Saturday, July 16.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

DUNLOP PARISH AND STEWARTON PARISH SCHOOL BOARDS *v.* CUNNINGHAME GRAHAME BURSARIES ENDOWMENT FUND PATRONS.

School Board—Title to Sue—Educational Trust—Scheme for Administering Bursaries—Condition of Passing Qualifying Examination in a Public School of Certain Parishes — Title and Interest of School Boards of Parishes to Enforce Condition.

One of the conditions of a scheme under which bursaries were administered was that candidates must have passed the qualifying examination of the Scotch Code in one of the public schools of certain parishes. The school boards of the parishes raised an action against the patrons of the bursaries for declarator that this condition had been violated, and that the patrons had acted *ultra vires* in awarding one of the bursaries, and for interdict. They maintained that they had an interest, and therefore a title to sue, in that parents might be attracted to the parishes and might send their children to the schools of the parishes, and that in this way a larger grant might be obtained from the Education Department.

Held that the pursuers had no title to sue, as their interest was too slender.

Opinion (*per* the Lord President) that school boards had no title given them *eo nomine* by the Education Acts to raise such questions, yet a title might flow if they had sufficient interest, and that had the bursaries been given to pupils attending the schools which were under these school boards there would have been sufficient interest.

The School Board of the parish of Dunlop, in the county of Ayr, and the School Board of the parish of Stewarton, in the same county, raised an action in the Sheriff Court at Kilmarnock against the Rev. William Young Lindsay, who had recently been Moderator of the Presbytery of Irvine, the Rev. James Lamont Fyfe, the then Moderator of said Presbytery, the Rev. James Symon, minister of the parish of Dunlop, and the Rev. William Falconer Ogilvie, minister of the parish of Stewarton, being the patrons, past and present, of the Cunninghame Graham Bursaries Endowment Fund, acting under a scheme approved by the Court of Session upon 19th June 1908.

The claim or demand of the pursuers, as stated in the initial writ, was "For declarator that the patrons of the Cunninghame Graham Bursaries Endowment Fund, acting at the time under scheme approved by the Court of Session upon 19th June 1908, were acting *ultra vires* and in violation of the provisions and conditions of said scheme, and illegally and unwarrantably, in granting or awarding, on or about 28th November 1908, one of the bursaries payable under said scheme to Agnes Gibb, residing at Parkside, Dunlop; and in subsequently paying over to her the sum of £7, 10s. as a first half-yearly payment on account of said bursary, the said Agnes Gibb not having complied with the conditions prescribed by said scheme for candidates for the examination thereby provided for applicants for said bursaries, and particularly not having passed the qualifying examination of the Scotch Code in one of the public or state-aided schools in the said parishes of Dunlop and Stewarton . . . [*as originally laid there followed a claim for repayment of the* £7, 10*s. to the Endowment Fund, but this claim was abandoned in the Inner House*]; and further, for interdict against the defenders the Rev. James Lamont Fyfe, presently moderator of said presbytery, and the Rev. James Symon and the Rev. William Falconer Ogilvie, ministers respectively of said parishes of Dunlop and Stewarton, and as such the present patrons as aforesaid, making payment to the said Agnes Gibb of said bursary illegally and unwarrantably granted or awarded to her as aforesaid."

