which it alters or modifies, but leaves the others untouched. But I think that when one party to a contract calls upon the other to fulfil his part of the contract, he must be prepared to show that he is ready to fulfil his own part of the contract so far as it has not been fulfilled, and that that is especially the case when dealing with a bankrupt estate. Now the trustee was, in my view, just as much bound as Mitchell would have been to erect buildings on the entire feu to the amount of £5000, but when he made the demand for allocation he had not done so. He had erected no buildings whatever on the other portion of the feu, and he declined to give any undertaking that he would. Had the defenders granted the allocation demanded they might, and probably would, have been left with a part of the feu, for which a feu-duty of £30 would in that case have been payable by the trustee, but on which there existed no security in the shape of buildings for its payment, such as the defenders were entitled to demand.

I think that, in the circumstances, the defenders were entitled to refuse to make the allocation demanded, seeing that they had no security that the trustee would fulfil the counter obligations to them which were unfulfilled, and that he would give no undertaking that he would fulfil them.

I think the defenders should be assoilzied.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD KINNEAR—I also agree with Lord Adam for the reasons he has given. I think the agreement in question modified one of the terms of the contract in favour of the vassal, but his trustee, although he may take up the entire contract, or might have taken up the entire contract, if he had chosen, cannot take up a single term of the contract and leave the rest untouched—he must take up the contract as a whole. It was urged that the effect of the agreement for allocation was to divide the property into two portions, so that the portion to which the allocation refers was separated from the remainder and might be treated as a distinct estate. I think that is entirely fallacious. The agreement gave the vassal facilities for making an allocation if he chose to take advantage of them, but no actual separation was made; and in order to separate the two parts of the estate on the favourable terms which it is assumed were given, the trustee must in the first place take up the contract.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuer and Respondent—Shaw, K.C.—Sandeman. Agents—Peter Morison & Son, S.S.C.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Hunter. Agents—Galloway & Davidson, S.S.C.

Friday, March 6.

FIRST DIVISION.

[Lord Low, Ordinary.

M'FADZEAN AND OTHERS *v.* SCHOOL BOARD OF KILMALCOLM.

School — Title to Sue — "Parent" — Subordinate Manager of Orphan Home — Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 1.

The Education Act of 1872 lays upon every "parent" the duty of providing education for his children, and section 1 defines "parent" as including "guardian and any person who is liable to maintain or has the actual custody of any child."

An orphanage consisted of a number of detached houses, in each of which a certain number of children lived under the charge of a lady or a married couple, who were known as the "fathers" and "mothers" of the children. These "fathers" and "mothers" were appointed by the founder and general manager of the orphanage, who had the power to dismiss them at any time. They had the same authority over the children for ordinary domestic purposes as if they were their own, but the ultimate disposal of the children by emigration or otherwise rested with the founder, to whose disposal they were committed at entry. In an action at the instance of these "fathers" and "mothers" against a school board for declarator that the defenders were bound to provide school accommodation for the children in the orphanage, *held* that the pursuers were not the "parents" of the children within the meaning of the Education Act, and had no title to sue.

School—Sufficiency of School Accommodation—Process—Declarator—Competency—Question of Government Administration—Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *secs.* 27, 28, 30, *and* 36.

In an action at the instance of certain persons, who alleged themselves to be "parents" within the meaning of the Education Act 1872, against a school board, concluding for declarator that there was not a sufficient amount of accommodation in the public schools in the parish, and that it was the duty of the defenders to supply the deficiency in the manner provided by the Education Act 1872, *held* (*per* Lord Low, Ordinary) that the action was incompetent, in respect that the provisions of the Education Act 1872 made the question of the sufficiency of school accommodation one for the school board, subject only to the control of the Scotch Education Department, whose determination is final.

Question reserved in the Inner House.

This was an action at the instance of David M'Fadzean and others, superintendents of

separate houses in a charitable institution known as Quarrier's Homes, in the parish of Kilmalcolm, Renfrewshire, against the School Board of said parish.

