objects of a company so far as may be required to enable it to carry on its business more economically or more efficiently, to attain its main purpose by new or improved means, to enlarge or change the local area of its operations, or to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company. Powers to put up and manage a crematorium, to manufacture and sell stone monuments as memorials of the dead whose remains are buried in the company's cemetery or cemeteries, and to act as undertakers in connection with funerals to those cemeteries, are obviously powers within the scope of this section. But neither in the petition nor in the report is there anything to show that it could be either convenient or advantageous to combine with the business of this Cemetery Company such businesses as those of masons, quarriers, florists, or gardeners. It is no doubt possible that a new company might be started in such circumstances, present or prospective, as to make it expedient to comprehend such a diversity of enterprise among its powers. But we have no evidence at all before us to show that in the existing circumstances of this long-established Cemetery Company any convenience or advantage whatsoever would be obtained by it from starting out on such new and apparently distinct undertakings as that of quarrymasters, or that of masons, or that of gardeners growing flowers for sale in the market, or in business premises conducted as a florist's shop. It is therefore both impossible and unnecessary for us to consider whether powers of such width and diversity might not competently be granted under section 9 of the Companies Act if some change in circumstances had been established presenting a case of convenience or advantage. On the other hand it is, I think, fairly put before us that some commercial dealings of the nature of those which usually fall within the sphere of the businesses referred to are, or at any rate may be, incidental to the carrying on of a cemetery undertaking. And if the powers asked are such as are intended, not as authorising the company to embark on so many separate and independent businesses, but to be used as incidental to the main object of the company, there seems no reason, why if the company asks them it should not get them. I suggest therefore to your Lordships that the powers may be sanctioned, provided always that in the enumeration of particular functions which follows the general function of owners of cemeteries or burial-grounds, these functions are described as powers in connection with and incidental to the business of owners of cemeteries or burial grounds.

LORD SKERRINGTON—I see nothing incompetent in any of the alterations proposed for our consideration. In petitions of this kind, however, there is a tendency to overlook the fact that the question whether the Court ought to exercise the discretionary power conferred upon it by the 4th sub-section of section 9 of the Companies (Consolidation) Act of 1908 comes to be to a large extent one of evidence. In the present case I agree with your Lordship that no good cause has been established for the grant of powers of so wide and far-reaching a character as are embodied in the special resolution. I think that we should exercise a wise discretion if in sanctioning the powers asked we limit them in the manner which your Lordship has suggested.

LORD SANDS—I agree with your Lordship in the chair.

LORD CULLEN did not hear the petition.

The Court confirmed the alterations subject to the first part of the third clause of the memorandum of association being restricted by adding after the word "crematorium" the words "and in connection therewith and as incidental thereto as."

Counsel for the Petitioners — Wilton, K.C.—Gibb. Agents—D. M. Gibb & Sons, S.S.C.

Wednesday, July 11.

SECOND DIVISION.

PATON'S TRUSTEE *v.* FINLAYSON AND OTHERS.

Sale — Retention — Possession — Growing Potatoes Lifted by Buyer and Pitted on Seller's Land—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 43 (1) (*b*).

The Sale of Goods Act 1893 enacts—Section 43 (1)—"The unpaid seller of goods loses his lien or right of retention thereon . . . (*b*) when the buyer or his agent lawfully obtains possession of the goods."

A potato merchant bought from farmers the growing crop of potatoes on their farms at a specified price per acre, and on maturity lifted the potatoes with his own servants, pitted them on the respective farms, and dressed them. The horse work required in lifting and carting the potatoes to pits and to rail was in terms of the contract supplied by the farmers. The buyer having been sequestrated the farmers claimed a right of retention over the potatoes lying in the pits against his trustee in bankruptcy. *Held* that at the date of the sequestration the bankrupt had not obtained possession of the potatoes, and that the farmers had accordingly a right of lien or retention over them for the unpaid price.

Contract — Mutual Contract — Retention—Performance of Counterpart—Possession —Contract between Merchant and Farmer for Use of Farmer's Land to Produce Crop of Potatoes—Mutuality of Services—Right of Farmer to Retain Potatoes Pitted on his Land against Charges.