The pursuers, *inter alia*, averred—"(Cond. 2) By his trust-disposition and settlement, dated 2nd January 1883, and, with relative codicil, recorded in the Books of Council and Session, 4th September 1884, the late Thomas Douglas Cunninghame Graham, of Dunlop, directed his trustees, on the expiry of a life-rent of the residue of his estate therein mentioned, to invest the sum of £2000 in trust securities, and to make over the same to the Moderator of the Presbytery of Irvine, the minister of Dunlop, and the minister of Stewarton, as permanent trustees or patrons, and that these permanent trustees were to hold the securities as a fund for two bursaries, to be called the 'Cunninghame Graham Bursaries,' the constitution of which bursaries the said permanent trustees were, after consultation with the patrons, to settle and adjust, but always without prejudice to certain regulations and rules referred to in the said trust-disposition and settlement, all as more fully set forth in the report by Mr J. H. Millar, advocate, and scheme for the administration of the endowment. (Cond. 3) The liferents having expired, and objection having been taken by the trustees to the regulations and rules referred to in the said trust-disposition and settlement, a petition at the instance of (*first*) the surviving trustees of the said deceased Thomas Douglas Cunninghame Graham, (*second*) the patrons or permanent *ex officio* trustees of the bequest, was presented to the First Division of the Court of Session for settlement of a scheme for administration of the bequest in the manner specified in the petition. (Cond. 4) A scheme for the administration of the bequest, after having been reported upon as aforesaid, was approved of by the

Court of Session on 19th June 1908. The bursaries are now being administered under this scheme. (Cond. 5) *Inter alia*, it is provided by said scheme that the patrons should apply the free annual income of the fund as follows: For the first three years from and after the commencement of the school session of 1908-9 they should divide it into four equal portions, and pay the same as annual bursaries to each of four bursars, whom they should select by an examination (written, oral, or both) held at such time before the commencement of the said period as the patrons should appoint, regard being also paid to the previous school record of the candidates as regards regularity of attendance, and industry, general merit, and good conduct. The bursaries should be tenable at any secondary or higher grade school in or convenient to the parishes of Dunlop or Stewarton, Ayrshire. . . . . (Cond. 6) Further, it is, *inter alia*, provided by said scheme that the candidates for said examination (who may be of either sex) must comply with the following conditions, viz.: —(1) They must be at least fourteen years of age; (2) they must be natives of the parishes of Stewarton or Dunlop; and (3) they must have passed the qualifying examination of the Scotch Code in one of the public or state-aided schools in the said parishes. . . . (Cond 8) . . . Upon or about 19th September 1908 the patrons or those of them who acted in the matter granted or awarded one of the bursaries to Agnes Gibb, residing at Parkside, Dunlop, and somewhat later paid over to her the sum of £7, 10s. sterling as a first half-yearly payment on account of said bursary. . . . (Cond. 9) The said Agnes Gibb had not at the date of her application, nor when the bursary was granted to her, passed the qualifying examination of the Scotch Code in one of the public or state-aided schools in the said parishes, as required by the conditions of the scheme. She was therefore not a qualified candidate for one of the bursaries, and the patrons were not entitled to admit her as a candidate, nor to grant nor to make payment to her of one of the bursaries. . . . (Cond. 11) The pursuers the School Boards of the parishes of Dunlop and Stewarton are the official public bodies in charge of the public schools of said parishes referred to in said trust-disposition and settlement in said report and in said scheme, and entrusted with and responsible for the proper administration of the educational affairs of the respective parishes, and the protection of the interests of the scholars or pupils under their charge and within their jurisdiction who had, have, and will have an interest in the bursaries in question, including the bursary illegally and unwarrantably granted to the said Agnes Gibb as aforesaid. Therefore, and because the financial interests of the boards would suffer by loss of grants and otherwise, they are entitled and have an interest to prevent the bursaries being granted, applied, and paid illegally and unwarrantably as aforesaid, or otherwise than in terms of the conditions prescribed by said scheme."

The pursuers pleaded, *inter alia*—"(1) The actings and proceedings of the patrons having been irregular and illegal, the pursuers are entitled to decree as craved. (2) In particular, the granting or awarding of one of the bursaries to the said Agnes Gibb being in violation of the conditions prescribed by the scheme, and being *ultra vires* of the patrons, and illegal and unwarrantable, decree should be pronounced as craved."

The defenders pleaded, *inter alia*—"(1) No title to sue, *et separatim* no interest to sue. (2) The action is incompetent."

The Sheriff-Substitute (MACKENZIE) on 14th July 1909 allowed intimation of the action to be made to Agnes Gibb and her curator, if she any had, in order that she might have an opportunity, if so advised, of sisting herself as a defender in the action, and on 20th July 1909 a minute was lodged for Agnes Gibb declining to sist herself as a defender.