The conclusions of the action were—"Therefore it ought and should be found and declared by decree of the Lords of our Council and Session that there has not been provided and is not at present in the parish of Kilmalcolm a sufficient amount of accommodation in public schools available for all persons residing in said parish for whose education efficient and suitable provision is not otherwise made, and that it is the duty of the defenders the said School Board to supply the deficiency in the manner provided by the Education (Scotland) Act 1872 and subsequent statutes: And the defenders the said School Board ought and should be decerned and ordained by decree foresaid to provide sufficient accommodation in public schools in the said parish for the children residing in the houses occupied by the pursuers, and at present numbering in all 917, and to provide duly qualified teachers sufficient for the educational requirements of said children, all in terms of said Act."

The facts of the case and the sections of the Education Act 1872 on which the question turned are fully stated in the opinions of the Lord Ordinary and the Lord President, *infra*.

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The action being incompetent, *et separatim*, the pursuers' statements being irrelevant, the action should be dismissed. (3) There being no obligation upon the defenders under statute or at common law to provide school accommodation for said children, decree of absolvitor should be pronounced."

Proof was allowed and led.

On 24th May 1902 the Lord Ordinary (Low) pronounced an interlocutor by which he sustained the defenders' first plea-in-law and the first branch of their second plea, and dismissed the action.

Opinion.—"The 917 children referred to in the second article of the condescendence are, with the exception of a very few, the orphan and destitute children who when the action was brought were resident in the Orphan Homes for Scotland which were established by Mr Quarrier at Bridge of Weir, in the parish of Kilmalcolm, about the year 1876.

"The Homes consist of a number of detached houses, each capable of accommodating (upon the average) from twenty to thirty children. Each house is under the charge of a lady or of a married couple, who are called the 'mother' or the 'father and mother' of the house, and who are allowed to have and exercise as nearly as possible the same discretion and authority over the children, so far as their home life is concerned, as if they were actually their own, the object being to provide for the children the training and influences of family life. The children who are admitted to the Institution are distributed among the different houses as Mr Quarrier or his superintendent thinks best.

"The 'fathers and mothers' have their board and lodging free, and although no payment in money is guaranteed to them (the Homes being dependent upon voluntary contributions for their support) they do in fact receive payments amounting to about £3 per month. The 'fathers and mothers' are selected and engaged by Mr Quarrier, and he is entitled to dismiss them at any time, the practice apparently being to give one month's notice.

"The lands upon which the Homes are built are vested in trustees (of whom Mr Quarrier is one), the original title being a disposition dated in 1876 when the lands were purchased by Mr Quarrier. The disposition is in favour of the trustees 'for behoof of the scheme organised in Glasgow by the said William Quarrier for the purpose of providing homes for and upbringing and educating destitute children.' The trust-purposes declared in the disposition of 1876 were somewhat modified by a disposition which was executed in 1882 upon the occasion of certain of the original trustees resigning and certain new trustees being assumed. By the latter disposition it was declared that the trustees were to hold the lands and the buildings erected or to be erected thereon 'for the purposes of the said scheme or other kindred purposes under the direction and control of the said William Quarrier, whom failing, then for the purposes of the said scheme or other kindred purposes as the same may be administered at the time, or as the said William Quarrier may by any deed under his hand direct or recommend the same to be managed or applied in virtue of the provision to that effect hereinafter written, or for the same or similar purposes as the same may be developed and managed by the wisdom and sound judgment of the said trustees themselves.' It was then declared that as it was impossible to foretell what modifications of the scheme might be necessary in the future, the power and discretion of the trustees should be left free and untrammelled, 'but' (the instrument proceeds) 'in the event of the said William Quarrier, after acquiring experience from his position and means of observation under the present trust, executing a deed of directions or recommendations regarding the future scope or management thereof, and which deed may contain the nomination or recommendation of a person to succeed the said William Quarrier in the direction and control of the said scheme, such deed shall be valid and receive effect and be acted upon unless modified or altered by a two-thirds vote of the trustees acting for the time.'

"Notwithstanding the constitution of the trust, therefore, Mr Quarrier continued to have the control of the Institution, and it is not disputed that he in fact exercises complete control.

"From the beginning the education of the children at the Homes naturally occupied a prominent place in the scheme, and until 1899 Mr Quarrier provided means of education. At first a room in one of the buildings was used as a school, but as the

number admitted to the Homes increased, that was found to be quite inadequate, and Mr Quarrier resolved to build a school. He was enabled to do so about 1890 by receiving for the purpose a donation of £6000, to which the donor subsequently added £2000 for the erection of a house for the teachers. A school and teachers' house were accordingly erected.

