The defenders, before defences were lodged, by ordinary motion, and without presenting a petition under the Personal Diligence Act 1838, section 20, moved the Lord Ordinary for recal. The motion was opposed by the pursuers on the grounds *firstly*, that it was incompetent, *secondly*, that it was unwarranted on the merits, and the Lord Ordinary refused the motion on the former ground. The pursuers were ultimately successful in the action and were found entitled to expenses.

In their account they included a charge of £6, 6s. 10d. for their successful opposition of the motion for recal. This charge the Auditor disallowed *in toto*, and the pursuers objected to the disallowance in a note of objections to his report.

Argued for the pursuers—The Auditor had disallowed the charge in question on the ground that proceedings for the recal of arrestments formed of necessity a separate and independent process, and that accordingly they must be separately dealt with and could not form a charge in the principal action. That was probably true where there had been a separate petition for recal. In the present case, however, there had been no separate petition—what had happened merely was this that the pursuers had been successful in an incidental motion in the main process, for which they must get their expenses in the ordinary way. The Lord Ordinary had written no interlocutor and the pursuers accordingly had had no opportunity of having the expenses specially dealt with or specially reserved.

Argued for the defenders — Formerly arrestments could only be recalled by petition to the Inner House. The Personal Diligence Act 1838, section 20, had made a petition to Lord Ordinary competent, and had empowered him to dispose of the question of expenses. Such a petition was clearly a separate process, the expenses of which must be separately dealt with. It was true that an ordinary motion had by custom been allowed to take the place of the petition, but the motion was merely equivalent to the petition and was just as much a separate process as the petition. If expenses were to be recovered, they must be awarded, or at anyrate reserved, at the time.

The Court sustained the objection and allowed three guineas as the expenses.

Counsel for the Pursuers—Macmillan. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defenders—C. D. Murray. Agent—R. H. Miller, S.S.C.

Tuesday, March 17.

SECOND DIVISION.

[Sheriff Court at Perth.

SINCLAIR *v.* MOULIN SCHOOL BOARD AND ANOTHER.

School—Education—School Board—Duty to Provide Education—Title to Sue—Child—Parent—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *secs.* 1 *and* 69—*Education (Scotland) Act* 1901 (1 *Edw. VII, cap.* 9), *sec.* 1.

A pupil child residing with his grandfather (his "parent" within the meaning of sec. 1 of the Education (Scotland) Act 1872) *held* to have no title to raise an action against a school board for the purpose of enforcing his alleged rights to receive education, the title to sue such an action being in the "parent," on whom the duty of providing elementary education for the child has been imposed by the Education Acts.

School—Education—Defective Children—Duty of School Board—The Education of Defective Children (Scotland) Act 1906 (6 *Edw. VII, c.* 10), *secs* 1 *and* 2—*Decision of School Board—Review.*

The Education of Defective Children (Scotland) Act 1906 enacts (sec. 1) that it shall be lawful for a school board "if they think fit" to make special provisions for the education of "defective" children, defined (by sec. 2) to mean "children who, not being imbecile, and not being merely dull or backward, are by reason of mental or physical defect incapable of receiving proper benefit from the instruction in the ordinary schools." *Held* (1) that a school board was entitled to refuse to receive such a child into its school, and at the same time to refuse to make special provision for its education elsewhere; (2) that the school board and Education Department were the proper judges of the fact of the child's defectiveness and unfitness for ordinary education, and that the Court would not review their decision nor allow a parent a proof of his averments that the child was not defective, if satisfied that the education authorities had exercised their discretion carefully and honestly.

The Education (Scotland) Act 1901 (1 Edw. VII, cap. 9), sec. 1, enacts—"It shall be the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age."

The Education of Defective Children (Scotland) Act 1906 (6 Edw. VII, cap. 10) which is (sec. 3) to "be construed as one with the Education (Scotland) Acts 1872 to 1906," sec. 1 enacts—"From and after the commencement of this Act it shall be lawful for a school board in Scotland, if they think fit, either alone or in combination with one or more school boards, to make special provision for the education,

medical inspection, and, where required, for the conveyance to and from school of epileptic or crippled or defective children between five and sixteen years of age, within their education district, and to defray the cost thereof out of the school rate." Sec. 2—"The expression 'defective children' means children who, not being imbecile, and not being merely dull or backward, are by reason of mental or physical defect incapable of receiving proper benefit from the instruction in the ordinary schools."

