Fiji as regards the methods or incidence of assessment for taxation. It appears that legislative machinery by way of proclamation exists for extending the boundaries of any town in Fiji, and it may be assumed that the rates leviable in the towns are higher than those in the landward areas, if indeed the latter are rated at all. But I find nothing to suggest that there is in Fiji any system corresponding to that which we know in this country of separating assessing bodies for burghal and landward areas respectively. The question in the *Suva* case arose purely between the Town Board, on the one hand, and an individual proprietor on the other—the latter objecting to his property being included in the town and rated accordingly. There was no question, and probably could have been none, as between a burghal assessing authority and a landward assessing authority; and it seems to me therefore that the distinction to which the Lord Ordinary adverts did not arise in that case. I have thought it right to express these views for what they are worth, because the doubts I felt as regards the general principle involved have not been entirely dispelled. But I recognise that the facts of the present case afford little, if any, basis for the broad argument which might on a different state of facts have arisen for application; and, as already said, I do not propose to dissent from the judgment of your Lordships.

LORD JUSTICE-CLERK—I concur in the result at which your Lordships have arrived, and I have done so without feeling any serious difficulty other than that caused by the number of public bodies and officials whose position has to be considered being so great and in some ways so overlapping. But when the case is looked at broadly upon the question, What is the boundary of the subjects in question where the subjects are skirted by the sea, I find no serious difficulty. When the case is looked at from that point of view it is, as it appears to me, not possible to come to any other result than that which your Lordships' opinions have expressed.

The Lord Ordinary proceeds upon the view that the law generally applicable may not apply to an administrative area. I am not able to concur in his view of that matter. I cannot see any ground in this case for such a distinction, whatever may be the probabilities as regards other cases that might arise, and if that view cannot be held sound in the present case, then I can see nothing that can stand in the way of a judgment such as your Lordships consider ought to be pronounced; and having had the opportunity of studying more than once the opinion prepared by Lord Salvesen, I content myself by expressing my concurrence.

I may add that my concurrence includes the view expressed as to the dredged channel outside the piers in the open waters of the Forth.

LORD ARDWALL was absent.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the compearing defenders.

Counsel for the Pursuers (Reclaimers)—Fleming, K.C.—Cooper, K.C.—J. H. Millar. Agent—V. A. Noel Paton, W.S.

Counsel for Defenders the Magistrates of Leith—M'Clure, K.C.—Lippe. Agents—R. H. Miller & Company, S.S.C.

Counsel for Defenders the Parish Council of Leith—W. J. Robertson—Armit. Agents—Snody & Asher, S.S.C.

Counsel for Defenders the County Council of Midlothian—Pitman. Agent—A. G. G. Asher, W.S.

Saturday, July 8.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

KIRKINTILLOCH KIRK-SESSION *v.* KIRKINTILLOCH SCHOOL BOARD.

School—Board School—Transfer of Parochial School by Kirk-Session to School Board—Reservation of Right to Use School Buildings when not Required for Educational Purposes—Power of School Board to Sell School Buildings—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *secs.* 36 *and* 38.

A kirk-session in 1873 transferred a parochial school to a school board, under sec. 38 of the Education (Scotland) Act, 1872 for use as a public school, reserving in the disposition the right to use the schoolrooms "at such times and for such purposes as may be deemed necessary when said rooms are not required for the ordinary purposes of education." In 1910 the school board, having obtained the consent of the Scotch Education Department, arranged to sell the whole subjects to a third party. The kirk-session thereupon brought an action to interdict them from selling the subjects without first obtaining the consent of the pursuers and arranging for their obtaining equivalent accommodation.

Held that the school board were not entitled to sell the school buildings without arranging to give the kirk-session an equivalent for their right of partial occupation.

Dicta of the Lord President in *School Board of Glasgow* v. *Kirk-Session of Anderston*, 1910 S.C. 195 (at 204), 47 S.L.R. 278, *approved.*

Property—Real Burden—Disposition of School to School Board under Condition as to Use—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 38.

A kirk-session transferred a parochial school to a school board, under section 38 of the Education (Scotland) Act 1872, by disposition which bore to be granted "under the real lien and burden of the

use by the said kirk-session . . . of school-rooms at such times and for such purposes as may be deemed necessary when said rooms are not required for the ordinary purposes of education."

