

barred from recovering damage. In the same way also the representatives of a person deceased of full age, who has met his death by a risk which he knew was incident to the employment, are also barred from recovering damages. I do not need to quote authority with reference to these propositions. No doubt in most of the cases having a bearing upon this point the cases went to proof, but if the state of matters as disclosed on the record shews that the deceased in this case was working in the knowledge of a patent risk, and that he met his death in connection with that patent risk, it must be held that he accepted a risk incident to the employment, and that his representative's claim against his employers is barred.

“Now, what is the state of matters as disclosed upon the record? It appears that the pursuer's son was and had been for twenty years employed on the defenders' railway. It is stated that the deceased was on the day of his death working at his usual occupation in the service of defenders. It is then averred some waggons were sent down one of the sidings by a push from an engine, and it became necessary for him to apply the brake in order to stop them at a particular place. He went forward to the waggons for that purpose, when they were proceeding at a slow speed, and walking alongside of them, endeavouring to apply the brake in the usual way, the waggons approached one of the piles of material which projected to within six inches of the rails, and he was caught between the waggon and the wood, and crushed. Then in article 4 is described the nature of heaps referred to. It is there stated, that some time previous to November 1884 (being the date of the accident) it was observed by a number of the men employed at St Rollox that certain heaps of material, consisting of broken waggons, sleepers, and old iron, for the most part, had been built at the very edge of the line, so that the waggons and the line nearly grazed them, and in some cases were actually caught by such projecting material. In the 5th article of the condescence it is set forth that it was the duty of the deceased to regulate the speed of the waggons shunted in the proximity of these heaps of materials (at least so I read the article). In these circumstances as set forth it appears to me that the deceased must have known that there was a risk to his life if he got between the waggons and this patent heap of materials; no doubt it was in a moment of forgetfulness, and when occupied with his work, that the accident happened, but still, as matter of law, the risk being a patent one and in his knowledge, it must be held that in accepting the employment he undertook the risk as one incident to it. It therefore does not seem to me that the case should go further. If the pursuer proved all that is set forth in his condescence, I still think the result would be the same. I have accordingly dismissed the action at this stage, though not upon the authority of the English case referred to, but on the general rule of law referred to above.”

The Sheriff (CLARK) on appeal recalled the Sheriff-Substitute's interlocutor and allowed a proof.

The pursuer appealed to the Court of Session for jury trial, and proposed the following issue—“Whether, on or about 22d November 1884, Norman Macleod, son of the pursuer, while in

the employment of the defenders at Saint Rollox siding, Glasgow, was, through the fault of the defenders, or of those for whom they are responsible, crushed between a waggon and a pile of wood, or a log or logs projecting from a pile of wood, and thereby sustained injuries, from the effects of which he died on the same day, to the loss, injury, and damage of the pursuer. Damages laid at common law at £500, or under the Employers Liability Act at £300.”

The defenders objected to any issue being allowed founding on the case of *Griffiths* as quoted in the Sheriff-Substitute's note.

At advising—

LORD YOUNG — Notwithstanding the reasons which Mr Johnstone has stated to the Court, I think we have no alternative but to send this case to trial, for the pursuer may then prove many facts and circumstances which are not set forth on this record, and I cannot with the least approach to satisfaction say from what is here set forth that he may not present a case which would entitle him to a verdict on his issue. I therefore think we should send the case to trial.

LORD CRAIGHILL— I think there are statements in the sixth article of the condescence which would differentiate the case from that which has been cited from the English Courts. There is an allegation that the waggon approached the place of danger while the pursuer's son was unaware of it, the suggestion being that he was occupied with his duties, or his attention drawn away from the approaching object. I think that is a speciality of this case which would have overcome the difficulty of the English Courts in the case cited. I am clear that the case should go to trial.

LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court approved of the issue and remitted the case to Lord M'Laren for trial.

Counsel for Pursuer (Appellant)—A. J. Young—Orr. Agents—Liddle & Lawson, S.S.C.

Counsel for Defender (Respondent)—D. F. Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Saturday, October 31.

SECOND DIVISION.

SPECIAL CASE FOR DONALDSON'S AND ORPHAN'S HOSPITALS.