Under a mutual contract a potato merchant agreed with a farmer for the use of so much of his land for the pur-

pose of growing potatoes at a specified charge per acre. The farmer did the horse work connected with the crop, supplied straw for the pits, and agreed to cart the potatoes to the station. The merchant supplied artificial manure and seed potatoes, did the planting and dressing, and lifted and pitted the potatoes. The merchant having become bankrupt, *held* that the farmer had under the contract such possession or control as entitled him to withhold delivery of the pitted potatoes until the bankrupt fulfilled the counterpart of the obligation, *i.e.*, paid the stipulated rent.

George Kirkwood Johnston, C.A., Edinburgh, trustee on the sequestrated estates of Robert Paton, potato merchant and grower, Edinburgh, *first party*, Mrs Isabella Robertson or Finlayson, executrix of the late William Finlayson, farmer, Crieff, *second party*, Andrew Alexander Cameron, Doune, *third party*, and Mrs Janet M'Caull or Lennox, Dunblane, and others, *fourth parties*, the second, third, and fourth parties being creditors in the sequestration with whom the bankrupt had contracts for growing potatoes, presented a Special Case for the opinion and judgment of the Court with regard to certain questions arising out of these contracts. The bankrupt's estates were sequestrated on 10th January 1922.

The Case stated, *inter alia*—"2. The said Robert Paton in the course of his business as a potato merchant was in use to enter into contracts with farmers for the supply of potatoes, which he retailed to his own customers. These contracts took different forms according as the said Robert Paton purchased growing or grown crops or rented fields for cropping purposes. For the purposes of this Special Case two styles of contract fall to be considered, viz., (1) contracts where growing crops of potatoes were purchased, and (2) contracts where ground was rented on which to grow potatoes. 3. Under the first form of contract the said Robert Paton bought the growing crop from the farmer at a specified price per acre. The ground had been prepared and the seed potatoes provided and planted by the farmer, who did all other necessary work for bringing the crop to maturity. On the other hand Mr Paton, as the purchsaer of the crop, lifted the potatoes, pitted them on the respective farms, and dressed them. He employed and paid the labour required for this purpose. The horse work required in lifting and carting the potatoes to pits and to rail was in terms of the contract supplied by the farmer. The parties of the second and third part are farmers with whom Mr Paton had contracts of this kind. 4. In the second form of contract, viz., where the ground was rented for cropping purposes, the said Robert Paton rented land from the farmer at a specified charge per acre. The farmer applied the farmyard manure to the land, ploughed and prepared the ground for the seed potatoes, and supplied the horse work for furring up and hoeing, and later for lifting the crop and carting the same to pit or to rail. On the other hand Mr Paton supplied the seed potatoes and the necessary artificial manure, and employed and paid for the labour required in the work of planting, hoeing, lifting, and dressing the crop. No formal lease or agreement was entered into between the parties, but the transactions were usually confirmed by a letter in some such terms as the following, which may be taken as a typical case:—'I confirm having taken from you about 10 acres of land for the purpose of growing potatoes at £15 per acre, you to do all horse work in connection with this crop, and I to supply artificial manure, seed potatoes, and to do the planting and dressing, &c. You to supply straw for covering pits and cart potatoes to station.' The parties of the second and fourth part entered into contracts of this kind with the said Robert Paton. 5. Under both contracts when the potatoes were ready for lifting Mr Paton sent out squads of workers, who were servants in his regular employment, for the purpose of handling the various potato crops. These squads were in every case employed and paid for by Mr Paton. 6. During the autumn of 1921 Mr Paton purchased various lots of growing potatoes under the style of contract first above set forth from the second and third parties. In the case of each of these parties the potatoes were before the date of the sequestration lifted and pitted upon the ground belonging to the said second and third parties. They were in the pits in whole or in part at the date of sequestration. In each case at said date either the whole or a part of the purchase price remained unpaid. 7. Similarly during the spring of 1921 Mr Paton entered into contracts with the second and fourth parties whereby he rented certain fields on their farms for the purpose of growing potatoes, the said contracts being of the style second above mentioned. As in the former cases, the potatoes remained in pits in whole or in part upon the ground of the said parties at the date of sequestration. In each instance the rental payable by Mr Paton for the use of the ground was at said date either wholly or partially unpaid. 8. Questions have arisen between the trustee as the party of the first part on the one hand, and the other parties to the case on the other hand, as to the respective rights of the second, third, and fourth parties. In particular, questions have arisen as to whether the second and third parties in the case of contracts of the first style had a right of lien over or retention of the potatoes remaining upon their land at the date of sequestration. The potatoes were sold by arrangement in or about March 1922, and the proceeds of the sale were consigned pending a judicial decision as to the rights of parties. Further questions have arisen between the trustee as the party of the first part and the second and fourth parties, under contracts of the style second above set forth, as to whether the parties of the second and fourth part had a right of lien over or retention of the potatoes for the unpaid portions of the rent in each case. As in the case of the other contracts, the potatoes were sold by arrange-