Held that the condition as to use by the kirk-session was not a real burden on the subjects disponed.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62) enacts—Section 36—". . . A school board may, with the sanction of the Board of Education, discontinue or change the site of any school under their management, and may sell and dispose of any land and buildings connected with any school so discontinued, or the site of which is so changed. . . . " Section 38—"With respect to schools now existing . . . in any parish or burgh erected or acquired and maintained . . . with funds derived from contributions or donations . . . for the purpose of promoting education, be it enacted that it shall be lawful for the person or persons vested with the title to any such school, with the consent of the person or persons having the 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 and 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 this Act, and it shall be lawful for the school board, with the sanction of the Board of Education, to accept of such transference, and on the same being made and accepted, the said school, with the site and any land and teacher's house included in the transference, shall be vested in the school board, and the school shall thereafter be deemed to be a public school under this Act, and shall be maintained and managed by the school board, and be subject to all the provisions of this Act accordingly. . . . And the use of the school-house at such times and for such purposes as shall not interfere with the use thereof under the provisions of this Act by the school board may also be made a condition of the transference thereof to the school board."

The Rev Thomas A. Morrison and others, the Kirk-Session of the Parish of Kirkintilloch, *pursuers*, brought an action in the Sheriff Court at Dumbarton against the Kirkintilloch Burgh School Board, *defenders*, to interdict them from selling the Oswald and Kirk-Session School without having first obtained the consent of the pursuers or made any arrangements for giving them equivalent accommodation in one of the defenders' other schools or elsewhere.

The following *narrative* of the *facts* of the case is taken from the opinion of Lord Dundas:—"The pursuers here are the Kirk-Session of the parish of Kirkintilloch, and the defenders are the School Board of that burgh. The material facts of the case can be very briefly stated, and the question of law involved is a short one. The parties did not formally renounce probation, but each pleaded that the averments of the other are irrelevant, and I think the matter can be disposed of upon the record. Prior to 1873 the Kirk-Session were proprietors of a school in the burgh, which was erected about 1853 with funds collected or provided by them. By disposition dated 29th November and 4th and 6th December, and recorded in the Register of Sasines 9th December 1873, the Kirk-Session freely and voluntarily, under authority of the Education (Scotland) Act 1872, and all other Acts, powers, and authorities enabling them therein, alienated and disponed to the School Board, in trust for the purposes of the said Acts, and to be maintained as a site for a public school within the meaning of the said Act of 1872, for a playground for the scholars and for a residence for the teacher or teachers and other officials in the said school, and for no other purposes whatsoever, but with all the powers and under the conditions, provisions and declarations contained in the said Acts, heritably and irredeemably, the said school, its site and pertinents, "but always with and under the real lien and burden of the use by the said Kirk-Session . . . of school-rooms at such times and for such purposes as may be deemed necessary when said rooms are not required for the ordinary purposes of education." For many years subsequent to 1873 the School Board continued the school as a public school, but latterly it got into a condition of disrepair, and ceased to be so used. Until very recently the Kirk-Session exercised the right reserved to them by the disposition of using the school-rooms when they were not required for ordinary purposes of education; but the School Board have now arranged to sell the whole subjects to a third party at the price of £210. They have obtained the consent of the Education Department to the sale, but they have not received the Kirk-Session's consent, and do not propose to make any arrangement for providing equivalent accommodation for them in another school or otherwise. The Kirk-Session raised this action in the Sheriff Court to have the School Board interdicted from disponing the subjects until they obtained the pursuers' consent and arranged for their obtaining equivalent accommodation in one of the defender's other schools."

On 14th June 1910 the Sheriff-Substitute (BLAIR) granted interdict as craved.

The defenders appealed, and argued—The reservation of the pursuers' right was inserted in the disposition in terms of section 38 of the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62). The sale, moreover, bore to be under the conditions contained in the Education Act. These conditions included under section 36 a power of sale. This statutory power was thus expressly reserved in the conveyance, though, standing the statute, that was probably unnecessary. The Kirk-Session had had the use of the building since 1873, and they could not, it was true, have been deprived of their right

if the buildings had remained a school. But the reserved right of use was not a real burden, and the condition must be held to be restricted to the period during which the buildings were used as a school. Even if the condition were, as it bore to be, a real burden, the pursuers could not prevent a sale. The real burden would always be available against the land and would affect the subjects in the hands of a singular successor—Rankine's Land Ownership (4th edit.) 414. Accordingly, any rights of use which the pursuers had would require to be provided for by the purchaser. But the condition in this disposition was not one which would be effectual against a singular successor — *Tailors of Aberdeen* v. *Coutts*, May 23, 1837, 2 S. & M'L. 609. The dicta of the Lord President in *School Board of Glasgow* v. *Kirk-Session of Anderston* (*sup. cit.*) were, so far as applicable to the present case, *obiter*.