Trust—Charitable Foundation—Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. c. 59)—Donaldson's, John Watson's, and Orphans' Hospitals, Scheme for Amalgamation of—Discretion of Commissioners—Ultra Vires.

The Educational Endowments Act 1882 gives the Commissioners thereby appointed power in framing schemes under the Act to divert from the purposes of free elementary education funds previously applicable thereto,

only to the extent to which such funds are manifestly in excess of the requirements of the locality to which they belong. *Held* in a Special Case brought to settle whether a scheme was within the scope of the Act, that the question of fact whether the funds were manifestly in excess of the requirements of the locality was one entirely within the discretion of the Commissioners.

Nature of a scheme for the administration of certain education endowments, which though making great changes therein, was *held not ultra vires* of the Commissioners under the Educational Endowments Act nor contrary to law.

The Commissioners appointed under the Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. c. 59) submitted to the Scottish Education Department a Scheme for providing for the administration of Donaldson's Hospital, the Orphan Hospital, and John Watson's Institution, all in Edinburgh, and the scheme was published by the Department as required by section 26. The scheme proposed to amalgamate the institutions. The cases now reported were cases presented by the governing bodies on the one part and the Commissioners on the other, to have the objections made by the former to the scheme decided.

Section 1 of the Act provided as follows—"Educational endowment" shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied or is applicable in whole or in part, whether by the declared intention of the founder or the consent of the governing body, or by custom or otherwise, to educational purposes, but shall not, except with the consent of the governing body, include the funds, whether capital or revenue, of any incorporation or society contributed or paid by the members of such incorporation or society by way of entry-moneys or other fixed or stated payments, nor burgess fines paid to any such incorporation or corporate society except as hereafter provided. 'Governing body' shall mean the managers, governors, or trustees of any endowment or other persons having the administration of the revenues thereof."

Section 4 of the Act provides for the appointment of Commissioners, and by section 5 it is enacted—"Subject to the provisions hereinafter contained the Commissioners shall have power to prepare drafts of schemes for the future government and management of educational endowment, which schemes may provide for altering the conditions and provisions of such endowments, including the powers of investing the funds thereof, or amalgamating, combining, or dividing such endowments, or altering the constitution of the governing bodies thereof, or uniting two or more existing governing bodies, or establishing new governing bodies with such powers as shall seem necessary, and to insert in such schemes clauses incorporating the governing bodies, whether new or old."

Section 7 provides that "Subject to the provisions of this Act it shall be the duty of the Commissioners in reorganising as aforesaid educational endowments to have special regard to making provision for secondary or higher or technical education in public schools or otherwise in those localities to which the endowments severally belong, or in such manner as to secure

to the inhabitants of those localities the benefit of such endowment, and if the Commissioners think fit they may provide for the establishing or aiding of industrial museums and libraries; provided that nothing in this Act contained shall be taken to compel the Commissioners to restrict any bursary, exhibition, scholarship, or other educational benefit attached to or tenable at any educational institution to the children of persons resident in the locality where that institution exists."

Section 8 provides that "This Act shall not apply (1) To any educational endowment given either by present gift made subsequently to the passing of the Education (Scotland) Act 1872, or by the will of a testator who died subsequently to the passing of the said Act." . . . And by section 9 it is further provided that "Where part of an endowment has been given before the passing of the Education (Scotland) Act 1872, and another part has been given subsequently to the passing of the said Act, and the two portions cannot in the opinion of the Commissioners be conveniently separated from each other, the date of the older part of the endowment shall be held to be the date of the endowment."

Section 10 provides—"Where any part of an endowment is an educational endowment within the meaning of this Act, and part of it is applicable or applied to other charitable purposes, the scheme shall be in conformity with the following provisions (except so far as the governing body of such endowment assent to the scheme departing therefrom) . . . (3) If the proportion applicable to other charitable uses amounts to or exceeds one-half of the whole of the endowment, the governing body of such endowment existing at the date of the scheme shall, so far as regards its non-educational purposes, remain unaltered by the scheme."

Section 12 provides—"For the purposes and subject to the provisions of this Act endowments for the payment of apprenticeship fees, or for the advancement in life, or for the maintenance or clothing, or otherwise for the benefit of poor children, and the funds and property of the Society in Scotland for Propagating Christian Knowledge so far as applicable or applied to educational purposes, shall be deemed to be and may be dealt with as educational endowments."