On 21st July 1909 the Sheriff-Substitute repelled the first plea-in-law for the defenders, except in so far as it related to the second conclusion of the action, and to that extent sustained the first and second pleas-in-law for the defenders, and *quoad ultra* allowed to both parties a proof of their respective averments in so far as not admitted, and to the pursuers a conjunct probation.

Note.—"The plea which here falls first to be dealt with is that of the defenders, to the effect that the pursuers have no title or interest to sue this action. They are the School Boards of Dunlop and Stewarton, and they sue for declarator, payment, and interdict against the patrons of what is known as the Cunninghame Graham Bursaries Endowment Fund.

"The view that a school board is a statutory body with no powers of general superintendence of the educational matters within its parish, but with only the rights and duties assigned to it by statute, received great weight from several decisions in the Supreme Court. In the case of *Forrest's Trustees, &c.* v. *The Commissioners on Educational Endowments*, 11 R. 719, two school boards along with a town council objected to a scheme prepared by the Commissioners, and exception was taken to their title to do so. This was obviated by the governing body also appearing, but in giving decision the Lord President referred to the objection to the title of the school boards as 'a very serious one,' and said 'it appeared to me from the first a very formidable objection.' In the case of the *Tay Fishery Board* v. *Robertson*, 15 R. 40, it was held that the pursuers being merely a statutory board with statutory remedies had no title to sue for interdict at common law. This view is also supported by the case of *Hope* v. *The Landward Committee of the Parish Council of Inveresk*, 8 F. 896. In the case of *The Kirk-Session of Largs* v. *The School Board of Largs*, 1 F. 915, in allowing the School Board a proportion of their

expenses out of the trust fund, Lord President Robertson says—'The only other observation I wish to make is that for my part I should not like it to be supposed that every school board, when an endowed school within its district comes into Court with a scheme, is entitled to come forward and take part in the proceedings as a matter of course, and get expenses out of the endowment. It may very well be that in the public interest a school board may think it right to come forward at its own expense, but it must not depend upon its being necessarily treated as a tutelary deity of the endowment whose presence is indispensable to the success of its every enterprise. I say this to guard against even this modest grant of expenses being construed as an invitation to school boards to come forward and take part in proceedings like the present.' In a subsequent action following upon this—*Fraser* v. *The School Board of Largs*, 9 S.L. Times 272—Lord Kincairney discussed with some minuteness the question of the School Board's right to appear, and held, on a question of expenses between them and their agent, that the appearance of the School Board to a certain extent was *ultra vires*.

In all the above cases where school boards were concerned the question before the Court was as to the terms of an educational endowment; it was not as to the administration of that endowment by the patrons or governors to whom it had been entrusted. It appears to me that this is a very important distinction, for it at once emphasises the difference, pointed out by Lord Kincairney in the case of *Fraser*, between a school board wishing to enlarge its powers and influence, and one which merely seeks to guard interests which are legitimately within its statutory scope, from loss or damage.

"For this latter purpose it appears to me that if there is an interest there is a title to intervene. In the case of *Ross* v. *Heriot's Hospital*, 1843, 5 D. 609, which was decided at a time long antecedent to the existence of school boards, Lord Cuninghame, in discussing the power of the Court of Session to entertain the action of a boy who had been refused admission to the Hospital, says—'It appears equally indisputable also that any party possessing an interest, either existing or contingent, in the right administration of the Hospital, has a good title to pursue all actions before this Court necessary for ascertaining and declaring the powers and duties of the governors and enforcing their execution.'

"In an earlier case still—*Bow and Others* v. *The Patrons of Cowan's Hospital*, 1825, 4 S. 276—Lord Alloway says—'It is most important that all trustees managing charitable funds should know that every person having an interest to complain of their actings has also a title to call them to account.'

"On this principle, I think it is clear that if the School Boards of Dunlop and Stewarton have an interest to complain of the actings of the defenders they have a title to sue.