"The education of the children was carried on by Mr Quarrier until 1899, when he closed his school and ceased to educate the children because the County Council had assessed the Homes for county rates. It appears that payment of rates for the Homes was demanded for the first time in 1898, and the demand being resisted by Mr Quarrier on the ground that the Homes were exempted by the Sunday and Ragged Schools (Exemption from Rating) Act 1869, an action was brought to try the question. It was held by the First Division that, even assuming that the Homes were within the Act, it was not imperative upon, but only optional to, the local authority to exempt them from rates, and that as there was no proposal to exempt them it was unnecessary to decide whether the Homes did or did not fall within the Act. Lord Pearson, who was Lord Ordinary in the case, however, expressed the opinion that the Homes were not ragged schools within the meaning of the Act.

"Mr Quarrier having discontinued his school, called upon the School Board of the parish to provide for the education of the children, and in April 1899 he marched some 800 children to the school at Kilmalcolm and demanded that they should be admitted. Naturally that demand could not be complied with for want of accommodation, but the School Board also took up the position that they were under no obligation, and therefore were not entitled, to undertake the education of the children in the Homes.

"The matter was then brought before the Education Department, and a long correspondence ensued between Mr Quarrier and the Department, and between the Department and the School Board.

"Several suggestions were made for the solution of the difficulty. In the first place Mr Quarrier offered to lease his school to the School Board, and the Education Department thought that the offer should be accepted. The Board, however, were advised by counsel that they had not power to enter into such a lease. Then Mr Quarrier offered to give the Board the use of the school upon certain conditions, but again the Board were advised that they had not power to enter into such a transaction. Then the Department suggested that Mr Quarrier should continue to carry on his school but should place it under inspection, which would enable the Government grant to be earned. That was estimated to amount to about £1500 per annum, a sum which would have enabled Mr Quarrier to carry on the school at less expense than he had formerly done. Mr Quarrier, however, would have nothing to say to that proposal, as it appears to be against his principles to accept State aid.

"These are the circumstances under which the present action was brought. One would have expected that the pursuer of the action would have been Mr Quarrier or the trustees in whom the Homes are vested. But that is not the case. For some reason which I do not know, the so-called 'parents' of the various houses have been put forward as pursuers, and the defenders plead that they have no title to sue. I should here explain that some of the pursuers have child en of their own, who are included in the list given in the condescendence. In regard to these children I need hardly say there is no difficulty. The only question is in regard to the orphan and destitute children who have been received into the Homes.

"It was argued that the pursuers have a good title to sue because they are 'parents' within the meaning of the Education Act of 1872. In the interpretation clause of that Act it is provided that the word 'parent' shall include guardian and 'any person who is liable to maintain or has the actual custody of any child.'

"The pursuers are not the guardians of nor are they liable to maintain the children placed under their charge, but it was said that they have the actual custody of these children. Now, no doubt, in a sense, the pursuers have the custody of the children, because, as I have pointed out, Mr Quarrier gives to them very large discretion as to the management and control of the children in their home or family life. But I think it is Mr Quarrier who has the custody of the children within the meaning of the Act. Those who send children to the Homes have nothing to do with the pursuers, and do not select the particular 'father' or 'mother' to whom a child is to be entrusted. The children are committed to the care of Mr Quarrier, and the pursuers are simply his servants who look after the children, subject to his ultimate direction and control. Mr Quarrier says that he does not interfere with the 'parents.' I do not doubt that that is the case, because the 'parents' are carefully selected persons who have an interest in the work, and probably seldom give cause for complaint. But if Mr Quarrier found that a home was being conducted in a manner of which he did not approve it would be his duty (which I have no doubt he would perform) to put matters right.

"That Mr Quarrier has truly the custody of the children in the Homes is markedly shown by the 'Form of Agreement' which persons applying to have children admitted to the Homes are required to sign. Taking a dozen applications at random, I find that the applicant is sometimes the mother of the child, sometimes the aunt, or the stepfather, or the grandmother, or the guardian, or the relationship is not defined. The form of these 'agreements' is that application is made that the child should be received into the Homes, 'with the view of being emigrated to Canada under the care of William Quarrier or his agents, or to be kept at home or otherwise disposed of as Mr Quarrier thinks best.'