Section 13 provides—"In framing schemes the Commissioners shall save or shall make due compensation for the vested interests of individuals holding any office, place, employment, pension, compensation allowance, bursary, or emolument under or arising out of the educational or any other endowment at the date of the passing of this Act, and shall provide that no funds now applied in terms of the founders' directions to free elementary education shall be diverted to any other purpose, except to the extent to which such funds are manifestly in excess of the requirements for the purpose of free elementary education of the localities to which they belong. 'Elementary education' shall mean such education as may be given in the State-aided schools of Scotland pursuant to the provisions of the Educational (Scotland) Act 1872, and in terms of the minutes of the Scotch Education Department in force for the time being with respect to the administration of the Parliamentary grant for public education."

Section 15 provides—"In framing schemes it shall be the duty of the Commissioners, with respect alike to the constitution of the governing body and to educational provisions, to have regard to the spirit of founders' intentions, and in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons is entitled, whether as inhabitants of a particular area or as belonging to a particular class in life or otherwise, they shall have regard to the educational interests of such class of persons: Provided always that where the founder of any educational endowment has expressly provided for the education of children belonging to the poorer classes, either generally or within a particular area, or otherwise for their benefit, such endowment for such education, or otherwise for their benefit, shall continue, so far as requisite, to be applied for the benefit of such children."

The history of Donaldson's Hospital is as follows:—James Donaldson, Esq. of Broughton Hall, died in 1830, and by his will bequeathed his whole property "to build and found an hospital for boys and girls, to be called Donaldson's Hospital, preferring those of the name of Donaldson and Marshall—to be after the plan of the Orphan Hospital in Edinburgh, and John Watson's Hospital"—and he appointed certain gentlemen "to be trustees for executing this will, and also for the Hospital." They accepted the trust, and in 1833 the Hospital was built with accommodation for about 200 boys and 200 girls. On 22d November 1844 the surviving trustees executed a deed of constitution for Donaldson's Hospital, by which the whole management was devolved upon 27 persons as managers and governors, twelve of whom were appointed in virtue of the offices they held, the remainder being appointed *nominatim* as persons of good professional and social standing. The heritable property was vested in five trustees named. The deed further empowered the Governors to admit from time to time such a number of poor children, one-half boys and the other girls, as the funds might suffice at the time to maintain and educate, of which the Governors should be sole judges, and in such manner as the Governors should decide, but no child was to be admitted to the charity whose parents could maintain him or her. The age of admission was fixed at six as a minimum and nine as a maximum, and no child was to remain after fourteen. A preference for admission was given to, first, poor children of the name of Donaldson and Marshall, and second, such children as appeared to the majority of the Governors most destitute.

In 1848 it was resolved to set apart a portion of the Hospital for deaf and dumb children in both sexes who were destitute.

In 1850 the Hospital was opened, and has since been managed under the deeds of constitution, the Governors from time to time framing bye-laws according as they judged them to be in accordance with the true intent of the deed and the will of the founder. The total number of children boarded had on an average been above 200, and these were drawn from all parts of Scotland, the number of applicants as hearing children having always been much in excess of the number of vacancies. Five-sixths of those received were fatherless children. The free elementary educa-

tion given included such branches as were likely to fit the children to be useful artisans or servants, and the Governors received satisfactory assurances of the success of this education.

Down to 1869 there were only 70 deaf-mutes in the Hospital, but the number was augmented, after formal inquiry, to 119, with a result satisfactory to the Governors, who were satisfied that the combination of hearing children with the deaf-mutes acted beneficially on both classes. The free annual income was £8700.