ment and the proceeds judicially consigned. The questions, however, fall to be determined as if no sale by arrangement had taken place."

The *questions of law* for the opinion of the Court were—"1. Had the second and third parties in the case of the first style of contract a statutory right of lien or retention over the potatoes remaining upon their ground at the date of sequestration? 2. Are the second and third parties in the case of the first style of contract entitled to a preferable ranking on the bankrupt estate? 3. Had the second and fourth parties in the case of the second style of contract a common law right of lien or retention over the potatoes remaining upon their ground at the date of sequestration? 4. Are the second and fourth parties in the case of the second style of contract entitled to a preferable ranking on the bankrupt estate?"

Argued for the first party—*First style of contract*—Delivery took place when the pursuer lifted the potatoes with his own men and placed them in the pits, and the property then passed—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sections 43 (1) (*b*) and 62; Bell's Comm. (7th ed.), p. 183. Delivery stopped the seller's lien—Bell's Prin., section 1418. Having been lost it did not revive—Benjamin on Sale (6th ed.), p. 968. The other parties' contention that delivery did not take place because there was still carting to be done could not be maintained—*Woodburn* v. *Andrew Motherwell, Limited*, 1917 S.C. 533, 54 S.L.R. 472; *Gowans (Cockburn's Trustee)* v. *Bowe & Sons*, 1910, 2 S.L.T. 17. Neither could it be maintained that control still preserved the lien—*Hartley* v. *Hitchcock*, 1816, 1 Starkie 408; Bell's Comm. (7th ed.), p. 186, citing *Stein* v. *Stewart*, 1796, 3 Pat. App. 462. There must be actual possession and not merely civil—Bell's Prin., section 1412; Bell's Comm. (7th ed.), p. 184. In the present case the only possession the farmer ever had of the potatoes in the pits was civil or fictitious by construction of the law. *Second style of contract*—In this case the potatoes never were in possession of the farmer at all. No work was done on them by the farmer, and therefore he had no lien—Bell's Prin., section 1405; Gloag and Irvine, Rights in Security, p. 351. The ownership of the potatoes after planting was with the first party—*Swanson* v. *Grieve*, 1891, 18 R. 371, 28 S.L.R. 258. The first party was really a tenant and had a special right to the use of the land for all purposes of the contract. The farmer had no possession and therefore had no lien. There was no example of lien being applied in a mutual contract like the present.