"It therefore seems to me that the pursuers cannot oe regarded as being 'parents' within the meaning of the Education Act. They are not the custodiers of the children, but the servants of the custodier. They have no responsibility for the children except that which Mr Quarrier imposes upon them. They are entrusted by him with the duty of looking after the physical and moral welfare of the children in their home life, but as regards matters outside of the domestic life of the children, such as secular education, the pursuers have no powers or duties. Now, unless the pursuers are 'parents' within the meaning of the Education Act, it was not contended that they have a title to sue the present action, and I think that the defenders have an interest to object to being compelled to try a difficult and important question with parties who have neither title nor interest to raise it.

"I am therefore of opinion that the plea of no title to sue is well founded, but as a different view may be taken by a higher Court, and the case was very fully argued, I think that it is right that I should express the opinion which I have formed upon the merits.

"Mr Quarrier having refused to continue his school and to put it under inspection, the difficulty (the defenders say the impossibility) of making any arrangements whereby the existing school at the Homes could be utilised arose in this way. By the 37th section of the Education Act a School Board is empowered to take on lease a school which is not maintained or partly maintained from contributions or donations. As Mr Quarrier's school was entirely maintained from contributions and donations it did not fall within the section, and therefore the defenders were advised that they had no power to take a lease of it. Then sections 38 and 39 deal with schools which are maintained from contributions and donations, and it is made lawful for the person vested with the title to such a school, with certain consents, to transfer it, with the site thereof, absolutely to the School Board. Assuming that the school at the Homes falls within these sections, Mr Quarrier could not be compelled to transfer the school to the defenders, but has only the option to do so, an option which it may be taken he has no intention of exercising. But as these sections authorise nothing except an absolute transfer of such schools to the School Board, the view of the defenders is that they have no power to accept the offer which Mr Quarrier made to allow them to have the use of the school. Whether that view is or is not well founded I express no opinion as the question is not raised and was not argued.

"The pursuers rest their case upon the 26th section, by which it is enacted that 'there shall be provided in every parish and burgh a sufficient amount of accommodation in public schools available for all persons resident in such parish and burgh for whose education efficient and suitable provision is not otherwise made.'

"The pursuers maintain (1) that the children in the Homes are 'persons resident within the parish' within the meaning of the section; (2) that as Mr Quarrier has shut up his school no efficient or suitable provision is otherwise made for their education; and that therefore (3) the defenders are bound to provide school accommodation for that purpose.

"In regard to the first of these propositions the defenders took up the position in their correspondence with the Education Department, and they also plead in this case, that they are under no obligation to provide school accommodation for the children in the Homes because they form no part of the normal population of the parish, but have been gathered from all parts of Scotland. As a general proposition, and apart from the special circumstances of this case, I do not think that that contention is sound in law. The children are lawfully in the parish, and I do not think that the mere fact that they are not part of the natural and ordinary population of the parish, but are orphan or destitute children from all parts of the country who are collected in a Home, is in itself sufficient to take them outside the scope of the 26th section.

"But in order to impose an obligation upon the School Board it is not only necessary that the children should be resident in the parish, but that there should not be efficient and suitable provision made for their education otherwise than by means of the public schools of the parish. Now for over twenty years Mr Quarrier has provided efficient and suitable education for the children, and at the time when he demanded that the defenders should undertake their education and provide school accommodation for them he was possessed of a sufficient school which had been built with money contributed for that purpose, and the funds necessary for defraying the expense of educating the children had admittedly never been wanting. But because the trustees in whom the Homes were vested were, as proprietors of lands in the parish, assessed for rates, Mr Quarrier shut up his school, ceased to educate the children under his charge, and demanded that the defenders should provide school accommodation and education for them. It is not surprising that the defenders were unwilling to accede to that demand, because it presumably involved building new schools capable of providing accommodation for somewhere about a thousand children in excess of the ordinary requirements of the parish, and that too to meet a necessity which might not continue.

