

the syndicate, and that thenceforth they held that interest for the assurance company. No consideration was needed for such a document. The consideration for the interest had already been paid by Fisher, and the defenders, knowing as they must have done that he required to place this interest with clients of his own, were quite prepared to set aside this 13,000 dols. and hold them for his clients—indeed I think Fisher might have insisted on their doing so. To my mind the transaction is very little, if at all, different from the case where a person had deposited 13,000 dols. of gold bonds with his banker and held a receipt for them, and thereafter instructed his bankers that he had sold them to another person, B, and told them to send B an acknowledgment that they now held these bonds for him. I do not think it is proved that by American law such a document as the letter in question required either the consideration expressed or to be executed under seal. One of the experts in American law, Mr Paul Fuller, comes very near what in my opinion is the correct view of the matter when he says regarding the letter—“In my opinion this paper is no contract, but the evidence of a completed transaction, to wit, a delivery to Potter, Choate, & Prentice of Louisville and Nashville bonds for account of the assurance company, and their acknowledgment that the bonds have been paid for and are held for the account of the company.”

It appears to me that the averment of foreign law in statement 4 of the defences is irrelevant. It mixes up two things, the original contract between the defenders and Mr Fisher and the letter of 15th February. The contract between the defenders and Mr Fisher is not questioned, and it put Mr Fisher in the position of requesting the defenders to hold any part of his share in the syndicate he pleased for a person to whom he had sold it; and accordingly we find that from that time onward the defenders entered this share of 13,000 dols. in their books as appropriated to the Scottish Metropolitan Life Assurance Company, Limited. I cannot see that there is any evidence that the law of New York is different from the law of this country as to the validity of such a document.

I may further add, that I am of opinion that according to the law of Scotland the document in question was *in remercatoria*, being an ordinary commercial document, and did not require to be either holograph or tested, and it does not appear that the law of New York is otherwise, the defenders having given effect to similar letters in the case of the Century Insurance Company and Zuluetta & Company.

The only difficulty in my opinion is with regard to the draft for £1700 which was sent by the defender to Fisher at the same time that they sent the letter above quoted to the Metropolitan Assurance Company. But this matter as well as the other points in the case have been so satisfactorily dealt with by my brother Lord Salvesen that I have nothing to add to what he has said.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

“Recal the . . . interlocutor reclaimed against: Sustain the first plea-in-law for the pursuer: Ordain the defenders to deliver to the pursuer twelve first general mortgage of 4 per cent. gold bonds for the sum of 1000 dols. each of the Louisville and Nashville Railroad Company (Atlanta, Knoxville, and Cincinnati Division), dated the 1st day of May 1905 and maturing the 1st day of May 1955, with half-yearly coupons (or the equivalent in cash in respect of past due coupons) for the interest due on each bond as at and from 1st November 1906, until the maturity of the said bonds, and to pay to the pursuer the sum of £73, 16s. sterling, with interest thereon at the rate of £5 per cent. per annum from 13th June 1907 until payment, being the amount of the securities and funds now held by the defenders and belonging to the pursuer as assignee of the Scottish Metropolitan Life Assurance Company, Limited, and that within six weeks from the date hereof, under certification that if they fail to deliver the said bonds and make the said payment with the said person, decree will be pronounced in terms of the alternative petitory conclusions of the summons, and remit the same to the Lord Ordinary to proceed,” &c.

Counsel for the Pursuer (Reclaimers)—
 Morison, K.C.—Constable, K.C.—Pitman.
 Agents—Simpson & Marwick, W.S.

Counsel for the Defenders (Respondents)—
 Chree—Hon. W. Watson. Agents—Tods,
 Murray, & Jamieson, W.S.

Friday, March 17.

FIRST DIVISION.

GOVERNORS OF LADY BURNETT'S
 SCHOOL, PETITIONERS.

School—Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62) secs. 37 and 47—Sale of School to School Board—Power of School Board to Accept and Administer a Bursary Fund.

The trustees under a scheme which had been settled under the Educational Endowments Act 1882, and contained a clause giving power to the Court to alter the provisions of the scheme with the consent of the Scotch Education Department, finding it impossible to efficiently carry on the school in accordance with the requirements of the Scotch Code and the regulations laid down by the Education Department as conditions of earning the Government grant, presented, with the assent of the

Education Department, a petition for authority (1) to sell the school to the School Board of the parish, with whom they had made a provisional agreement, and (2) to transfer the trust funds to the School Board to be held as a fund for providing bursaries under certain conditions, and for alteration of the scheme accordingly.