"The question of interest, therefore, is the main point of difficulty.

"In the first place, it is necessary to consider the precise language of section 4 of the scheme under which these bursaries fall to be awarded: The conditions as to birthplace, age, or sex of candidates are not in dispute, but the third and only remaining condition is in those terms—'They must have passed the qualifying examination of the Scotch code in one of the public or State-aided schools in the said parishes.'

"These schools are carefully defined, and the definition without doubt involves the proposition that the pupil may have to pass this examination in a school within the control and under the administration of the pursuers. There may be some doubt as to how far it is the intention of the scheme that pupils who pass such an examination shall have been in regular attendance at these particular schools. The expression in section 3—'Regard being also had to the previous school record of the candidates, as regards regularity of attendance, and industry, general merit and good conduct,' rather seems to imply that the attendance should have been at the schools in question. But this is not definitely stated. It is therefore open to the defenders to argue that a pupil otherwise qualified might come in from another school and compete at a qualifying examination in these schools, and so possibly obtain the bursary. But it is difficult to conceive of such a case in view of the regulations as to the qualifying examination contained in section 29 of the code. No one can, I think, read that section without being satisfied that what is meant by a pupil being presented to the inspector for examination is that the pupil shall be one of those in ordinary attendance, for at least six months, at the school in which the examination is to be held. The 'teacher of the class' and the 'headmaster of the school' have to certify to the pupil's proficiency. How could they do so in the case of a stranger? Or is it to be supposed that these certificates are to be got from the teachers of other schools? I am of opinion that this contention is unfounded and extravagant. The plain meaning of the scheme and code alike to my mind is that the qualifying examination is to be held among the pupils attending these particular schools. I do not say that if it were otherwise the pursuers would be deprived of all interest, but as an argument against their interest this construction of the scheme must be put aside.

"If this be the true meaning of the scheme, I think the pursuers have plainly an interest to see that the bursaries are not diverted into other channels. Even if all they could insist upon was the holding of the examination in their school, it is evident that if their averments are well founded they have been deprived of the presence of this particular pupil at any such examination.

"But there are further considerations of

actual or prospective pecuniary loss which demand attention. On this point I have had a good deal of difficulty, and to some extent at least I am unable to follow the argument of the pursuers. I do not think it can be said that because the bursary was given to Agnes Gibb, who had not been attending their school for some time, the pursuers have lost the grants she might have earned to them by such attendance. If the bursary had been given to another the School Board would have been no richer than it is. The giving it to Agnes Gibb cannot have affected anything which took place before that decision was come to. An effect cannot precede its cause.

"With regard to the future, however, the case is very different; and here I may again refer to the words of Lord Cunningham assigning a title to 'any party possessing an interest, either existing or contingent, in the right administration of the hospital.' The pursuers have a clear interest in the future administration of these bursaries. They form, and were intended to form, a benefit to the schools under their charge. They constitute undoubtedly an attraction to pupils, and consequently hold out a prospective augmentation of grants. If it were to be found that in order to gain one of these bursaries attendance or the passing of this examination at the schools in question—or something equivalent thereto in its effects—might be dispensed with, the pursuers as the statutory administrators of these schools would undoubtedly suffer loss, not only in the additional attraction and reputation conferred by the bursaries upon the schools, but in actual money value of the grants obtained.

"I therefore think that on the main question, and as to the future, the pursuers have both a title and an interest to sue the present action.

"[*The Sheriff-Substitute here dealt with the conclusion for repayment of the* £7, 10s., *and held that the pursuers had no interest in it as it was in the past.*]

"On the other questions raised I think a proof before answer is necessary. Many of the averments of the pursuers, including the main allegations as to the disqualification of the recipient of the bursary, are denied by the defenders. Further, the questions raised as to the responsibility of individual defenders and their *bona fides* are all in issue, and I think can only be satisfactorily dealt with after the precise facts have been ascertained."