The history of the Orphan Hospital is as follows:—It owed its origin to the exertions of Mr Andrew Gairdner, private contributions, and a collection made in the Edinburgh churches. In 1734 it was built on the ground immediately adjoining the old Trinity College Church. In 1739, when Mr Gairdner died, there were 74 orphans maintained and educated. In 1742 letters-patent were granted by George II., which, proceeding on the narrative that "there were great numbers of children orphans whose parents cannot bear the charges of their education," and that certain funds had been agreed "to be applied for defraying the charge of maintaining them," &c., incorporated certain persons under the title of "The Orphan Hospital and Workhouse at Edinburgh," with power to make bye-laws, &c., for the government of the Hospital, and to elect such persons as they chose, and who should be contributors to the institution. At the date of these Cases the corporation numbered 90. There was a further power given to them to elect 15 managers. By bye-law 15 it was provided that if any person gave a benefaction of £200 sterling to the corporation, and desired to present a child to the Hospital, any quarterly meeting might give such benefactor and his heirs a perpetual right of presentation, and when such child was removed from the Hospital a similar right to present another child, but reserving power to the corporation to redeem the right on repayment of the £200. These rights were subsequently granted on payment of £500, and of them there were, at the date of this Case, 18, conferring rights to present 33 children. Of this number there were 24 in the Hospital at the date of this Case. Of these rights 3 had been acquired since 1872. For some years a system had been in force of admitting boarders to the Hospital—orphans whose friends are able to contribute towards their support, £16 being paid for a boy and £14 for a girl. The number of children in the Hospital was 95—59 boys and 36 girls—59 foundationers and 36 boarders. Gifts, bequests, and legacies had been received since 1872 to the amount of about £10,000, while the funds had doubled in the last sixty years. The sum of £10,000 would, in the opinion of the Governors, be adequate on the boarding-out system to secure substantial benefits in the way of education, &c., for the class of children for which the money was subscribed.

"John Watson's Institution" was built and opened in 1828 for boys and girls of the destitute class, and owed its origin to the will of John Watson, W.S., Edinburgh, who died in 1759, leaving £5000 to trustees to be applied as they should think right "for pious uses." It was in 1822 organised by a scheme obtained by Act of Parliament (3 Geo. IV. cap. 23)—which scheme provided for purchasing ground for building and endowing an institution in or near Edinburgh

for the maintenance and education of destitute children, and bringing them up to be useful members of society.

In the scheme drawn up by the Commissioners, in which (as already narrated) it was proposed to amalgamate the three institutions, the following alterations on the existing state of affairs was contemplated—Section 3 provided for the constitution and election of a new governing body, to consist of 21 persons. Section 23 provided that within two years after the date of the scheme the governors were to discontinue the existing hospitals and schools in the three institutions; no new foundationers were to be elected to the Orphans' and Watson's Hospitals, and only deaf-mutes were to be admitted as foundationers at Donaldson's. Section 24 provided that the governors should have power to board out the boys on the foundation of Watson's, the children on the foundation of the Orphan, and the children other than deaf-mutes on the foundation of Donaldson's Hospitals respectively, and to pay for them for the time during which they would have remained as foundationers such a sum as they deemed sufficient for maintenance, &c., and also to pay for their education during that period at such schools as they thought proper. Section 27 provided that the governors should establish and maintain an hospital and school within the buildings of the Orphan Hospital. Section 28 provided that they might borrow money, and expend annually up to £5000, for the maintenance of the school and hospital. By section 29 they were empowered to transfer to the hospital the deaf-mutes in Donaldson's, charging for their maintenance and education a sum which they considered reasonable and parents able to pay. By section 30 it was provided that the deaf-mute children were to be admitted from seven to nine years of age, though the governors might admit them up to eleven if they saw fit. The applicants were to be approved by the governors, and children were to be rejected whose state of health or constitution made their admission undesirable. Section 31 provided that they were not to remain in the hospital as boarders after fourteen years old. Section 32 empowered the governors to establish classes for deaf-mutes above fourteen in or out of the hospital, admitting to such classes children destitute and showing special aptitude, and in case of necessity making an allowance of £20 for each child, the limit of age for this privilege being fixed at eighteen, and no further payment to be made for any child whose progress was not satisfactory. By section 33, 60 children, selected by the new governing body, were to be entered on the foundation, not being deaf-mutes but orphans and destitute, and after they had passed an examination equal to the standard suitable to their ages. If the candidates exceeded the vacancies, regard was to be shown to merit as ascertained by the examination. They were to be boarded out, but the governors might, if they thought right, acquire a house for their accommodation. By section 34 day-scholars might be admitted (either hearing children or deaf-mutes), on payment of fees.

By sections 41 and 42 a school was to be established for girls in Donaldson's Hospital, and power was given to borrow money and expend up to £3000 annually on the maintenance of the school.