Argued for the pursuers—The pursuers' right to reserve the use of the buildings was expressly conferred on them by section 38 of the Education Act of 1872. But if the defenders' contention were right the buildings might now be sold and the pursuers be absolutely deprived of the right for which they stipulated under sanction of the statute. It was absurd to suggest that the defenders had the power of depriving the pursuers of a valuable right by removing the school. The reservation was not to be defeated in that way. They did not seek to prevent the sale unconditionally, but maintained that it should not be carried out till an equivalent accommodation was provided them. This was precisely the sort of case figured by the Lord President in *School Board of Glasgow* v. *Kirk-Session of Anderston* (*sup. cit.*). The Court in cases of reserved right had gone on the principle that if an equivalent was given that was enough, *e.g.*, rights-of-way cases. It was not impossible to insert in a disposition a condition that the disponee should not dispose. Such a stipulation would bind the parties to the contract, being part of their bargain, though it would not, it was true, be good against singular successors—*Waddell* v. *Campbell*, January 21, 1898, 25 R. 456, 35 S.L.R. 351.

At advising—

LORD DUNDAS—[*After the narrative given above*] — The Sheriff-Substitute granted interdict and the defenders have appealed. I think the Sheriff-Substitute was quite right. The defenders founded upon section 36 of the Act of 1872, which, *inter alia*, empowers a school board, with the sanction of the Board of Education (now the Education Department), to discontinue any school under their management, and to sell and dispose of any land and buildings connected with such school. But along with that provision one must read section 38, which authorises the transfer of a school like the present, with its site and pertinents, to (and the acceptance of such transfer by) the school board of the parish in which it is situated, and provides, *inter alia*, that "the use of the school-house at such times and for such purposes as shall not interfere with the use thereof under the provisions of this Act by the school board may also be made a condition of the transference thereof to the school board." The "condition" just quoted was in substance, though in ill-chosen language, imported into the disposition in favour of the defenders already referred to, and has a very material bearing on the rights of parties, for the school must of course in the hands of the School Board be subject to any valid condition contained in the deed of transfer. The defenders urged that the reserved use of the school-rooms was not and could not be a "real lien and burden" on the subjects, and that their obligation flew off upon the discontinuance of the school. The latter branch of this argument seems to me to ignore section 38 of the Act. As regards the first branch, I agree with the legal view as stated by the defenders, but its very soundness seems to me to justify the pursuers' case for interdict. If the condition in question could be validly imposed as a real burden it would of course affect the subjects themselves even in the hands of a singular successor. But as this is not so, the express reservation contained in the disposition—a condition contemplated and authorised by the statute—would practically be rendered nugatory if the proposed sale were carried through without some adequate arrangement being first made for provision of substituted accommodation or otherwise. The pursuers' counsel did not suggest that they were entitled to stop the sale absolutely and unconditionally. He merely desired that it should not be carried out until reasonable provision had been made by the defenders for his clients' accommodation for their meetings, which he stated (I do not know how the facts stand) could be easily found in one of the defenders' other schools. The defenders, on the other hand, maintain in effect that they are entitled to read the statutory reservation in question out of the deed. I am clearly of opinion that the pursuers' contention is well founded. The observations of the Lord President in the recent case of *School Board of Glasgow* v. *Kirk-Session of Anderston*, referred to by the Sheriff-Substitute, supports this view. The defenders endeavoured to discount them as "mere *obiter dicta*." It is true that, strictly speaking, the Lord President's dicta were *obiter*, but they were very relevant to the matter he was discussing and appear to be directly in point here. I accordingly adopt Lord Dunedin's words as applicable to this case—"I do not think that the School Board could sell unless they arranged with the Kirk-Session to give them some equivalent for their partial right of occupation; . . . if they want to sell they must come to terms with the people who have a right to maintain a limited right of occupation." This is just the result embodied in the Sheriff-Substitute's interlocutor, and I am for affirming it accordingly.

