne & Company, merchants and shipowners in London and Cardiff, and the partners of that firm, for the purpose of recovering two sums, £5664 and £820, 1s. 2d. sterling, being the cost of certain repairs and furnishings executed by them upon said vessel, on the employment of R. Byrne & Company, who owned 31-64ths thereof, and were the managing owners of the vessel. The only defenders who have lodged defences are Charles E. Dixon and Alfred Dixon, who are the registered owners of 21-64ths, Thomas Pery Powell, who is registered owner of 2-64ths, and Ambrose Parsons, who is registered owner of 10-64ths. The main grounds of defence are that the repairs and furnishings in question were not necessary repairs, or such as a ship's husband or managing owner is entitled to order on the credit of his co-owners, and that even if necessary they were executed in a home port without the order or sanction of the present defenders.

“The facts of the case as disclosed in the proof appear to be as follows:—Prior to the end of March 1872 Messrs C. E. & A. Dixon were the registered owners of the whole vessel, apparently in trust for persons of the name of Fernie, carrying on business in Liverpool as ‘The Merchants Trading Company,’ who by a contract of sale, dated 3d December 1872, sold to Messrs R. Byrne & Company the ‘Brazilian’ as she then lay in Birkenhead Dock. One-third of the vessel was to be held by Messrs C. E. & A. Dixon, who were not to transfer the same without Messrs Byrne's consent; but in the event of Messrs Byrne & Company deciding to re-engine the vessel, they were to find the money to do so, all profits earned on the one-third interest to be retained by them until the amount advanced for the new engines should be repaid to them, with interest at five per cent. The vessel was to be managed by Messrs R. Byrn