By section 43, the school was to consist of a secondary and a primary department, the governors being empowered to discontinue the primary if it should appear expedient that the school should be devoted wholly to higher instruction. By section 44 the children were to be admitted after examination. By sections 45 and 46 it was prescribed that in the primary department the highest classes were to be those suitable for children in the 5th Standard of the present Scottish Code, and in the secondary the subjects included reading, writing, arithmetic, Latin, German, French, needlework, pianoforte, cookery, &c., &c. By section 47 fees were to be charged in both departments to cover the cost of education. Section 55 provided that fifty girls, orphans or needful of assistance, should, after examination, be entered on the foundation, regard to merit at the examination being had if the candidates should be more numerous than the vacancies. Section 56 fixed a sum of not more than £300 to be applied for maintenance of the most necessitous of the foundationers. By section 57 an annual sum of £500 was to be applied in establishing competitive bursaries of £10 value, with free education for a period of not more than three years among girls whose parents could not afford to give them higher education, and who were pupils in the primary department or at State-aided schools, and had passed the 5th Standard, or who were on the foundation under section 33. By section 58 higher bursaries were established in the school, to be awarded by competitive examination. By section 59 a sum of £500 might be applied in establishing bursaries for the higher education of girls, to be awarded competitively among pupils attending Donaldson's School. Section 60 provided that bursaries, each of £10 yearly value, should be awarded by competitive examination among boys and girls attending State-aided schools through Scotland, outside Edinburgh, who had passed the 5th Standard and whose parents could not afford to give them a higher education, to be tenable for three years at Donaldson's School or any other school approved by the governors.

Two Special Cases were presented to the Second Division of the Court of Session by the governing body of Donaldson's Hospital as first parties and the Educational Endowments Commissioners as the second parties in the one case, and by the governing body of the Orphan Hospital as the first parties and the Commissioners as the second parties in the other case, on the ground that the scheme was not within the scope or made in conformity with the Educational Endowments (Scotland) Act 1882. The Cases were presented under the 30th and 31st sections of the Act, which provides, *inter alia*, that if the governing body of any endowment to which a scheme relates feels aggrieved by the scheme on the ground that it is not within the scope of or made in conformity with the Act, such body may submit a Case to the Court of Session, to which the Commissioners may be parties, for the opinion of the Court on the question therein stated, and if the Court is of opinion that the scheme is contrary to law on any of the grounds in this section mentioned, the Scotch Education Department shall not approve thereof, but may remit it to the Commissioners. The judgment of the Court of Session is to be final, and the Court may direct the

expenses to be paid out of the funds of the educational endowment to which the proceeding relates.

In the Case for Donaldson's Hospital the first parties, the Governors, contended:—“(1) That the scheme is not warranted by and is contrary to section 5 of the Act, in respect that it proposes the extinction of the existing governing body; (2) that the scheme is contrary to the provisions of section 13 of the Act, in respect that it involves a diversion of funds now applied, in terms of the founder's directions, to free elementary education, such funds not being manifestly in excess, and indeed being manifestly not in excess, of the requirements of the localities to which they belong; and (3) that the scheme is contrary to the provisions of section 15 of the Act, as being framed in disregard of both the spirit and the letter of the founder's intentions, and in particular of the express instruction ‘to build and found an hospital for boys and girls,’ and also as failing to satisfy the other requirements of that section.”

The Commissioners contended that the said scheme is within the scope of the Act; that it is not contrary to any of the provisions of the said sections; and generally is framed in conformity with the whole provisions of the Act.

In the Case for the Orphan Hospital the first parties (Governors) contended:—“(1) That the property of the Orphan Hospital is not an educational endowment within the meaning of the Act as defined by sections 1 and 12. (2) That in any case that proportion of the funds of the Hospital which has been contributed as a condition of membership, or in consideration of rights of presentation, falls within the exception stated in section 1 of the said Act, and cannot be dealt with as educational endowments. (3) That in any case the large sum of money gifted to the Hospital since 1872, or received from testators dying since that date, or yet to be received on the expiry of liferents, is excluded from the operation of the said Act in terms of section 8. There is nothing to prevent the convenient separation of this sum from the other part of the endowment, and section 9 of the said Act does not apply. (4) That the proposed extinction of the existing governing body of the Hospital is not warranted by section 5 of the said Act (which while it authorises the amalgamation, combining, or dividing of endowment, does not warrant the total abolition of a governing body, but only the alteration of its constitution, or the uniting of two or more existing governing bodies, or the establishing of new governing bodies—this last clause being plainly applicable to the case of the dividing of an endowment). (5) That the proposed extinction of the existing governing body is contrary to section 10 of the said Act, subsection 3, the proportion of the funds applicable to charitable uses other than education amounting to or exceeding one-half of the whole endowment. (6) That the scheme does not have regard to the educational interests of the particular class of persons hitherto benefited by the institution, and is contrary to the provisions of section 15 of the said Act.”