The Court, *holding* that the School Board had power to accept and administer the trust under section 47 of the Act of 1872, *granted* the authority and made the alterations as desired.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), section 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."

The Governors of Lady Burnett of Leys' School, in the parish of Banchory-Ternan, with consent of the Scotch Education Department, presented a petition for the approval of an agreement between them and the School Board of Banchory-Ternan, and for alteration of a scheme for administration of the Reid and Burnett Endowment. The petitioners administered their trust under a scheme framed, submitted to, and approved of by the Scotch Education Department on 24th February 1890, in terms of section 33 of the Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59), the annual value of the endowment (which was composed of several bequests amalgamated under the name of "Reid and Burnett Endowment") being under £50.

The petitioners averred—"By article 2 of the said scheme, the whole rights, funds, and estate, heritable and moveable, belonging to the said endowments were vested in the proprietor of Leys for the time being, the minister of the parish of Banchory-Ternan, and the chairman of the School Board of the said parish, who were thereby incorporated under the name of the Governors of Lady Burnett of Leys' School, as the governing body of the said endowments, under the declaration that if and when the said proprietor or minister should be chairman of the School Board, the said Board might from time to time appoint one of their number to be a governor. By article 3 of the said scheme the proceedings of the governors are regulated. By article 4 of the scheme as originally framed it was provided that the governors should proceed to erect a classroom, as an addition to the school buildings, at a cost of not more than £120. Article 5 provided for appli-

cation of the revenue of the endowments in payment of the salaries of the mistress and other members of the staff of the school, and of repairs.

"By article 10 of the scheme it is provided that 'it shall be in the power of the Court of Session to alter the provisions of this scheme upon application made to them by the governing body or any party interested, with consent of the Scotch Education Department, provided that such alteration shall not be contrary to anything contained in the Educational Endowments (Scotland) Act 1882.'

"The petitioners have, since the date of the said scheme, continued to administer the said school and endowments thereunder. The school supplies elementary education, including supplementary course up to the merit certificate stage, and it has been used for the education of girls in all standards and of boys in the two lowest standards.

"Shortly after the scheme came into force the petitioners encountered difficulty in its administration, caused by insufficient funds. The ordinary expenditure of the school amounted to about £200 per annum, and beyond the small sum derived as interest from the endowment funds, the whole revenue of the school was obtained entirely from Government grants, no fees being charged. The Government inspector made complaints about the condition of the school and offices, and in order to meet the requirements of the Scotch Education Department in these respects it became necessary for the governors to carry out extensive repairs on the school buildings and premises. As the petitioners then foresaw increasing difficulty in carrying on the school efficiently with the limited funds at their disposal, they entered into negotiations with the School Board of the parish of Banchory-Ternan, in which the said school is situated, and it was resolved, subject to obtaining the consent of the Scotch Education Department and of the Court, to offer to transfer to the said School Board the school buildings, teacher's house, and whole endowments, to be held and administered by the School Board as the governors under the scheme. This offer was accepted by the School Board, and thereafter on, 19th February 1895, the Education Department gave their consent to the alterations on the scheme necessary to give effect to the proposed transfer, and sanctioned an application to the Court for its approval.

"On 25th April 1895 the petitioners presented a petition to the First Division of your Lordships' Court, in which they craved the Court to alter the scheme so as to carry out the said arrangement with the School Board. The Court, after inquiry and reports by Mr Charles C. Maconochie, advocate, on 5th November 1895 approved of his second report, suggesting that the proposed alterations should not be sanctioned, but that an alteration should be made on the scheme, which consisted of the deletion of the fourth article thereof, and the substitution therefor of an article which

authorised the petitioners to expend on alterations and repairs upon the school, &c., a portion of the capital of the endowments not exceeding £200, in addition to such sum as would be required to meet the expenses of the said petition and proceedings thereunder. The principal objections stated by the reporter and sustained by the Court to the proposed alterations then submitted were—(a) that under the terms of the scheme as proposed to be altered the School Board would be in a position within a short time to spend upon the buildings in maintenance and equipment of the school the whole capital of the endowments, and (b) that the result would practically be to relieve the ratepayers at the expense of the endowments. . . .