The defenders appealed to the Sheriff (CAMPBELL LORIMER), who on 22nd November 1909 recalled the interlocutor of the Sheriff-Substitute of 21st July, found that the pursuers had no title to sue, dismissed the action, and decerned.

Note.—"The Sheriff-Substitute has repelled the first plea-in-law for the defenders (the patrons of the bursaries), and thereby sustained the title and interest of the pursuers (the School Boards) to sue this action except for replacement of £7, 10s., the first instalment of the bursary already paid. The broad proposition in law on which this plea to the pursuers' title is based is that a statutory body is not entitled to act outside the statutory functions; and the question is whether in any particular case its actings have gone beyond the execution of these functions as fairly and reasonably interpreted, or, in other words, beyond the fair and reasonable administration of the trust committed to them by the statute. This principle is so stated in the case of *Perth Water Commissioners* v. *M'Donald*, 1879, 6 R. 1050, and is illustrated in the cases of school boards and other statutory boards cited by the Sheriff-Substitute. The more recent case of *Houldsworth* v. *School Board of Cambusnethan*, 1904, 7 F. 291, which I believe was not quoted to the Sheriff-Substitute, is one where the Second Division of the Court of Session held that a school board had no title to defend an action of declarator at the instance of the representatives of the donor of land for a school site under the School Sites Act 1841, to the effect that the site and buildings had reverted to the pursuer in consequence of the failure of funds to carry on the school. The Court held that the School Board had no right to the school or its proceeds if sold, and that the School Board (who had been allowed to compear) had no title to intervene. Lord Young explains the ground of judgment, so far as regards the School Board, as follows:—'School boards are statutory bodies, having statutory, and only statutory, duties to perform, and having statutory, and only statutory, funds in order to carry them on, these consisting of the rates and of contributions made by Parliament, assigned from time to time and provided by Parliament—by the proper authority in London the Education Department. These are the funds that they have assigned to them for the purpose as a statutory body of discharging their statutory duties, and it was no statutory duty of theirs as a governing body—the governing body of the board schools, and the governing body of no other school—it was no part of their duty or within their competence to appear in this Court to suggest to the Court a *cy-près* scheme, or to maintain that the trustees of a particular trust should have suggested a *cy-près* scheme. I think that is manifestly outside their duty. It is not their duty as a statutory body, and the suggestion that they are the beneficiaries under this trust is to my mind altogether extravagant.

"Now, in that case the School Board claimed right to hold and administer a derelict school forming a derelict trust estate then vested in a separate body of trustees, and not falling within the general scope of the Board's powers or within the special provisions of sections 46 and 47 of the Education Act of 1872, but the claim was, on the grounds stated, disallowed. In the present case the School Boards of two parishes claim right to challenge the administration of a bursary fund for the benefit of natives of these parishes vested in a

separate body of trustees, on the ground that they have not required compliance on the part of the candidates with one of the conditions of the scheme settled by the Court, that condition requiring candidates to pass the qualifying examination of the Scotch code in one of the public or state-aided schools of these parishes.

"The Sheriff-Substitute draws a distinction between cases where a school board seeks to enlarge its powers and influence, *e.g.*, by appearing in Court to aid in settling the terms of an educational endowment, and cases where it merely seeks to guard from loss or damage interests which are legitimately within its statutory scope. It may, no doubt, be that in the former class of cases the School Board travels further beyond its proper functions, and, as in the case of *Fraser*, may be found to be acting *ultra vires* and be disentitled to expenses from the rates; but the legal question is the same, viz., whether the interests to be protected are under the administration of the School Board, or, as the Sheriff-Substitute expresses it, 'legimately within its statutory scope.' In the present case I do not think it is any part of the statutory duty of the School Board to challenge the administration by a separate body of trustees of a trust lawfully committed to them, even although interests under the charge of the School Board may be more or less directly affected. Each body has an independent sphere of action, and neither is entitled to interfere with the other. If the bursary scheme is violated there may be a challenge at the instance of the founders' representatives, or of an aggrieved beneficiary. These remedies are, no doubt, very strong, but the Lord Advocate has also a right of challenge if it is brought to his notice that a public trust is being violated, and, as head of the Scotch Education Department, he has means of obtaining authentic information in regard to the merits of the complaint and any question of educational policy which it may raise.