James M. Sinclair, residing at Cloichard Cottages, Pitlochry, in the Parish of Moulin, Perthshire, brought a petition in the Sheriff Court at Perth against the School Board of the Parish of Moulin, and William MacGowan, schoolmaster, residing at Pitlochry, "to interdict, prohibit, and discharge the defenders, and each of them, and all persons acting under the authority or upon the instructions of them, or either of them, from refusing to enrol the pursuer as a pupil at Pitlochry Public School, and from preventing him entering, or excluding or expelling him from said school, or in any other way obstructing his attendance as a pupil at said school during school hours, and to grant interim interdict, or otherwise; and alternatively, to decern and ordain the defenders the School Board of the Parish of Moulin to make sufficient and available provision elsewhere for the efficient education of the pursuer, and to find the defenders jointly and severally liable in expenses."

The pursuer averred—"(Cond. 1) The pursuer is an illegitimate child, and resides with his grandfather James Sinclair at Cloichard Cottages, Pitlochry, in the parish of Moulin, Perthshire. He was born in Pitlochry on 5th June 1896. The defender William MacGowan is headmaster of Pitlochry Public School, which is vested in and is under the control and management of the defenders the School Board of the Parish of Moulin. (Cond. 2) Since he was six years of age the pursuer has attended Pitlochry Public School. On or about December 1906 the defender William MacGowan, without assigning any reason, turned him out of school, and told him to go home and stay there. On the following day the boy was taken back to the school by his grandmother, and was admitted by Mr MacGowan, but next day he was again sent home by Mr MacGowan, who now refuses to admit him back to the school. (Cond. 3) On 27th December 1906, the defenders the School Board of the Parish of Moulin, through their clerk Mr Hugh Mitchell, solicitor, Pitlochry, wrote to the said James Sinclair that the pursuer 'is a source of great trouble in the class, as he is quite incapable of learning anything,' and that he 'cannot be permitted to enter Pitlochry School unless you produce a certificate from a duly qualified medical man that James Sinclair is at the time of the certificate being granted so far improved mentally as to be capable of receiving instruction at a board school in the usual way.' (Cond. 4) On 12th January 1907 the pursuer was examined by Dr Robert Stirling, Perth, who granted a certificate in the following terms:—'James Sinclair is a backward child, but not in my opinion unfit for education, though probably unfit to keep pace with the average schoolboy. He requires special consideration on account of physical weakness.' Said certificate is produced and referred to. It was sent to the defenders the School Board on or about 21st January 1907. (Cond. 5) Subsequently, on the suggestion of the Scotch Education Department, the pursuer was examined on behalf of the School Board by Dr Ash, medical adviser to the Carnegie Trust, Dunfermline, who reported, of date 6th May 1907, that the pursuer not being imbecile is by reason of mental defect incapable of receiving proper benefit from the instruction in ordinary schools, but capable of receiving instruction in special classes. The pursuer denies that he is incapable of receiving benefit from the instruction in Pitlochry Public School. The defenders the School Board have not tendered him instruction in special classes, and he believes and avers that they have not provided any such classes."

The defenders the School Board made the following statement of facts—"(Stat. 1) The pursuer when an infant suffered from meningitis. He was enrolled as a pupil at Pitlochry Public School in the beginning of September 1901, and was a pupil in the infant department until the end of the year 1905, when, on account of illness of the nature of cerebral excitement, he was removed from school by order of his medical attendant, and did not return until nine months after, in September 1906. (Stat. 2) In September 1906 the pursuer was transferred to the junior department of the school, not as in the usual course because he was qualified to leave the infant department, but because it was thought unreasonable that he should remain any longer in the infant department to associate with children much younger than himself, and to continue to be a source of annoyance to class after class. (Stat. 3) The pursuer attended school most irregularly because of frequent illnesses, chiefly violent headaches. Great difficulty was found in teaching him. He had no power of concentration and was very restless. Lessons caused him cerebral excitement, bringing on violent headaches and vomiting, and his frequent illnesses were really the result of attempting to teach him. He could repeat words or figures after a teacher, but could not recognise them when written or printed. His restlessness disturbed the teaching of the other pupils, and he could not be punished as he was not mentally or physically fit. The efficiency of the school suffered from his disturbing influence. (Stat. 4) Little or no improvement resulted from the long continued efforts to educate the pursuer in school, and in December 1906 these defenders, having fully considered the circumstances, deemed it unreasonable and inexpedient that he should be longer received as a pupil in school. They communicated their decision and the