Argued for the second, third, and fourth parties—*First style of contract*—The seller's right to lien was really an equity which arose from possession and which depended on the fact that the one party could not call on the other to perform his part of the contract until he himself had performed the counterpart. The right of lien only arose when the property passed, because prior to that it was a right of ownership. Here the property passed when the potatoes were lifted. Further, the test to be applied was not delivery but possession—Sale of Goods Act 1893, sections 39, 41, 42 (2), and 43. *Second style of contract*—In the case of work to be done there was a common law right of lien for the price of the work. There was no legal distinction between work on a natural product such as potatoes and work on an artificial. The first party had possession during the whole period of growth until they were removed to the station. This form of contract was not one of landlord and tenant—*Lord's Trustee* v. *Great Eastern Railway*, [1908] 2 K.B. 54, and *per* Fletcher-Moulton, L.J., at p. 68, and [1909] A.C. 109, 46 S.L.R. 1024. The land still remained the farmer's, and he had physical possession of the potatoes. In such circumstances a right of lien existed—Bell's Prin., sections 70, 71, 1411, 1419, 1430; *Harper* v. *Faulds*, 1791, M. 2666; *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69, 18 S.L.R. 56; *Miller* v. *Hutcheson & Dixon*, 1881, 8 R. 489, 18 S.L.R. 304; *Robertson* v. *Ross*, 1887, 15 R. 67, 25 S.L.R. 62; *Moore's Carving Machine Company* v. *Austin*, 1896, 33 S.L.R. 613; *Findlay (Liquidator of Scottish Workmen's Assurance Company, Limited)* v. *Waddell*, 1910 S.C. 670, 47 S.L.R. 478.

At advising—

LORD JUSTICE-CLERK—The parties to this Special Case are the trustee in bankruptcy of Robert Paton, a potato merchant in Edinburgh, and certain of his creditors, with whom, at a date anterior to his sequestration, he had business dealings. The nature of these dealings is fully set out in the case to which I refer. Broadly speaking, Paton entered into two forms of contract with these creditors—one under which he bought from them growing crops of potatoes, and another under which he rented ground from them on which to grow potatoes. Under each form of contract the potatoes contracted for were at the date of Paton's sequestration pitted on the creditors' land. The questions which have arisen between the parties are two in number—first, whether under the first form of contract the creditors had at the date of sequestration a statutory right of lien or retention over the potatoes pitted on their ground; and second, whether under the second form of contract the creditors had a common law right of retention or lien over the potatoes.

Our decision with regard to the first form of contract depends on the application to the circumstances of the case of section 43 (1) (*b*) of the Sale of Goods Act 1893. It is there enacted that "the unpaid seller of goods loses his lien or right of retention thereon . . . when the buyer or his agent lawfully obtains possession of the goods." Let me observe parenthetically that we are here concerned with a question relating to a right of possession, not a right of property, and that accordingly cases dealing with the latter question are neither enlightening nor helpful. That the property in the potatoes had passed to Paton is not doubtful, and indeed is not disputed. Were it not for that fact, his creditors would not be remitted to the necessity of pleading a

right of retention or lien over them. The question then on this branch of the case is as simple, at least in statement, as this—Had Paton at the date of his sequestration lawfully obtained possession of the potatoes or had he not? I am of opinion that he had not. The potatoes were at that date, as I have said, pitted on the creditors' land. In my judgment the potatoes remained in their actual physical possession, and for my part I cannot see what better possession the creditors could have had. It was certainly superior in quality to the right of possession which a hotelkeeper has over the luggage of a guest in his hotel in order to secure payment of the guest's bill. It was argued for the trustee in bankruptcy that possession of the potatoes passed to Paton when his servants lifted them from the ground. I do not agree. The mere fact that Paton's servants handled the crop is, in my judgment, insufficient to yield that result. The potatoes were lifted for the purpose of being pitted, not for the purpose of being taken away. Indeed I am disposed to think that until the creditors delivered the potatoes at the railway station they retained possession of them, and that Paton had not lawfully obtained possession. The views which I have expressed are, I think, in accordance with the dissenting judgment of Fletcher-Moulton, L.J., in *Lord* (*Trustee of*) v. *Great Eastern Railway* ([1908] 2 K.B. 54), which received effect in the House of Lords on appeal, [1909] A.C. 109. I therefore suggest to your Lordships that the first and second questions should be answered in the affirmative.