The Commissioners as second parties contended—“That the whole property of the Orphan Hospital is an educational endowment within the meaning of the Act; that the sums contributed by

members, or in respect of which rights of presentation have been conferred, do not fall under the exception stated in section 1 of the Act; and that, in respect the Commissioners are of opinion that that part of the property given since 1872 cannot be conveniently separated from the older part, the property given since that date is not excluded from the operation of the Act. The Commissioners further contend that the scheme is within the scope of the Act, that it does not contravene any of the provisions thereof, and generally, is made in conformity with all the provisions thereof.”

The following question of law was submitted in both cases:—“Whether the said scheme, in the particulars above mentioned, or in any, and if so, in which of them, or otherwise, is not within the scope of or made in conformity with the Educational Endowments (Scotland) Act 1882, and is contrary to law?”

The two cases were heard together.

The arguments submitted by the parties in both cases were founded on their contentions, which are narrated above.

Argued for the Commissioners—As matter of law, the Commissioners had a discretion committed to them by the Legislature, and unless the Court were of opinion that there has been some serious miscarriage or gross injustice done under the various deeds of endowments, it would not interfere—*Campden Charities*, May 1881, 18 L.R., C.D. 310, *vide* opinion of Sir Geo. Jessel, M.R., and James, L.J. Now, having regard to the scope of the Act, a perusal of sections 7, 13, and 15 showed that it was contemplated by the Legislature that where directions suitable enough a century ago were not suitable to the present state of matters a certain amount of gentle violence might be done to the founder's intention to carry out its spirit in accordance with modern ideas. Hence the scheme providing specially for secondary or higher education. *Taking Donaldson's Hospital first*:—(1) As to the foundation and constitution. Full power had been given by the 5th section to alter this, and it was not limited to the case of the foundation being provided. (2) There was no diversion of funds applied in terms of the founder's direction to free elementary education. Section 5 gave the Commissioners absolute power not merely to alter the condition of endowments but to amalgamate them. Therefore in judging whether the will had been carried out in the scheme, the whole scheme must be looked at. In point of fact the Commissioners had endeavoured to comply with the leading features of the three trusts by the benefitting parties intended to be benefitted in those schemes, viz., the children of the poorer classes, giving a preference to orphans, and devoting a considerable part of the funds to educate and maintain them. Five-sixths of the whole funds were by the scheme to be applied to giving elementary education, only £1000 a-year being devoted to higher education. It must be borne in mind too that the Education Act of 1872 had greatly altered the law with regard to providing elementary education—*Forrests' Trustees v. Commissioners*, March 20, 1884, 11 R. 719. The Commissioners had only altered the means to adapt them to an end. *Clephane v. Mags. of Edinburgh*, February 26, 1869, 7 Macph. (H. of L.) 7, *vide* Lord Westbury's opinion. (3) The Commissioners had the right to

prefer girls to boys, as they found the latter amply provided for. (4) In subjecting the children to examination the Commissioners were only carrying out the directions in the statute. When a vacancy occurred there must be a selection of applicants, if, as might be expected, they were numerous. *Taking the Orphan Hospital next*:—(1) It was said this was not a proper educational endowment. But it fell fairly within the definition. (2) As regards the entry-money, the donations of £500 were not within the first section. There was no condition of entry at all. It could not be said how much was entry-money and how much voluntary donation. (3) As regards the right of presentation, the proper parties were not represented. But further, they were sums devoted to educational purposes, and fell within "educational endowments." (4) Under section 9 the Commissioners had power to say whether the sums paid or given since 1872 could be separated from sums previously given, and they had decided this in the negative. On the whole matter, the questions as regards both institutions fell to be answered negatively.