"I now turn to the summons to see what it is that the Court is asked to do. In the first place declarator is asked 'that there has not been provided and is not at present in the parish of Kilmalcolm a sufficient amount of accommodation in public schools available for all persons residing in said parish, for whose education sufficient and suitable provision is not otherwise made, and that it is the duty of the defen-

ders, the said School Board, to supply the deficiency in the manner provided by the Education (Scotland) Act 1872, and subsequent statutes.'

"There is then a conclusion to the effect that the defenders should be ordained to provide sufficient school accommodation and duly qualified teachers for the children, 917 in number, residing in the pursuers' houses.

"The latter conclusion is not now insisted in, so only the declaratory conclusion remains. The first question appears to me to be whether it is competent to ask this Court to declare that there is not a sufficient amount of school accommodation in the parish. To answer that question it is necessary to consider the provisions of the Education Act.

"I have already referred to the 26th section, which enacts in general terms that sufficient accommodation in public schools shall be provided for all persons resident in the parish for whose education suitable provision is not otherwise made. The succeeding sections, from the 27th to the 36th, provide how that enactment is to be carried out.

"By the 27th section it is provided that it shall be the duty of every School Board first elected, as soon as conveniently may be after its election, 'and of every subsequently elected School Board from time to time as shall be reasonable, to ascertain and take into their consideration the educational requirements of such parish or burgh, and the extent and quality of the provisions for supplying the same by means of schools existing and in operation within or so situated as to be conveniently available for such parish or burgh.' The School Board are then directed to report the opinion at which they arrive to the Board of Education (now the Education Department), and the latter are empowered to approve of the determination of the School Board, or to alter or vary it, or to order further inquiry. It is in particular enacted in the 28th section that 'should the said Board of Education see fit to direct that additional school accommodation be provided, although not determined upon by the School Board, they shall have power to do so, and their direction shall be acted on and carried into effect by the School Board without unnecessary delay.'

"By the 30th section it is provided that in determining what accommodation or additional accommodation is required 'the School Board and the Board of Education shall have regard to and shall take into account every school, whether public or not, and whether or not situated in the said parish or burgh, which in their opinion gives or will when completed give efficient education to and is or will when completed be suited and available for the education of the children of such parish or burgh or any portion of them;' and then the School Board and the Board of Education are armed with powers to enable them to obtain full information in regard to all such schools.

"It is further provided in the 36th section that if at any time the Board of Education are satisfied that the School Board have failed, *inter alia*, 'to provide such additional school accommodation as in the opinion of the Board is necessary to supply a sufficient amount of school accommodation in the parish,' they shall send to the School Board a requisition requiring them to fulfil the duty which they have failed to perform, and if the School Board do not do so they 'may be summarily compelled to do so by the Court of Session on a petition and complaint at the instance of the Lord Advocate.'

"The result of these enactments seems to me to be that the question whether the amount of school accommodation in a parish is or is not sufficient is one for the consideration of the School Board in the first instance, subject to the control of the Education Department, whose determination is final. I am of opinion that it is not competent for this Court to review the determination of the Department upon such a question. Suppose that the Department determined that additional school accommodation was required in a parish, and directed the School Board to provide such accommodation, I think that it is plain that it would not be competent for the School Board in such a case to bring an action to have it declared that the existing school accommodation in the parish was sufficient, and that no additional accommodation was required. This is really the converse of that case. The Education Department have refused to require the defenders to provide additional school accommodation, and this Court is now asked to declare that additional accommodation is required. I am of opinion that that is not competent.

"I quite recognise that the question, whether or not there is sufficient school accommodation in a parish, although primarily one of fact, might largely depend upon an underlying question of law which the Court might be called upon to determine. In such a case, if the question of law was distinctly raised in the pleadings, and if the proper parties were present, I should be disposed, if possible, to decide it, even although the terms in which the summons was framed were not altogether appropriate. But in the present case there is no room within the summons to deal with any question except the sufficiency of the school accommodation. In the condescendence and anwers it is true that the question is raised whether the children in the Homes are persons resident within the parish within the meaning of the 26th section. Even assuming that that question was answered, as I think that it would fall to be answered, in the affirmative, it would not advance matters at all, or enable any decree to be given under the summons. I think that there are questions of law the determination of which might materially aid in the solution of the difficulty which has arisen; but they are not raised upon this record, they were not argued, and I imagine that they are probably all questions which could not be dealt with in proceedings to which Mr Quarrier is not a party.