"But whatever other remedies may be available, I do not think the School Board has a title to call an outside body of trustees to account for alleged maladministration of their trust. The pursuers' averments (Cond. 11) assert that they are 'entrusted with the responsibility for the proper administration of the educational affairs of the respective parishes, and the protection of the interests of the scholars or pupils under their charge and within their jurisdiction who had, have, or will have an interest in the bursaries in question.' That appears to me too sweeping, and at the same time too vague, an averment of interest both in regards to the parishes and the scholars—and goes beyond the statutory functions imposed on them by the Education Acts.

"Again, the financial interests of the boards are pleaded in general terms, and a memorandum prepared by the teachers of the Dunlop and Stewarton Schools was put in to supplement the pursuers' averments on that point. If I had been able to find that the pursuers had a title to sue, I should have been disposed to allow an inquiry in regard to the pursuers' interest, so far as the future is concerned, but as I am of opinion that there is no title to sue, I do not think that the averments of interest can avail the pursuers. They require to show a title as well as an interest, and, as I think they fail in the former requirement, the action must be dismissed."

Argued for the appellants—The conditions of the scheme involved that bursars must attend, or at any rate must have passed the qualifying examination in, one of their schools; that was an attraction inducing children to be sent to their schools and gave them an interest to sue. They also had an interest in that the bursaries served as an incentive to scholars to improve their efforts; the schools then would get better reports and bigger grants. If they had an interest, it followed that they had a title to sue, unless a good distinction could be drawn between them as statutory bodies and an individual. For an individual who had an interest in a charitable fund had a title to sue the administrators thereof—*Ross* v. *Governors of Heriot's Hospital*, February 14, 1843, 5 D. 589, esp. opinion of Lord Cuninghame at p. 609; *Bow and Others* v. *Patrons of Cowan's Hospital*, December 6, 1825, 4 S. 276 esp. opinion of Lord Alloway at p. 278. A statutory body might have a title, and it might be their duty, to sue or oppose bills even though no such express power was given to them by statute—*Elgin County Road Trustees* v. *Innes*, November 10, 1886, 14 R. 48, 24 S.L.R. 35; *Brighton* v. *North*, 1847, 16 L.J. Ch. 255; *Perth Water Commissioners* v. *M'Donald*, June 17, 1879, 6 R. 1050, Lord Justice-Clerk Moncreiff, at p. 1056, 16 S.L.R. 619. Section 46 of the Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59) was a process section and recognised that school boards might have an interest in endowment schemes. The other sections of Education Acts referred to by the respondents had no bearing whatever on the question. Presumably someone could call the respondents to account, and the cases of *Ramsay* v. *United Colleges of St Andrews*, June 23, 1860, 22 D. 1328, and *M'Donald* v. *M'Coll*, June 17, 1890, 17 R. 951, 27 S.L.R. 761, showed how difficult if not impossible it would be for a disappointed or would-be bursar or the parent of such to raise the question.

Argued for the respondents—That more children would attend the appellants' school or that bigger grants would be earned was mere conjecture. In the case of *Ross* (*cit. sup.*) and of *Bow* (*cit. sup.*) the pursuer was a private person. Here the pursuers were statutory bodies with statutory duties to fulfil; they had no right or duty given them to intervene in such a question as this unless it were given them by statute—*Houldsworth* v. *School Board of Cambusnethan*, December 16, 1904, 7 F. 291, esp. Lord Young at p. 300, 42 S.L.R

237; *Tay District Fishery Board* v. *Robertson*, November 6, 1887, 15 R. 40, 25 S.L.R. 54. The Educational Endowments (Scotland) Act 1882, *cit. sup.*, section 46, contemplated endowments being dealt with in which school boards would have the same interest as here and yet thought it necessary to provide how they could sue. The inference from that was that otherwise the board would have had no title, and this inference was strengthened by the terms of the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), section 47, and the Education (Scotland) Act 1908 (8 Edw. VII, cap. 63), section 3 (7). As to the argument that there must be some-one with a title to raise this question, they submitted that there was a remedy at the instance of the founder's representatives and of the Education Department.