The Court made avizandum.

At advising—

LORD RUTHERFURD CLARK delivered the opinion of the Court—In these two cases we are asked to say whether the schemes which have been prepared by the Education Commissioners for the future administration of Donaldson's Hospital and the Orphan Hospital have been made in conformity with the Educational Endowments Act, or are contrary to law. These schemes make very sweeping changes. But we are in nowise concerned with the prudence or propriety of them. That is a matter which is wholly within the discretion of the Commissioners, subject to the control of Parliament. We are only concerned with the question whether the Commissioners have acted within the powers conferred on them by the Act.

It is plain, from the 7th section, that the Commissioners are empowered to make provision for secondary or higher or technical education. It was not contended—indeed it does not admit of dispute—that they might use for this purpose funds devoted by the testator or founder to primary education. Their powers in this respect are very large, and, so far as I see, they are not controlled except by the 13th and 15th sections. The former provides "that no funds now applied, in terms of the founder's directions to free elementary education shall be diverted to any other purpose except to the extent to which such funds are manifestly in excess of the requirements for the purpose of free elementary education of the localities to which they belong."

The latter directs the Commissioners "to have regard to the spirit of the founder's intentions, and in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class is entitled they shall have regard to the educational interests of such class of persons: Provided always that when the founder of any educational endowment has expressly provided for the education of children belonging to the poorer classes, such endowment shall continue so far as requisite to be applied for the benefit of such children." I have not quoted the clauses in full, but I think that I have quoted all that is material.

The limitations which are imposed on the Commissioners show in a very clear manner the extent of the powers which have been conferred on them. For I think that we may safely hold it to be the true construction of the Act, that with regard to the matters dealt with by the sections which I have quoted, they may do what they are not forbidden to do. They may provide that funds now applied in terms of the founder's will to free elementary education shall be diverted to another purpose, if these funds are manifestly in excess of the requirements of the localities to which they belong. They may abolish or modify any privileges or educational advantages to which a particular class of persons is entitled, if they have regard to the educational interests of such class of persons. Nor are they bound to continue any educational endowment for the education of children of the poorer classes except in so far as the continuance of that endowment is requisite for the education or benefit of these children. They must of course keep within the statutory limitations. But I see nothing else to control them. They are by the 17th section to extend the benefit of an endowment to both sexes, and by the 16th it is directed that regard shall be paid to merit as ascertained by examination.

The Governors of Donaldson's Hospital assign three grounds on which, according to their contention, the scheme for the future administration is contrary to law.

1. They say that it is contrary to the Act because it proposes the extinction of the governing body. By the scheme three institutions have been amalgamated—Donaldson's Hospital, Watson's Hospital, and the Orphan Hospital. It was not, I think, contended that this amalgamation was unlawful, and at any rate I see no ground for the contention if it were. The scheme proposes a governing body for the amalgamated hospitals. In framing this part of the scheme there is no statutory direction, except that the Commissioners shall have regard to the spirit of the founder's intentions. I see no reason for thinking that they violated this direction.

2. Again, they say "that the scheme is contrary to the provisions of section 13 of the Act, in respect that it involves a diversion of funds now applied, in terms of the founder's directions, to free elementary education, such funds not being manifestly in excess, and indeed being manifestly not in excess, of the requirements of the localities to which they belong." It appears to me that this is an allegation of fact, and unless the fact be proved, the objection necessarily fails. We must assume that the Commissioners are satisfied that the allegation is not well founded. They are directed by the statute to take care that no funds now applied in terms of the founder's directions to free elementary education shall be diverted to any other purpose, except to the extent to which such funds are manifestly in excess of the requirements for the purpose of free education of the localities to which they belong. They have no doubt discharged their statutory duties to the best of their ability, and are satisfied, by proper inquiry, that they are acting within their powers. We cannot inquire into the fact, or order a proof on it. The Commissioners are the sole judges with respect to it, subject to the control of Parliament.