"I have therefore come to the conclusion that I have no choice but to dismiss the action."

The pursuers reclaimed.

The arguments on each side, so far as relating to the question of title to sue, sufficiently appear from the opinion of the Lord President, *infra*. An argument was also submitted on the question of the competency of the action, which in the view taken by the Court it is unnecessary to report.

At advising—

LORD PRESIDENT—Two questions are raised in this case—first, whether the pursuers have a title to sue the action; and second, whether, assuming that they have such a title, they have established grounds entitling them to obtain decree in it.

In the year 1876 Mr William Quarrier purchased certain land at Bridge of Weir, in the parish of Kilmalcolm, and he has since erected a number of detached houses upon it which are generally known as "Quarrier's Homes." The disposition of the land was taken in favour of trustees with the view of carrying into effect a benevolent scheme devised by Mr Quarrier "for the purpose of providing homes for and upbringing and educating destitute children." The trust purposes expressed in the disposition of 1876 were somewhat altered by a disposition executed in 1882, by which it was declared that the trustees should hold the lands and buildings erected or to be erected thereon for the purposes of the scheme, or for kindred purposes, under the direction and control of Mr Quarrier, "whom failing, then for the purposes of the said scheme or kindred purposes, as the same may be administered at the time, or as the said William Quarrier may by any deed under his hand direct or recommend the same to be managed or applied, in virtue of the provision to that effect hereinafter written, or for the same or similar purposes as the same may be developed and managed by the wisdom and sound judgment of the said trustees themselves." By the latter deed Mr Quarrier reserved to himself the power of executing a deed of directions or recommendations regarding the future scope and management of the trust, which deed should contain the nomination or recommendation of a person to succeed him in the direction and control of the scheme, and should be valid and receive effect and be acted upon unless modified or altered by a two-thirds vote of the trustees acting for the time.

Mr Quarrier was thus entitled to retain, and he has in fact retained, complete control over the management of the houses, each of which is under the charge of a lady or a married couple, who are known as the "mother," or the "father and mother," of the houses, and who exercise very much the same control over the children in so far as their domestic life is concerned as if they were their own. There are upwards of nine hundred children accommodated in the Homes, and they are distributed among the houses in such way as Mr Quarrier or his superintendent may direct.

The "fathers and mothers" receive their board and lodging free, and they also receive payments in money amounting to about £3 per month. Mr Quarrier has the power to dismiss them at any time, although they generally receive a month's notice.

Down to the year 1899 Mr Quarrier provided education for the children within the buildings, in which, about 1890, a school and teachers' house were erected, the cost being defrayed from two donations which he received for this purpose, amounting together to £8000.

In consequence of Mr Quarrier having been rated by the county council for county rates in respect of the Homes, he discontinued his school, and required the School Board of the parish to provide education for the children resident in the Homes; but the School Board declined to undertake the duty of educating these children. Various suggestions were made with a view to meeting the difficulty, but without success, and the present action was raised in May 1901 against the School Board of the parish with a view to obtaining an order upon that board to provide sufficient school accommodation for and to educate therein the children resident in the Homes.

The first plea stated by the defenders is "no title to sue," and this plea is founded upon the contention that the "fathers and mothers" of the Homes, who are the pursuers of the action, are not "parents" within the meaning of the Education Act of 1872, by the interpretation clause of which it is declared that "the word 'parent' shall include guardian, and any person who is liable to maintain or has the actual custody of any child." It is clear that the pursuers are not in any reasonable sense the guardians of the children, nor are they under any liability to maintain them, and it therefore appears to me that the objection to their title to sue must be sustained, unless they can establish that they have "the actual custody" of the children within the meaning of the Act of 1872. I am, however, of opinion that the Lord Ordinary is right in holding that they have not the actual custody of the children within the meaning of the Act. They are simply the servants of Mr Quarrier, and I agree with the Lord Ordinary in thinking that he has the custody of the children in the sense of the Act. The power of receiving, dismissing, and regulating the residence and pursuits of the children rests with him, not with the "fathers and mothers," who are simply employed by him to take care of them. The form of agreement which persons desiring to have children received into the Homes are required to sign bears that they are received with a view to being emigrated to Canada under the care of Mr Quarrier or his agents, "or to be kept at home or otherwise disposed of as Mr Quarrier thinks best." It would