“The petitioners have continued to administer the said scheme as altered and settled by the said interlocutor, and have provided the said £200 and expenses out of the capital of the endowments, and made the necessary alterations and repairs.

“The property of the said Reid and Burnett Endowment now consists of—1. The school and schoolhouse buildings and offices and school furniture and fittings. It is difficult to estimate the present market value of these subjects. In the petition by the governors to the Court in 1895 above referred to their value was estimated at £600, but the petitioners believe that their present value would not exceed from £300 to £400. 2. Money endowments under the said mortification and wills, about £53.

“The important educational changes which have recently taken place have materially altered the position and prospects of the whole endowment. In 1908 the said School Board instituted a Higher Grade Department in connection with Banchory-Ternan Central Public School, which is situated within the burgh of Banchory and within a mile of Lady Burnett's School, and the said Higher Grade Department has been duly approved and recognised by the Education Department. In view of the increased facilities for higher education provided by the said Higher Grade Department, large numbers of the class of pupils which formerly attended Lady Burnett's School are now attending the said Central Public School, either going to it direct or leaving Lady Burnett's School at an earlier age than was formerly the case; and on this account, and owing to various other causes, the number of pupils attending the various departments of the petitioners' school has been seriously diminished. There is no reasonable ground for anticipating that the numbers will increase in the future, but on the contrary it is believed that they will continue to diminish. In consequence of such diminished attendance the financial position of the petitioners' school has been and will continue to be seriously affected by the falling off in the annual parliamentary and other grants. The gross income from the school endowments, including the rent of the schoolhouse which is let to a tenant, amounts only to about £18, and the petitioners have been forced to the conclusion that it will not be possible

for them to carry on the said school efficiently in accordance with the requirements of the Scotch Code and with other regulations laid down by the Education Department as conditions for earning the Government grants. Further, the petitioners believe that while the school has in the past been of service to the community in providing educational facilities chiefly adapted for girls and very young boys, the necessity for such special provision, as well as the means of maintaining it as an integral part of the educational machinery of the parish, have been greatly diminished in consequence of the statutory and administrative requirements and regulations and other conditions above referred to.

“In the above circumstances, the petitioners again entered into negotiations with the said School Board with the view of endeavouring to arrive at an arrangement under which, while the school would be transferred to the Board as the public body charged with the care of education in the parish, the value of the school buildings and the endowments would be preserved intact, to be managed by the said School Board as governors, as a fund for the conferring of educational benefits within the parish. As the result of said negotiations, the petitioners have entered into the provisional agreement with the said School Board, dated 7th November 1910. By the said agreement, after narrating the original scheme, the said alteration thereof by the Court, and the circumstances as above set forth leading up to the arrangement, it was, *inter alia*, agreed that subject to the consent of the Scotch Education Department and to the sanction of the Court, the petitioners should sell and make over to the School Board, at such price as may be fixed by arbiters mutually chosen, or in the event of their differing, by an oversman, the whole property and assets of every kind belonging to the petitioners, and that on such transference being completed the members of the School Board *ex officio* should become the governors of the said endowment. It was also provided that the free annual revenue of the endowment should be applied in providing a bursary or bursaries for behoof of children whose parents or guardians reside in the said parish of Banchory-Ternan, under regulations to be made by the governors, subject to the approval of the Education Department, and that the endowment and income thereof should not under any circumstances be applicable to any purpose for which the Board are entitled or bound to make provision out of the school rate or school fund. The agreement further provided for application being made for the consent of the Scotch Education Department to an application being made to the Court to alter the existing scheme so far as necessary to give effect to the agreement, and, in particular, to sanction and authorise the alterations specified in the schedule annexed thereto.

“The said agreement was duly submitted to the Education Department, and the

Department has consented to the present application being presented, conform to letter from the secretary herewith produced and referred to.

"The petitioners are satisfied that it is no longer possible for them to carry on the said school, and that it is in the interests of education in the parish that the said agreement with the School Board should be carried out. The object of the mortification under which the original of the said school was founded by Sir Thomas Burnett in 1651 was 'the education and virtuous upbringing of young men and maids in the said town of Banchory.' The sale and transference of the said school and endowments in the form now proposed and the other alteration of the present scheme as proposed, will, so far as that can be done under existing conditions, comply with the purpose of the original benefactor and also with the purpose of the said Dame Margaret Burnett of Leys, who built and gifted the present school and school-house and conferred other benefactions on the school. The said Sir Thomas Burnett and Dame Margaret Burnett are now represented by Sir Thomas Burnett, Baronet of Leys, the successor of the former in the title and estate of Leys, who is also chairman of the said School Board and one of the present governors and petitioners.