As regards the second form of contract the creditors' alleged right depends not on statute but upon the common law. It is necessary *in limine* to attend to the precise terms of the contract with which we are here concerned. It was not really a contract of lease. There was no surrender of possession of the land to Paton. The arrangement was a composite one whereby both parties pooled their endeavours in order to produce a crop of potatoes. No doubt the argument for the creditors is conditioned by the necessity on their part of proving possession, for without possession the right of retention does not arise. It was argued for the trustee that the potatoes were never in the possession of the creditors. I am of opinion that this argument is not sound. The potatoes were put upon and remained upon the land of the creditors. On that land certain operations had to be conducted, without which there would have been no crop of potatoes at all. The creditors, in my opinion, obtained possession of the potatoes when they were planted, and they never lost that right. This being so, I am of opinion that the doctrine of mutuality in contract law applies, and that the creditors were entitled to retain the potatoes which were in their possession until the rent of the land upon which they were grown was paid. This was not done at the date of the sequestration. In any event I am of opinion that, when the potatoes were pitted, they fell into the possession of Paton's creditors. In either view, Paton's trustee cannot successfully claim that the possession was his. Accordingly, I suggest to your Lordships that questions three and four in the case also fall to be answered in the affirmative.

LORD HUNTER—In the first form of contract with which we have to deal the farmers sold growing crops of potatoes to the bankrupt at a specified price per acre. The farmers prepared the ground, planted the seed, and did all other work necessary to bring the crops to maturity. The bankrupt, however, lifted the potatoes, pitted them on the respective farms, and dressed them. The horse work required in lifting and carting the potatoes to pits and to rail was supplied by the farmers. At the date of the bankruptcy the potatoes had been lifted and pitted upon the ground of the farmers. The price was, either in whole or in part, unpaid.

The question is whether or not the farmers had a right to retain the potatoes until the price was paid. By section 39 of the Sale of Goods Act 1893 the unpaid seller of goods has by implication of law a lien on the goods or right to retain them for the price while he is in possession of them. Section 43 (1) provides—"The unpaid seller of goods loses his lien or right of retention thereon . . . (*b*) when the buyer or his agent lawfully obtains possession of the goods."

For the bankrupt's trustee it was maintained that delivery was given to the bankrupt when his employees lifted the potatoes from the ground and placed them in pits; that the farmers had consequently no lien or right of retention at common law or under statute; and that the potatoes accordingly formed part of the sequestrated estates which he is entitled to realise, leaving the farmers to claim for an ordinary ranking in the sequestration for the amount of the unpaid price. I do not think that this reasoning is sound. It is no doubt true that lien or right of retention depends on possession by the seller, and that transference of possession to the buyer or his agent brings the right to an end. But the possession by the buyer necessary to defeat the seller's right of retention must be actual and absolute. In *Grice* v. *Richardson* (3 App. Cas. 319) the vendors were also warehousemen of the goods sold under an arrangement with the purchasers to pay warehouse rent. On the insolvency of the vendees it was held that the vendors' lien revived as the goods remained in the possession of the vendors and no actual delivery had been made to the purchasers. In the case of *Lord* (*Trustee of*) v. *Great Eastern Railway Company* ([1908] 2 K.B. 54) Fletcher-Moulton, L.J., said (at p. 72)—"A lien is impossible except under circumstances which place the goods in what I may call the possessory control of the holder of the lien, that is to say, where they are so far in his actual possession that he can prevent their being taken away and dealt with by the owner." On the facts stated in the present case I think that while the property in the goods passed to the

bankrupt when his employees lifted the potatoes from the ground, the sellers never lost that possessory control which gives them their right of retention.

The question under the second type of contract is somewhat different. The bankrupt acquired right from the farmers, with whom he entered into contracts of this form, to use ground for the purposes of growing potatoes at a specified sum per acre. The farmers had to do the horse work connected with the crop, supply straw for covering pits, and cart the potatoes to the station, while the bankrupt had to supply artificial manure and seed potatoes, and do the planting and dressing. As in the cases under the first type of contract the potatoes were in pits upon the ground of the farmers at the date of sequestration, and the rental payable by the bankrupt was either wholly or partly unpaid.