reasons for it to the pursuer's grandfather in a letter from their clerk dated 27th December 1906. (Stat. 5) On 21st January 1907 the said James Sinclair handed to the defenders' clerk the certificate by Dr Robert Stirling referred to in article 4 of the condescendence. This certificate was considered by these defenders, but, as they intimated to the said James Sinclair, they had no school staff to give special teaching to the pursuer, and they adhered to their decision that he could not be admitted to the school. (Stat. 6) Founding upon the Scotch Code 1906 for day schools, article 17, sub-section (*a*), which provides that before any grant is made to a school the Scotch Education Department must be satisfied that 'no child is refused admission on other than reasonable grounds,' Mr Alexander Macbeth, solicitor, Pitlochry, on behalf of the said James Sinclair, forwarded on 25th January 1907 to the Scotch Education Department the letters which these defenders had sent to the pursuer's grandfather and grandmother, and the said certificate by Dr Stirling, and asked the Department to require these defenders to educate the pursuer. A correspondence ensued between the Department, these defenders, and Mr Macbeth as agent of the said James Sinclair, in the course of which it was agreed that the pursuer should be examined by a medical man to be selected by the defenders and the said James Sinclair as the parties interested. On the suggestion of the Department Dr Ash was so selected. (Stat. 7) Dr Ash came to Pitlochry on 3rd May 1907, and examined the pursuer, who was accompanied by his grandparents and Mr Macbeth. Dr Ash wrote out his report in duplicate, and on or about 6th May 1907 sent one of the copies to Mr Macbeth and the other to these defenders. (Stat. 8) On 8th May 1907 these defenders forwarded a copy of Dr Ash's report to the Education Department, and said that as it fully bore out the contention of these defenders, they presumed it would be unnecessary for them to take any further action in the matter. The correspondence ended with a letter from the Department on 10th May 1907, saying that 'the boy in question would appear to belong to the category of "defective" children for whom special provision may be made by a school board in terms of the Education of Defective Children (Scotland) Act 1906.' (Stat. 9) These defenders did not think fit to make special provision for the education of this defective child under the last-mentioned statute. His is the only case of the kind in their district, and they did not feel justified in relieving the said James Sinclair of his primary obligation to provide efficient elementary education for the said child and putting the burden on the ratepayers."

The pursuer pleaded, *inter alia*—"(1) The defenders being bound to admit and enrol the pursuer as a pupil in Pitlochry Public School, and having refused to do so, interdict should be granted, as craved, with expenses. (2) The pursuer being a child of school age resident in the parish of Moulin, the defenders the School Board of the said parish are bound in terms of the Education (Scotland) Act, to have at all times sufficient and available provision for his efficient education."

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The action is incompetent. (4) The defenders having acted within their power and according to their duty as managers of the school in refusing to admit the pursuer to the school, the petition should be refused. (5) *Separatim*—The exclusion of the pursuer from the said school being in the circumstances proper and reasonable, the petition should be refused."

The Sheriff-Substitute (SYM) having previously appointed a *curator ad litem* to the pursuer, on 13th August 1907 pronounced an interlocutor repelling the plea of "no title to sue," dismissing the action so far as laid against the defender MacGowan, and continuing the cause. On 28th October following he pronounced an interlocutor allowing a proof before answer.

The defenders appealed to the Sheriff (C. N. JOHNSTON), who on 6th December pronounced an interlocutor dismissing the action.

Note.—"In this case the parties concur in stating that they do not desire proof. Each party asks me to dispose of the case in his own favour on the pleadings and productions as they stand. It appears to me that there is material for doing so. A school board is bound to maintain efficient schools sufficient for the needs of the parish, and to admit thereto all children in the parish capable of being taught with other children in an ordinary primary school. The board is not bound to make special provision for a defective child who, not being an imbecile, yet from mental defect cannot be taught with other children, or is a disturbing influence in the school. For such children special provision may be made under the Act of 1906, but only if the School Board see fit. It may be argued that as this Act though voluntary provides an alternative to reception in the school, the School Board, if they do not avail themselves of its provisions, may now be compelled to receive in the ordinary school defective children whom formerly they might have refused. I am unable, however, to accept this argument. It was contended by the defenders that the reception or non-reception of children in the public school is an administrative matter entrusted by Parliament to public boards under the supervision of the Department, and that accordingly an action like the present cannot be entertained by a court of law. That contention does not commend itself to me. On the other hand, however, I am of opinion that a court of law ought to take note of the consideration that it is to public boards and not to the courts of law that Parliament has entrusted the administration of the Education Acts, and the exercise of the discretion which this implies. Where this discretion has been carefully and honestly exercised it is not the province of a court of law to