"The alterations proposed are further in accord with the terms and spirit of the said Educational Endowments (Scotland) Act 1882, in respect that the proposed application of the revenue of the endowment to a bursary or bursaries will furnish the readiest means of assisting children of the parish of Banchory-Ternan to an opportunity for obtaining higher education."

The principal alterations proposed by the schedule were in articles 2, 3, and 4, which as now proposed read, the words underlined in 4 being deleted by the Court—"(2) From and after the date when the authority of the Court of Session shall have been obtained in an application for, *inter alia*, the sale and transference to the School Board of the parish of Banchory-Ternan of the property, assets, effects, and estate, heritable and moveable, of the endowment, and on such sale and transference being thereafter completed, the members of the said School Board for the time being and their successors in office from time to time shall be the governors of the endowment under this scheme *ex officio*, and they shall hold and be vested in the whole rights, funds, assets, property, and estate thereof of every kind . . . without the necessity of any new conveyance or instrument, and the said rights, funds, property, assets, and estate shall be held and administered by them under the said scheme, as the same may from time to time be legally constituted. . . . (3) The business of the governing body may be transacted either at the ordinary meetings of the said School Board or at meetings summoned for the purpose, which meetings shall be convened and conducted according to the ordinary rules and practice of the said School Board. (4) The free annual revenue of such part of

the endowment as shall be transferred to and become vested in the governing body, as reconstituted as aforesaid, shall be applied annually in providing a bursary or bursaries for behoof of a child or children whose parents or guardians reside in the said parish of Banchory-Ternan, which bursary or bursaries shall, so far as may be legally competent, be tenable only in the upper department of the said Banchory-Ternan Central Public School by whatever name such department may be designated, or otherwise as the said Scotch Education Department may from time to time determine. The number and value of the said bursaries shall be determined annually by the governors on the ascertainment of the free revenue at their disposal for any year, and in respect of the foregoing matters, as well as of the conditions on which the said bursary or bursaries may be awarded and held, or of any other conditions or matters relating thereto, the same shall be administered in accordance with regulations to be made and adopted for that purpose by the governors for the time being, when reconstituted as aforesaid, but subject to the approval of the said Scotch Education Department."

The prayer of the petition was—"(*a*) To approve of the said provisional agreement entered into between the petitioners and the School Board of the parish of Banchory-Ternan dated 7th November 1910, and to authorise the petitioners to implement the same, and in particular to sell, convey, dispense, and make over to the said School Board, at such price as may be fixed by arbiters mutually chosen, or in the event of such arbiters differing in opinion by an oversman to be appointed by them, the whole property, assets, effects, and estate, heritable and moveable, of every kind, belonging to and vested in the petitioners as governors aforesaid, and for that purpose to make and execute all such dispositions, transfers, and other deeds as may be necessary, all on the terms and conditions set forth in the said minute of agreement and relative schedule; and (*b*) to alter the scheme dated 24th February 1890, under the Educational Endowments (Scotland) Act 1882, for the administration of the endowments belonging to the said Lady Burnett of Leys' School, known as the 'The Reid and Burnett Endowment,' in the manner and to the effect set forth in the schedule annexed to the said minute of agreement, . . . and to settle the scheme as so altered as the scheme for the administration of the said endowment."

On 21st December 1910 the Court remitted to J. Hepburn Millar, Esq., advocate, to inquire as to the facts and circumstances set forth in the petition and to report.

On February 20, 1911, Mr Millar lodged his report, which, *inter alia*, stated—"The proper administration of a school with so scanty a revenue as the Lady Burnett school possesses has not become easier since 1895. The standard of school accommodation and of teaching efficiency has been raised, and any shortcoming in these

respects may result in the partial or total forfeiture of the Government grant, upon which, as already explained, the school is almost wholly dependent. Again, the amount of Government grant is determined by the number of pupils in average attendance, and on that side the governors have now to sustain formidable competition on the part of the School Board. In connection with the Banchory-Ternan Central Public School, which is situated within a mile of Lady Burnett's, a Higher Grade Department was instituted by the School Board in 1908. . . . [After quoting the petitioners' averments as to the falling off in numbers of the pupils, and the impossibility of efficiently carrying on the school, the report proceeded—]. . . .