In these cases I think that the farmers obtained possession of the potatoes, if not at the time of planting, at all events at the time of pitting. When the bankruptcy occurred the potatoes were on ground rented by the farmers. Their contracts with the bankrupt involved not merely the granting of a licence as to the use of land, but the undertaking on their part of certain specified work. In such cases there appears to me to be room for the operation of special retention which, as explained in Bell's Principles of the Law of Scotland, section 1419, "is part of the law of mutual contract entitling one to withhold performance or retain possession of that which forms the subject of the contract till the counter obligation be performed." A number of cases illustrative of this right of retention were cited, but I do not think it necessary to examine them in detail. On the facts as stated I think that the farmers had under contracts of the second type that possession or control of the potatoes which entitled them to withhold delivery until the bankrupt fulfilled the counterpart of the obligation, *i.e.*, paid the stipulated rent.

LORD ANDERSON—The legal right which is claimed by the farmers under both forms of contract is that of lien. This assumes that the property of the goods over which the lien is to be exercised has passed to the buyer, otherwise the seller's claim would be to retain goods which still remained his own property. It is common ground, therefore, that in both forms of contract the property of the potatoes passed to Paton when his servants removed them from the soil. The right of lien, however, depends upon possession, and the crucial question in reference to each form of contract is whether or not the farmers had possession at the time when the lien became operative.

As regards the first contract, the transaction was an ordinary sale of ascertained goods, to wit, the potatoes which the farmers had planted on their land, the price being fixed at so much per ton. The lien claimed in connection with this form of contract is the statutory lien conferred by section 41 (1) (*b*) of the Sale of Goods Act 1893 which allows an unpaid seller of goods who is in possession of them to retain possession until payment or tender of the price, where the goods have been sold on credit but the term of credit has expired.

It was maintained for the trustee in bankruptcy (the first party) that the farmers, who admittedly had been in possession of the potatoes while they were growing in the soil of which they were the occupants, had lost this possession when Paton's servant's gathered the crop and pitted it. I am unable to sustain this contention. The potatoes when in pits on the farmers' land were plainly in their physical possession, and I cannot hold that there was a break or hiatus between this possession and that which they admittedly had when the tubers were in the soil, such as would divest them of their right of lien. In other words, the handling of the potatoes by Paton's servants did not amount to delivery of the potatoes to Paton. They remained in the possession of the farmers all the time. I do not go so far as to say that delivery could not take place until the potatoes were on rail, because the stipulation as to carting to rail was one in favour of the buyer which he could waive—*Woodburn*, 1917 S.C. 533; *Gowans*, 1910, 2 S.L.T. 17. Delivery could not take place, however, so long as the potatoes remained on the farmers' land and in their possession. It follows that the first and second questions of law which refer to the first form of contract should be answered in the affirmative.

As regards the second form of contract, the transaction was of a composite character. By that contract, the farmer, for a consideration calculated as at so much per acre, gave the use of his land and certain services to Paton. The purpose of the contract was to produce a crop of potatoes by the united efforts of the parties. There was not therefore a complete cession or divestiture of the land by the farmer to Paton.

The lien claimed as to this form of contract is a right arising at common law out of the particular contract. It is thus a special lien implied in the contract, as explained by Lord Young in *Miller* (8 R. 489, at p. 492) and by Mr Bell in his Principles, sections 1411, 1419, 1430. The farmers based their right to exercise this lien on two principles, each of which seems to be applicable. (1) If the contract be regarded as a *locatio operarum*, in which the farmer rendered services for Paton in connection with the growth of the crop, the common law gives the farmer the right to retain the crop till the services have been paid for—Bell's Prin., section 1430. (2) If the contract be regarded as a mutual innominate contract with reciprocal obligations, then if one of the parties refuses or delays "performance of a material part of the contract, the other whose part is still unfulfilled is entitled to refuse performance or retain"—Bell's Prin., section 71.

In connection with this form of contract, as in the case of the other form, it is essential that the party claiming a lien should have and should never have lost possession. The trustee in bankruptcy maintains that under this contract the farmer never had

possession of the potatoes. In my opinion this contention is not well founded. It seems to me that the farmer possessed the potatoes from the moment the seed was planted in soil of which he was tenant and of which he had not divested himself. In any event he obtained possession at the time the crop was pitted, and his possession continued without break thereafter.

It follows that the third and fourth questions of law which relate to the second form of contract should be answered in the affirmative.

LORD ORMIDALE did not hear the case.