review the decision arrived at. Accordingly, where a child has been excluded from a school on the ground of mental unfitness or of considerations of order and discipline, it is not for a judge after inquiry into the whole facts to determine whether or not he would have exercised discretion in the same way. All that a judge needs to satisfy himself of is that the board has not acted capriciously, but that their procedure has been reasonable, and that their decision is not either unconscionable or founded upon an erroneous view of the law.

"In the present case the Board excluded the child from the school on the alleged ground that he was from mental defect unfit to profit by instruction therein, and that for similar reasons his presence was a source of disturbance to good order in the school. This view of the matter having been challenged by the guardian of the child, a medical certificate was called for as to the child's fitness. An inconclusive certificate having been tendered, the Board, after the matter had been referred to the Department, consulted a medical expert recommended by the Department. This expert made a careful inquiry and reported that the child was unfit for instruction in an ordinary primary school, and that his teachers found that his restlessness was a disturbing influence. In these circumstances the Board adhered to their decision. The Department supported their action, pointing out, however, that the Board might if they saw fit avail themselves of the Act of 1906 to make special arrangements. In these circumstances there does not appear to me to be any ground for judicial interference.

"It is deeply to be regretted, however, if this poor little boy is not to get all the education by which he can benefit. He was unfortunate in the circumstance of his birth, and of early severe and later recurrent illness, and the worry of the school has at times brought on severe headaches. Yet withal he is not a bad boy, but docile and obedient. If the circumstances of the grandparents do not permit them to give him special instruction, the case is certainly one which appeals very strongly to benevolence. It was stated on behalf of the Board that special instruction would cost £20 per annum. If so I do not think that the Board can be blamed for declining to undertake the whole of this expense. On the other hand, if the circumstances of the grandfather are anything like what is indicated in the correspondence, where he is described as a labourer, it is obviously unreasonable to expect him to pay any very considerable proportion of that sum. If the special instruction of this child would cost £20 per annum, then unless the grandfather is a person in very good circumstances, the statement in answer 9 about not 'relieving him of his primary obligation to provide efficient elementary education for the said child' is harsh and unreal.

"I was asked to sist the grandfather as *dominus* and decern against him for expenses. The pursuer, however, has a curator appointed by the Court who has adopted and insisted in the action. In these circumstances the question of *dominus* could be raised, if at all, only in a separate action after an award of expenses.

"I regard the action, therefore, simply as one between the pursuer and the defender, and so regarding it I do not think this is a case for an award of expenses."

The pursuer appealed, and argued—The pursuer was entitled to decree in terms of one or other of the conclusions of the petition. Every child in the country was entitled to receive elementary education from the educational authorities, unless perhaps it had forfeited that right through its own misconduct, and every parent or guardian was similarly entitled to demand such education for his or her child—*Barr* v. *Smith*, January 28, 1903, 5 R. (J.C.) 24, Lord Young at p. 32, 40 S.L.R. 547. That this must be so was obvious from a consideration of the Education Acts. In the first place, not only were the Acts obviously framed on the assumption that it was the duty of every parent or guardian to send his chlld to school, but they also contained express compulsory clauses, the only excuse for absence being the inability of the child to attend—Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), secs. 68, 69, 70; Education (Scotland) Act 1883 (46 and 47 Vict. c. 56), secs. 4, 6, 9, 11; Education (Scotland) Act 1901 (1 Edw. VII, c. 9), secs. 1, 2, 3. But if the parent was under an obligation to send his child for education, it followed that he must have a correlative right to demand that his child should be received and educated. In the next place, it was clear from the Acts that this obligation to send and duty to receive applied not merely to normally but also to abnormally constituted children. Thus, a duty to educate blind and deaf-mute children was imposed on school boards by the Education of Blind and Deaf-Mute Children (Scotland) Act 1890 (53 and 54 Vict. c. 43) (see especially sections 3 and 5); and by the Education of Defective Children (Scotland) Act 1906 (6 Edw. VII, c. 10) express power was given to school boards to make special provisions for the education of defective children. The only reasonable reading of that Act was that whereas the school board had been prior to its passing bound to receive such children in the ordinary school, they could now receive them either as formerly in the ordinary school or in a special school specially provided, but in one or other they must receive them, and the pursuer founded directly upon this Act. Nowhere in the Acts was there any authority for the view that the school board had the right of refusing to admit scholars; such an idea was based upon a complete misunderstanding of the position and duty of school boards, whose main concern was to look after the rights and interests of ratepayers by on the one hand protecting their pockets and on the other seeing that sufficient accommodation and efficient education was provided—*Kelso School Board* v. *Hunter*, December 18, 1874, 2 R. 228, Lord President Inglis at 230, 12 S.L.R. 163; *Morison* v. *Glen-*