LORD SALVESEN—This case raises a question of general interest affecting the rights of property of school boards in schools which have been transferred to them in virtue of section 38 of the Education (Scotland) Act 1872. It appears that in 1873 the Kirk-Session of the parish of Kirkintilloch disponed to the defenders certain school buildings and playgrounds which had been erected and acquired by the Kirk-Session from funds gifted to them for the purpose "to be maintained as a site for a public school within the meaning of the Act of 1872 for a playground for the scholars and for a residence for the teacher or teachers and other officials in the school, and for no other purpose whatever." At the time when this disposition was granted the school buildings had been used for meetings of agencies connected with the church when the schoolrooms were not required for the ordinary purposes of education. The disposition was not an absolute one, but was declared to be "under the real lien and burden of the use by the said Kirk-Session and the Kirk-Session of the parish of St Davids, Kirkintilloch, of school rooms at such times and for such purposes as may be deemed necessary when said rooms are not required for the ordinary purposes of education." It is not disputed that until recently the pursuers have regularly exercised this reserved right.

The defenders allege that since 1890 the school buildings so conveyed and known as "Oswald School" have ceased to be used for educational purposes of any kind, and are incapable of being so used. They accordingly in 1908 applied for and obtained the consent of the Education Department to the sale of the subjects. They were exposed for sale by public auction on 9th February 1910, and were sold at the price of £210 to Mr Andrew Fletcher, plumber, Kirkintilloch. The pursuers maintain that this sale is invalid without their consent, and they seek interdict against the defenders carrying it through until they have obtained such consent. The Sheriff-Substitute has granted interdict substantially as craved, and his interlocutor has now been submitted to review.

It appears that the purchaser is under the articles of roup bound to take the property subject to all burdens in favour of the pursuers constituted by the title; and accordingly it was maintained that the pursuers could not complain of the sale, as any rights of use which they had in the buildings would require to be provided for by the purchaser. The argument would, I think, be unanswerable if any real lien or burden capable of affecting a singular successor had been effectually constituted in the pursuer's favour. In my opinion, however, if the sale to Mr Fletcher were carried through, the so-called real lien or burden in favour of the pursuers could not be enforced against him. It proceeds on the asumption that the buildings will always contain schoolrooms, and provides for the use of such rooms by the pursuers at certain times. A right of occupation of this kind in favour of a body of persons is, I think, incapable of being made a real burden on property binding on a purchaser. If, therefore, the sale had been carried through without objection by the pursuers, the result would have been that they would have been deprived of the right for which they stipulated, and that the whole price of the site and of the buildings upon it originally provided out of funds belonging to them would have passed to the defenders without any liability on their part to provide equivalent accommodation for the pursuers elsewhere.

This result is so inequitable that it will not readily be presumed that it was within the contemplation of the Legislature when the Education (Scotland) Act 1872 was passed. The policy of the Act was, with the view of saving the pockets of the ratepayers, to encourage the managers of existing schools to transfer them to the new educational authority. It recognises that where religious bodies used the school-house for church purposes, such bodies would not be disposed to transfer the property in the schools which belonged to them unless their rights of use were reserved; and accordingly it was expressly enacted that "the use of the school-house at such times and for such purposes as shall not interfere with the use thereof under the provisions of this Act by the school board may also be made a condition of the transference thereof to the school board." It was therefore lawful for the pursuers' predecessors to stipulate for the use of the schoolrooms for such purposes as they might deem necessary when the rooms were not required for the ordinary purposes of education, and it was lawful for the School Board to accept a disposition of Oswald School under this condition. The fact that the condition is expressed in conveyancing language which is not appropriate does not, in my opinion, make it the less binding. I was at first moved by an argument to the effect that the condition must be held to be restricted to the period during which the buildings transferred continued to be used as a school, but I see no warrant for this in the Act. It may well be that when the defenders ceased to use Oswald School for their own purposes they were under no obligation to maintain the buildings so as to be suitable for occupation by the pursuers for their meetings; but it is a very different thing to say that they are entitled to sell the buildings and site without the pursuers' consent and appropriate the whole proceeds to their own uses. The solution of the matter would seem to be that which was so clearly stated by the Lord President in the case to which the Sheriff-Substitute refers; and accordingly I agree with your Lordships in holding that we must affirm the interlocutor appealed from, with expenses.

The LORD JUSTICE-CLERK concurred.

LORD ARDWALL was absent.

The Court dismissed the appeal.

Counsel for Pursuers (Respondents)—Johnston, K.C.—J. G. Jameson. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Appellants)—Chree—Wark. Agents—Patrick & James, S.S.C.