3. The third objection is, "that the scheme is contrary to the provisions of section 15 of the Act, as being framed in disregard of both the spirit and the letter of the founder's intentions, and, in particular, of the express instruction 'to build and found an hospital for boys and girls,' and also in failing to satisfy the other requirements of that section. This is very general and vague. The Commissioners are directed to have regard to the spirit of the founder's intentions, and I must assume that they gave this matter due consideration. I see no reason for thinking that they have violated this statutory instruction. It must be kept in view that it is an instruction only, and given to a body to whom very extensive powers are intrusted. They are empowered to make great changes, even to the diversion of the funds of the foundation, or at least a part thereof, from the purpose for which they were destined. These changes necessarily involve a violation of the letter of the founder's will. But if the letter may be violated, how is a court of law to decide whether the spirit has been observed or has been disregarded? That cannot be a question of law. It is one of discretion, and that discretion is vested in the Commissioners, who have a full knowledge of all the circumstances on which the proper exercise of it depends. We cannot review them in the exercise of this discretion. We have neither the knowledge nor the power. It is possible to conceive of an abuse of their discretion so flagrant as would warrant the Court in interfering. But from anything which has been submitted to us I cannot hold that the Commissioners have disregarded the statutory instruction.

Various objections are stated on the part of the Orphan Hospital.

The first and second are to the effect that the property of the Hospital and the funds thereof do not fall within the operation of the Act. I can only say that in my opinion the words of the Act are so comprehensive as to include them. The matter which creates most difficulty is the right of presentation. This right cannot, however, be considered as purchased or as being patrimonial. It is attached by the constitution of the Hospital to "benefactions" of £200 or upwards. I cannot hold that these benefactions are anything else than contributions to a charity, and I think that the right of presentation which is attached to them is merely intended to give the donors a share in the administration of the charity by empowering them to select some of the children who are to obtain the benefit of it. For the right to present is necessarily qualified by the condition that the child presented is a proper person to be received into the Hospital.

The third objection is sufficiently answered by the declaration which the Commissioners have made under the 9th section.

The remaining objections are disposed of by what I have already said in regard to Donaldson's Hospital.

We have delayed our decision in these cases—perhaps we have delayed it too long. But we have deliberated much, because we have felt much anxiety. The scheme of the Commissioners is most sweeping. It changes wholly the constitution and character of three hospitals which we believe are in good repute and do useful work. It diverts to the purpose of secondary

or higher education very large funds which were given for charity. It provides that no child shall be admitted into what remains of the Orphan Hospital "unless it shall have passed an examination equal to the standard suitable to its age," and probably thus excludes the least cared for and the most helpless.

We have considered very carefully whether the statute could authorise a change so radical and so subversive of the original trusts. But having regard to the extensive powers and large discretion which have been entrusted to the Commissioners, we are constrained to say that in our opinion the scheme is not contrary to law. Of course we say nothing as to its propriety or expediency. That is a matter for the discretion of the Commissioners and for Parliament.

LORD CRAIGHILL and LORD YOUNG concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor in each case:—

"The Lords having heard counsel for the parties on the case, are of opinion that the scheme complained of is not, in respect of any of the objections maintained by the governing body, beyond the scope of or disconform to the provisions of the Educational Endowments Act 1882, and is not contrary to law: Find and declare accordingly: Authorise the governing body to pay the expenses in relation to the case incurred by them and by the Commissioners out of the funds of the endowment; and decern."

Counsel for Governors of Donaldson's Hospital—Pearson—H. Johnston. Agent—John Cook, W.S.

Counsel for Governors of Orphan Hospital—Mackay—Dickson—Wood. Agents—Melville & Lindesay, W.S.

Counsel for Commissioners—Hon. H. J. Moncreiff—Gillespie. Agent—Donald Beith, W.S.

Thursday, October 29.

OUTER HOUSE.

[Lord M'Laren.

FRASER v. STRONACH.

Agent and Client—Witnesses—Expenses—Act of Sederunt, 21st December 1765.

The agent conducting a cause in the Court of Session held liable for the expenses of witnesses who had appeared before a commissioner under a diligence granted by the Lord Ordinary, though he had not personally instructed the citation, that having been done by the party in his own name.

On 17th November 1884 an action was brought in the Court of Session at the instance of David Littlejohn, assignee of James Garvie & Son, builders, Aberdeen against William Alexander Fraser, a dealer there. The action was not defended, and decree was given on the 16th December 1884, in the undefended roll. The decree was extracted on the 31st December 1884. On 12th March 1885 Fraser brought a note of suspension of