shiel School Board, May 28, 1875, 2 R. 715, Lord Young, p. 718 and following, 12 S.L.R. 473. *Haddow* v. *Glasgow School Board*, June 10, 1898, 25 R. 988, 35 S.L.R. 736, founded on by the defenders, had no bearing, because the child there was the child of parents able to pay for the books in question. In no event, however, could the Court at this stage decide the case in favour of the defenders, as their case depended upon the fact that the pursuer was "defective," which he denied, and as to which he demanded proof or impartial inquiry. Lastly, there was no substance in the defenders' technical plea as to title. The consideration which weighed with the Court in recent cases was whether the pursuer had an interest, and undoubtedly he had a valid interest here.

Argued for respondents—The pursuer had no title to sue. The Education Acts nowhere conferred upon a child a right to education or a duty to attend a school. It was upon "parents" (as defined by the Education (Scotland) Act 1872, sec. 1) that the duty of providing education for their children was imposed—Education (Scotland) Act 1872. sec. 69; Education (Scotland) Act 1901, sec. 1—and accordingly it could only be the "parents" and not the children who had a title to sue an action against a school board—*M'Fadzean* v. *Kilmalcolm School Board*, March 6, 1903, 5 R. 600, 40 S.L.R. 440. Even, however, if the action had been competently brought by the child's parent it must fail. It was based upon the fallacy that there was a duty upon the School Board to educate all children, and a corresponding right upon parents to demand education for all children. It was true that parents were bound to educate all their children in so far as they were capable of receiving education, but the only duty (with an exception to be afterwards noted) incumbent on the school board was to maintain in a proper state of efficiency every school under its management, *i.e.*, it must see that all schools were suitable and efficient as regarded accommodation and teachers for the education of ordinary children—Education (Scotland) Act 1872, secs. 26 and 36. The only exception to the rule apparently was in the case of deaf and dumb mutes, it being provided by the Education of Blind and Deaf-Mute Children (Scotland) Act 1890 that school boards must provide for the education of such children if their parents were in poverty. The Education of Defective Children (Scotland) Act 1906, on which the pursuer founded, was entirely against him; it enabled a school board to make special provision for the education of such children "if they think fit," but plainly negatived the idea that they were under any obligation to do so. The theory that all children must be received by the school board had been expressly negatived in the case of *Haddow* v. *Glasgow School Board*, *cit. sup.*, where the School Board was held to be entitled to exclude children who came unprovided with books—*a fortiori* could it exclude a child who had not the necessary mental equipment to receive education, and whose presence in the school would militate against the school's efficiency? Further, however, and finally, this was not a matter in which the Court could interfere. The duty of supervising school boards lay upon the Education Department; the Education Department had given a decision upon the matter, and had conducted a careful inquiry, and the Court could not interfere with that decision unless it were shown that the Department had acted unconscionably or capriciously, and there was no such suggestion here—*M'Fadzean* v. *Kilmalcolm School Board*, March 6, 1903, 5 R. 600, Lord Low, pp. 609-10, 40 S.L.R. 440; *Lord Advocate* v. *Stow School Board*, February 19, 1876, 3 R. 469, 13 S.L.R. 305.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case is a child, and the purpose of the case is at the instance of the child to interdict the Moulin School Board from preventing him from attending their school, and from obstructing his attendance at school, and alternatively to ordain the School Board to make sufficient provision elsewhere for his efficient education. I have no doubt that such an action by a child is incompetent. The duty of education lies upon the parent or the person who is *in loco parentis*, and he has the right to demand education. It is not a right given to the child to demand education in its own name. I do not enlarge upon this, as I concur in Lord Stormonth Darling's opinion, which I have seen. But even if the action were competent in the form in which it is laid, I am of opinion that the Sheriffs have rightly decided the case.