At advising—

LORD PRESIDENT — I agree with the learned Sheriff in holding that the School Boards have here no title to sue. School Boards are statutory bodies, and admittedly no title to raise questions such as the present is given *eo nomine* to these bodies in the Education Acts. But this, I admit, does not conclude the matter, because there are cases in which, if a pursuer has an interest, a title will flow from that interest; and if I thought that the Boards had a sufficient interest here I would hold that they had a title to sue. But the Boards' interest in this matter is too shadowy and remote to support a title. If the bursaries were given to pupils attending the schools which are under these school boards there would, I think, be a sufficient interest; but the bursaries are not so given, and the only way in which the school boards are interested is that there is a condition in the scheme under which the bursaries are administered that candidates must have passed the qualifying examination of the Scots Code in one of the public schools in the parishes. It is said that parents might be attracted to the parishes and might send their children to the schools of the parishes, and that in this way a larger grant might be obtained from the Education Department, but this interest is too slender, in my opinion, to give the pursuers a title, and therefore I think we must adhere to the Sheriff's interlocutor dismissing the action.

LORD SALVESEN—I agree.

The LORD PRESIDENT intimated that LORD KINNEAR also concurred.

LORD JOHNSTON had been absent at the hearing.

The Court affirmed the interlocutor of the Sheriff dated 22nd November 1909, refused the appeal, with expenses.

Counsel for the Pursuers and Appellants —Blackburn, K.C.—J. M. Hunter. Agents —Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents — Munro, K.C. — W. T. Watson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Saturday, July 16.

FIRST DIVISION.

(EXCHEQUER CAUSE).

TEBRAU (JOHORE) RUBBER SYNDICATE LIMITED (IN LIQUIDATION) *v.* FARMER (SURVEYOR OF TAXES).

Revenue—Income Tax—Profits or Gains—Sale by a Company of its Whole Undertaking to a New Company before Producing-Stage Reached — Property and Income Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *Sched. D.*

A rubber syndicate, a limited company, included in its objects as set forth in its memorandum of association (*a*) the acquisition and development of rubber estates and the cultivation and manufacture of rubber, and (*b*) the sale of the whole or any part of the business or property of the company. It expended £29,500 in the purchase and development of estates, but finding its capital insufficient to develop the estates until they reached the producing stage it sold its whole undertaking to a new company at the price of £38,500, paid partly in money and partly in shares in the new company.

Held that the £9000, being the difference between the sums expended in purchase and development and the sale price, was not liable to tax.

The Tebrau (Johore) Rubber Syndicate Limited (in liquidation), being dissatisfied with a determination of the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to the Inhabited-House Duties for the county of Edinburgh, at a meeting held by them at Edinburgh on 10th June 1909 required the Commissioners to state a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Case stated—"The Tebrau (Johore) Rubber Syndicate, Limited, now in liquidation (hereinafter referred to as the company) appealed against an assessment for the year ending 5th April 1909 on the sum of £9000 (duty £450) made upon it under the Income Tax Acts in respect of the profits derived by it from sale of rubber estates.

"The assessment was made under 5 and 6 Vict. c. 35, sec. 100, Schedule D, First Case; 16 and 17 Vict. c. 34, sec. 2, Schedule D; and 8 Edw. VII, c. 16, sec. 7.

"The following facts were admitted or proved:—The company was incorporated on 26th September 1907 under the Companies Acts as a company limited by shares. The capital of the company was £30,000 divided into 30,000 shares of £1 each. Under its memorandum of association the capital might be increased or reduced from time to time. The registered office of the company was at 5 St Andrew Square, Edinburgh.