scarcely be possible to conceive a larger power of control and disposal of a child than is thus conferred upon him. But no such power is conferred on the fathers and mothers whom he places in the actual charge of the children. They have no power over the children except what is derived from Mr Quarrier, nor have they any responsibility with respect to them except that which they undertake to him. It therefore appears to me that they are not the "parents" of the children within the meaning of the Education Act; and that consequently the Lord Ordinary is right in sustaining the plea of no title to sue.

The second question is, whether this Court has the power and the duty to determine whether a proper amount of accommodation for elementary teaching is provided by the School Board of the parish of Kilmalcolm, in respect that it has not made, and declines to make, provision for receiving and educating the children resident in Mr Quarrier's Homes, or whether the sufficiency of the school accommodation provided falls to be determined by the Scotch Education Department. Seeing, however, that, for the reasons already assigned, it appears to me that the pursuers have no title to sue, and that consequently the action should be dismissed, I think that it is unnecessary to express any opinion upon this second question.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuers and Reclaimers —Clyde, K.C. — Hunter. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Respondents — Sol.-Gen. Dickson, K.C.—M'Clure. Agents—Cumming & Duff, S.S.C.

Tuesday, March 10.

FIRST DIVISION.

ALEXANDER, PETITIONER.

Minor and Pupil — Custody — Orphans — Paternal Grandfather and Nearest Male Agnate in Question with Maternal Uncle — Welfare of Children — Religion — Respective Material Advantages of Homes Offered—Grandfather Residing in House of Niece.

A petition for the custody of two pupil children whose parents were dead was presented by the children's paternal grandfather, who was the nearest male agnate of the children. Answers were lodged by the maternal uncle of the children, with whom the children had resided since the death of their father and for some time prior to that event. The petitioner was a Protestant and the respondent was a Roman Catholic. The father of the children had originally been a Protestant, but became a Roman Catholic prior to his marriage, his wife being a member of that Church; but some time before his death he again became a Protestant, and was a Protestant at the date of his death. The children had been baptised according to the rites of the Roman Catholic Church. Shortly before his death the father had consulted a Presbyterian minister with a view to having the children removed to a "home," and he made no objection when the minister suggested a certain Protestant orphanage. The petitioner lived with a niece to whom he paid nothing for board or lodging. She was willing to receive the children, and to do all in her power for them. The circumstances of the petitioner's niece and of the respondent respectively were such that the home offered by the petitioner afforded a greater prospect of material wellbeing and better prospects of advancement in life to the children than the home of the respondent. As regards the moral training which the children were likely to receive in the two houses respectively, there was no reason for drawing a distinction.

Having regard to the physical welfare of the children, and in view of the inference, from the latest expression of the father's wishes, that he would have had no objection to the children being brought up as Protestants, the Court *granted* the prayer of the petition.

John Alexander, miner, residing at Lochend Cottages, Kirkliston, Linlithgowshire, died there on November 7, 1902, leaving two pupil children, Mary Jane and Mary Anne.

John Alexander's wife, Mrs Jane M'Garrity or Alexander, predeceased him on May 31, 1902. After his wife's death John Alexander, with his two children, took up his residence with his brother-in-law, Patrick M'Garrity, miner, and his wife, at Lochend Cottages, Kirkliston, and the children after their father's death continued to reside there.

On December 5, 1902, William Alexander, labourer, Old Town, Broxburn, father of the deceased John Alexander and grandfather of the two children, with the concurrence of their father's sister, and of their father's cousin, the petitioner's niece Mrs William Anderson, presented a petition praying the Court to find him entitled to the custody of the children, and to ordain Patrick M'Garrity to deliver up the children to him.

The petitioner stated—"The deceased John Alexander and his family, including the petitioner, were and are Protestants, and John Alexander was very desirous and intended that his children should be brought up in that faith . . . The said children are in the custody of Patrick M'Garrity, who is a Roman Catholic. M'Garrity is in poor financial circumstances, and not in a position to properly maintain and educate said children. His weekly wage is about thirty