The facts are that the School Board have decided that the child is "mentally incapable of receiving instruction in a board school," giving great trouble and being incapable of learning anything, and interfered by his conduct with the proper conducting of the class in which he was. They accordingly decided that until they received a certificate of improvement in his condition from a medical man he could not be allowed to attend the school. A medical man who was consulted gave a certificate that special requirements being attended to the child might be taught. The Board having considered the matter held that this could not be done with justice to the school as a whole. Accordingly the matter was brought before the Board of Education, which obtained a report from a skilled physician of their own choice. His report was quite decided as to the unfitness of the child to receive education in the Board School. This child is thus certified to be a "defective child" in the sense of the Education Acts.

These being the facts, they seem to me to be conclusive. To allow a proof whether the Board's discretion has been rightly exercised I hold to be quite out of the question. They are the proper tribunal, subject to review of the Education Department, and without some relevant allegation of *mala fides* there is no room for further judicial inquiry.

Finally, as to the demand that they shall find another place for the child's education, it is sufficient to say that the statute lays no obligation upon the Board in the case of such a child. It confers a power on the Board "if they see fit" to make special arrangements. It is obvious that in some circumstances such action may be reasonably feasible and in other circumstances it may be impracticable. Of this they must judge. There is nothing in this case which tends towards the conclusion that they have not exercised their judgment fairly and reasonably.

I would therefore move your Lordships to affirm the Sheriff's judgment.

LORD STORMONTH DARLING—This is an action at the instance of a pupil child (of the age of eleven at the date when the action was raised) against the School Board of the Parish of Moulin in Perthshire to have the defenders interdicted from excluding the pursuer from the Public School of Pitlochry, and alternatively to have the School Board ordained to make sufficient and available provision elsewhere for the efficient education of the pursuer. Pupillarity being in contemplation of the law a state of absolute incapacity, it was clear that the action could not proceed as it stood; and the pursuer being illegitimate and having no legal guardian the Sheriff-Substitute adopted the expedient of appointing Mr Gordon, a solicitor in Perth, to be curator *ad litem* to the pursuer, and by a later interlocutor repelled the plea of "no title to sue." It seems to me that however unobjectionable the course adopted by the Sheriff-Substitute would have been in an ordinary action it was not the proper course to take when it was brought under his notice by both parties that the pursuer resided with his grandfather, who had the actual custody of the child, and was therefore undeniably his "parent" within the meaning of section 1 of the Education (Scotland) Act 1872. In such a case as this I hold that the plea of "no title to sue" should have been sustained and not repelled, for the proper person to raise any question as to the duty of a school board to receive any particular child is, in my opinion, not the child himself but the parent of the child, or the person having the actual custody of the child, on whom the duty of providing efficient elementary education in reading, writing, and arithmetic for children between five and fourteen years of age was laid by section 1 of the Education (Scotland) Act 1901. And it is to be observed that the definition which I have quoted above from the Act of 1872 is read into the Act of 1901, because, by section 7, all the Education Acts from 1872 to 1901 are to be construed as one Act. In short, there are only two legal *personæ*—the School Board and the parent, as defined in the Act of 1872—standing towards each other with correlative rights and duties. It is said that the child himself has an interest, and I admit that he will ultimately have the highest interest of all. But for the time being he has no interest because he has no duty except the passive one of imbibing the instruction which he receives. Certainly he has no interest on which, even apart from his *status* of pupillarity, he can sue, and no right which he can enforce.