The Court answered the questions of law in the affirmative.

Counsel for the First Party—Chree, K.C. —Thom. Agents—Arch. Menzies & White, W.S.

Counsel for the Second, Third, and Fourth Parties—Aitchison, K.C.—Gilchrist. Agent —Herbert Mellor, S.S.C.

Friday, July 13.

SECOND DIVISION.

[Lord Constable, Ordinary.

NORFOR AND OTHERS *v.* EDUCATION AUTHORITY OF COUNTY OF ABERDEEN.

Arbitration—Jurisdiction—Statutory Reference to Government Department—Whether Jurisdiction of Courts Excluded—Scope of Reference—Question of Fact—Question of Law—Education (Scotland) Act 1918 (8 *and* 9 *Geo. V, cap.* 48), *sec.* 18, *sub-secs.* (3), (4), *and* (9).

By the Education (Scotland) Act 1918, sec. 18, sub-sec. (3), provision is made for the maintenance of transferred schools by the education authority.

By sub-sec. (4) it is enacted as follows: —"Any question which may arise as to the due fulfilment or observance of any provision or requirement of the preceding sub-section shall be referred to the department, whose decision shall be final."

By sub-sec. (9) it is provided that after the expiry of ten years from the transfer of a school the department may in certain circumstances discontinue the school or maintain it as a public school free from the conditions prescribed in sub-sec. (3).

The trustees of a voluntary school transferred it under the provisions of the Education (Scotland) Act 1918 to the county education authority. Prior to the transfer the school was carried on as a primary school, providing a full primary course of instruction together with a supplementary course. Two years after the transfer the education authority resolved to alter the status of the school by discontinuing the giving of primary instruction therein to pupils beyond the infant or junior stages, whereupon the former trustees of the school brought an action against the education authority for declarator that the defenders were bound for the space of at least ten years from the date of the transfer to maintain the school as a primary school providing a full and supplementary course of instruction, and for interdict against the defenders for the said space of time maintaining the school as a school for infants and junior pupils only, or otherwise than as a school providing a full primary course of instruction. The defenders pleaded that the action was incompetent in respect that the question raised by the pursuers fell to be decided by the Scottish Education Department in terms of sec. 18, sub-sec. (4) of the Act.

The Court (*diss.* the Lord Justice-Clerk, and *reversing* the judgment of Lord Constable, Ordinary) *repelled* the plea of incompetency, *holding* that, although questions as to the due fulfilment or observance of the statutory obligation were questions of fact which fell to be decided by the Department, the question as to the scope of the statutory obligation was a question of law which was not excluded from the jurisdiction of the Court.

Robert Thomas Norfor, C.A., Edinburgh, as secretary and treasurer of the Representative Church Council of the Episcopal Church in Scotland and others, *pursuers*, brought an action against the Education Authority for the County of Aberdeen, *defenders*, for declarator (1) that St John's Episcopal School, New Pitsligo, was at the date of the passing of the Education (Scotland) Act 1918 (8 and 9 Geo. V, cap. 48) on 21st November 1918 a voluntary school within the meaning of "the Education (Scotland) Act 1897" (60 and 61 Vict. cap. 62); (2) that the said school was transferred as and from 15th May 1919 to the defenders, in terms of the said Education (Scotland) Act 1918, by the trustees for behoof of the Congregation of St John's Church, New Pitsligo; (3) that at the date of the said transference the said school was a primary school providing a full primary school course of instruction together with a further supplementary course; and (4) that the defenders as education authority vested in the property, control, and management of the said school in virtue of the said transference and of the provisions of the said Education (Scotland) Act 1918 were bound in terms of the said Act to hold, maintain, and manage the said school for the space of ten years at least from and after the said 15th May 1919 as a primary public school providing a full primary and supplementary course of instruction, subject to the provisions of the said Education (Scotland) Act 1918, and to the defenders' curriculum for the time being applicable to courses of primary instruction in schools under their charge; and for interdict against the defenders holding, maintaining, and managing the said school at any time within the space of ten years from and after the said 15th May 1919 as a school for infants and junior pupils only,