"The reporter entertains no doubt that the petitioners' averments are well founded, and that, situated as they are financially, it is practically impossible for them to administer the trust under the existing scheme any longer. Their application is but one among many which have been presented to your Lordships in recent years occasioned by an imminent failure of trust purposes owing to precisely similar causes. Conceiving that he need not elaborate this topic, the reporter now proceeds to consider the proposals which the petitioners put forward by way of substitution for the regulations at present in force.

"These proposals may be divided into three heads, viz.—(1) That the petitioners should be authorised to denude of the trust and to transfer it to the School Board, who shall in future be the governing body. (2) That the School Board shall purchase the school, school-house, and furniture for a price to be fixed by arbitration, and hold the price as part of the capital fund of the endowment; and (3) That the income of the whole endowment should be applied in providing school bursaries for children attending the upper department of the Banchory-Ternan Central Public School, in accordance with regulations to be prescribed by the School Board, with the consent of the Department.

"These suggested alterations have received the approval of the School Board, and have indeed been embodied in a provisional agreement entered into between the petitioners and the School Board, for which your Lordships' approval is now desired.

"Postponing meanwhile the discussion of the first head, the reporter has no hesitation in recommending your Lordships to approve generally of what is proposed under the second and the third. The scheme now brought forward appears to be at once competent and practical. As to its competency, the reporter apprehends that no doubt can exist, for it is careful to avoid any violation of the rule given effect to in the *Prestonpans* case—*Kirk Session v. School Board of Prestonpans*, November 28, 1891, 19 R. 193, 29 S.L.R. 168—which was the rock on which the petitioners' proposals made shipwreck in 1895. . . . The reporter is disposed to think that considerable latitude may be allowed to the governing body, always under the super-

vision of the Department, in the way of regulating the tenure and conditions of bursaries, and he would venture to suggest that the proposed alteration should be so adjusted as to leave no ambiguity with regard to the competency of adapting such regulations from time to time to meet any supervening change in educational circumstances.

"It remains to consider the proposal for transferring the endowment to the School Board and constituting them the governing body for the future. The whole arrangement, it should be pointed out, hangs together, and the reporter is given to understand that unless your Lordships see your way to sanctioning this part of the petition the proposed purchase of the buildings will fall through. He feels bound, however, to remark that on this head a question of some little difficulty appears to arise for your Lordships' determination. Your Lordships' attention was recently directed to the *Alloa* case—*School Board of Alloa v. M'Lean and Others*, November 4, 1898, 1 F. 48, the decision in which was distinguished in *Williamson and Others (M'Grouther's Trustees)*, 48 S.L.R. 220. In the *Alloa* case, a body of *ex officio* trustees sought to hand over the property and administration of their trust to the School Board, and their application was refused, the Lord President remarking that 'diffidence and self-abnegation are virtues not to be indulged in by *ex officio* trustees.' On the other hand, in *M'Grouther's* case, private trustees nominated by a testatrix were authorised to divest themselves of the trust and transfer the trust funds, subject always to the burden of the trust purposes, to the General Trustees of the United Free Church of Scotland. The present governors, it may be said, are trustees *ex officio*, placed in the saddle by virtue of an Act of Parliament, and therefore the Court will be slow to permit them to denude and to impose upon others the responsibility so fixed upon them. As against this contention it may be urged that the proposed new governing body, being the education authority for the parish, may be assumed to be thoroughly conversant with the subject-matter of the trust purposes; that owing to the radical change in the educational situation the present governors may no longer be the body best fitted to carry out these purposes; and finally, that the very authority (viz., the Scottish Education Department) which sanctioned the selection of the present governors for their office has now given its consent to this application being presented. These considerations, coupled with the high expediency from a practical point of view of giving effect to the other proposed alterations, strongly dispose the reporter to recommend your Lordships to sanction the transference of the property and administration of the endowment to the School Board.

"The only remaining point for consideration is as to the power of the School Board to accept of the trust and adminis-

ter it in terms of the trust purposes. That question appears to be set at rest by section 47 of the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), the terms of which, if not directly applicable, would seem to be sufficiently wide to cover the present case.