I therefore think that we ought to sustain the plea of "no title to sue" which the Sheriff-Substitute repelled by the interlocutor of 13th August 1907. But since we had an interesting argument on the question whether even the grandfather, having the actual custody of the child, could insist on the child being received by the School Board into the Public School, or else on their making sufficient provision elsewhere for his efficient education, it is, I think, desirable to take this case upon the footing that the action had been brought at his instance, not at the child's. Now the whole difficulty here is personal to the boy. After doing their best for his education since he was six years of age the School Board, through their clerk, intimated to the boy's grandfather that he was mentally incapable of receiving instruction in a board school, that he was a source of great trouble in the class as he was quite incapable of learning anything, and could not sit still but wandered about the room, thus distracting the attention of the class, and for other reasons, which are fully set out in their letter of 27th December 1906, they concluded by intimating that the boy could not be permitted to enter Pitlochry School unless the grandfather produced a certificate from a duly qualified medical man that the boy was so far improved mentally as to be capable of receiving instruction at a board school in the usual way. The grandfather then had him examined by Dr Stirling of Perth (a medical practitioner of good standing), who granted a rather inconclusive certificate. This certificate was intimated to and considered by the School Board, and their reply was that as they had no school staff sufficient to have the boy specially taught, and as the teacher could not neglect the other children in the class in order to give special teaching to this boy they must adhere to their former determination not to admit him to Pitlochry School. The matter then seems to have been brought under the notice of the Scotch Education Department at the instance of the boy's legal adviser. But I am quite willing to accept the view taken by the Sheriff-Substitute, that the pursuer and his advisers had done nothing to justify what might be called a "reference" of the child's capacity to attend school to Dr Ash of Dunfermline; but it is certain that Dr Ash was selected on the suggestion of the Department. That gentleman visited Pitlochry and examined the boy in the presence of his grandparents and his legal adviser on 3rd May 1907. Three days afterwards he made a careful and detailed report, which was forwarded to the Department by the School Board. The practical conclusion of it was that "in any case instruction could only be carried out in special schools. In my opinion therefore the boy, not being imbecile, is

by reason of mental defect incapable of receiving proper benefit from the instruction in ordinary schools, but capable of receiving instruction in special classes." These words are an echo of section 2 of the Education of Defective Children (Scotland) Act 1906, which defines defective children thus—"The expression 'defective children' means children who, not being imbecile and not being merely dull and backward, are by reason of mental or physical defect incapable of receiving proper benefit from the instruction in the ordinary schools," and by section 3 of the same Act it is enacted that "this Act shall be construed as one with the Education (Scotland) Acts 1872 to 1906." To complete the narrative of this correspondence (which is all admitted and referred to) it is proper to add that it ended with a letter from the Department of 10th May 1907, saying that "the boy in question would appear to belong to the category of 'defective children,' for whom special provision may be made by a school board in terms of the Education of Defective Children (Scotland) Act 1906." And it is important to note that the power to make this "special provision" is all qualified by the words "if they think fit."

Accordingly the question comes to be, Has the grandfather as the actual custodian of the boy, and therefore for the purposes of the Education Acts from 1872 downwards in the position of his parent, any right in the circumstances to insist in either alternative of this petition? He is not bound to send him to a public school. His duty is discharged if he has him efficiently educated in reading, writing, and arithmetic in any school of his selection. If the boy is "by reason of mental defect incapable of receiving proper benefit from the instruction in ordinary schools," as Dr Ash's report and the letter of the Department says he is, it would undoubtedly be unfortunate for the poor boy that he should be debarred from receiving the little instruction of which he is capable. But, on the other hand, why should the whole order and discipline of the school and the efficient education of the other children in the school, for which the School Board are responsible, be upset by the presence of this hapless lad? It is no question of mere dulness and backwardness. For the exclusion of a case of that kind from its provisions the Statute of 1906 makes careful provision, no doubt for the reason that there would be a certain danger in allowing such a case to come within the category of mental defect. But literally the only averment in the condescendence of which the proof allowed by the Sheriff-Substitute (though rather unwillingly, as I gather) could take note is the averment in cond. 5 —"The pursuer denies that he is incapable of receiving benefit from the instruction in Pitlochry Public School." Is that a kind of averment which a court of law can be asked to send to proof? It is always within the competency and duty of a court of law to inquire whether a public body to which has been committed a certain duty of inquiring into facts have acted reasonably and within the powers entrusted to them, or capriciously and in disregard of those powers (see observations of Lord President Inglis in *Lord Advocate* v. *Stow School Board*, 3 R. at p. 473). But here it is not suggested that any such disregard of statutory powers has occurred either on the part of the School Board or the Education Department. And if these two public bodies have acted within their powers, Can it be said that they are not, each in its own sphere, the proper judges of this boy's fitness for receiving benefit from the ordinary instruction in a public school, and next whether the School Board can be called upon in justice to the other interests involved to make special provision for the efficient education of this particular boy? If this latter demand is to be open to any parent or person *in loco parentis*, I confess I do not see why the Legislature was careful, after referring to a school board in Scotland, to insert the words "if they think fit."