"Your Lordships, if satisfied that the prayer of the petition may be granted in whole or in part, may be pleased to remit the petition back to the reporter for final adjustment in conformity with such instructions thereon as your Lordships may think proper to give."

The case was heard on 25th February 1911 before the Lord President, Lord Johnston, and Lord Skerrington, and re-heard on 4th March 1911 along with a petition—*Wauchope and Others (Trustees of Anderson Female School)*—before the Lord President, Lord Kinnear, Lord Dundas, Lord Johnston, and Lord Skerrington.

Argued for the petitioners—Power to alter the scheme was given by section 20 of the Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. c. 59), section 20, and article 10 of the scheme. The petitioners had power to sell the school to the School Board—*M'Culloch and Others v. Kirk Session and Heritors of Dalry*, July 20, 1876, 3 R. 1182, 13 S.L.R. 717; Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), section 37. Moreover, power was given to the School Board to accept the trust and hold the fund under section 47 of the 1872 Act. As in *Governors of Jonathan Anderson Trust*, March 12, 1896, 23 R. 592, 33 S.L.R. 430, so here, the effect of the transference of the trust would not be to relieve the rates. The case of the Gateside School—*Sutherland*, February 3, 1903, 5 F. 424, 40 S.L.R. 345—had no bearing.

At advising—

LORD PRESIDENT—I am of opinion that in this case the prayer of the petition may be granted.

I think any difficulty that might appear to arise is got over by the proposed arrangement. The purchase of the school by the School Board will bring about the same result as if it were sold to a third party and the scheme were adjusted for the administration of the revenue to be derived from the price obtained.

I am satisfied that here there is a good case for not carrying on the school as it is, and that the School Board has power to accept the trust and take over the capital fund under section 47 of the Act of 1872. Accordingly I think the prayer of the petition should be granted and the proposed alterations on the scheme approved, with one exception. I do not think it would be right in the substituted article 5 to leave in the words "or otherwise as the said Scotch Education Department may from time to time determine." I think that would be substituting the Scotch Education Department for ourselves in a duty that has been put upon us by Act of Parliament. With the exception of these words, I think that the proposed alterations may be given effect to.

I therefore propose that the Court grant the prayer of the petition and remit to the reporter to see the alterations on the scheme duly carried out.

LORD KINNEAR, LORD DUNDAS, LORD JOHNSTON, and LORD SKERRINGTON concurred.

The Court allowed the petition to be amended by the deletion of the words "or otherwise as the said Scotch Education Department may from time to time determine"; approved of the report; and gave the approval and authority and made the alterations in the scheme as asked in the prayer of the petition, and settled the scheme as altered and adjusted as the scheme for the administration of the endowment; and remitted to the reporter to see the agreement and scheme carried out.

Counsel for the Petitioner—A. M. Mackay. Agents—Alexander Morison & Company, W.S.

Friday, March 17.

SECOND DIVISION.

(WITH THREE JUDGES OF FIRST DIVISION.)

[Sheriff Court at Glasgow.]

WHITTON v. EWING, EDGAR, & AITKEN.

Sheriff—Process—Jury Trial—Interlocutor Fixing Questions to be Put to Jury—Appeal—Competency—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), secs. 28, 31, 32, and 52—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 14, and Second Schedule (17) (b).

A workman raised an action in the Sheriff Court against his employers, in which he claimed damages for personal injury at common law, or alternatively compensation under the Employers' Liability Act 1880. The Sheriff, on the pursuer's motion, appointed the cause to be tried before a jury, and thereafter issued an interlocutor fixing the questions to be proposed to the jury. On the motion of the defender the Sheriff granted leave to appeal against this interlocutor. The defender thereupon appealed to the Court of Session.

Held by a Court of Seven Judges (*dub.* Lord Kinnear) that the appeal was competent.

The Sheriff Courts (Scotland) Act 1907 (7 Edw VII, c. 51), enacts—Section 28—"Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment of a sheriff-substitute or of a sheriff, but that only if the value of the cause exceeds fifty pounds, and the interlocutor appealed against is a final judgment, or is an interlocutor. . . . (c) Against which the sheriff or the sheriff-substitute, either *ex proprio motu* or on the motion of any party, grants leave to