It therefore seems to me that the Sheriff has decided the case upon perfectly right grounds (except only, as I have explained, that he ought to have sustained the plea of "no title to sue"). He has found no expenses due to or by either party in the Sheriff Court, and as this was an action against a public body on the construction of a recent statute, I think this may pass. But I also think that the pursuer and his advisers, having got a formal judgment against them from the Sheriff, were not entitled to carry the case further except on penalty of bearing the expense of the appeal, and I am therefore in favour of finding the School Board entitled to the expenses of this appeal.

LORD ARDWALL—I concur in the opinion which has just been delivered by Lord Stormonth Darling. I am of opinion that the Sheriff-Substitute erred in repelling the plea of "no title to sue." Under the Education Acts the two parties concerned in attending to the education of a child are on the one hand the parent and on the other hand the School Board, the parent being bound to see to it that the child goes to school, and the School Board, under section 26 of the Education Act of 1872, being bound to provide efficient schools. "Parent" is defined by section 1 of the said Act to include "guardian and any person who is liable to maintain or has the actual custody of any child." In the present case the parent in the sense of the Act is the pupil's grandfather, in whose custody he is and with whom he resides, and he was the proper person to raise an action against the School Board regarding the education of the pursuer if such action were justifiable. A pupil child does not appear to me to have under the Education Acts or at common law any title to sue an action of this kind, and it would be exposing School Boards to risk of vexatious litigation were they liable to have actions raised against them nominally at the instance of pupil children, but of course at

the instigation of older people who might be possibly moved thereto by motives not of the best description.

In the next place, and supposing that the action had been at the instance of the pursuer's grandfather, I am of opinion that the Sheriff-Substitute made a mistake in allowing a proof, I suppose with the object of enabling himself to determine the question whether the defenders were justified in excluding the pursuer from their school owing to his mental condition, and it seems to have been in the contemplation of the Sheriff-Substitute that after evidence of the kind usually given in cases involving inquiries of this kind, which, as everyone knows, is generally lengthy and conflicting, he should then decide whether the pursuer was entitled to be educated at the Pitlochry Public School or elsewhere. Now it appears to me that under the Education Acts School Boards are the proper judges of questions of this kind, and that their actings ought not to be interfered with unless, as the Sheriff puts it, their decision is capricious or unconscionable or founded on an erroneous view of the law, and, I might add, or if their conduct has been oppressive. But there is no suggestion in the whole proceedings in this matter that the School Board have acted otherwise than regularly and fairly, and not only have they after careful investigation determined this question in the way they have done, but the matter has been investigated by the Scotch Education Department with the assistance of an able expert in such matters, and I think it is out of the question to propose that there should now be a proof, and that the Sheriff-Substitute should upon that proof review the resolution that has been come to by the School Board and has been approved of by the Board of Education.

By section 26 of the Education (Scotland) Act 1872 it is provided that all public schools shall be under the management of the school board of the parish or burgh in which they are situated. The exercise of their discretion in regard to the management of the school, including of course the question of the exclusion or admission of any pupil, forms part of the functions of the School Board as managers of the school, and resolutions arrived at by them with regard to such matters ought not, in my opinion, to be interfered with except on very weighty grounds, and none such exist here.

As I agree with what has been said by the Lord Justice-Clerk, by Lord Stormonth Darling, and by the Sheriff in his note, it is unnecessary for me to add more.

LORD LOW was absent.

The Court recalled the interlocutors of the Sheriff-Substitute and Sheriff (except in so far as they had dismissed the action as against the defender MacGowan, and which the Court affirmed), sustained the first plea-in-law for the defenders the School Board, and dismissed the action.

Counsel for the Pursuer (Appellant)—T. B. Morison, K.C.—Macdonald. Agent—John C. Sturrock, Solicitor.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Jameson. Agents—Carmichael & Miller, W.S.

Tuesday, March 17.

FIRST DIVISION.

[Sheriff Court at Arbroath.

GOURLAY *v.* MURRAY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *Sched.* I (1), *a*, (*ii*)—*Compensation—"Sum Reasonable and Proportionate to the Injury"—Illegitimate Child—Funeral Expenses.*

In an application for compensation under the Workmen's Compensation Act 1906 at the instance (1) of a deceased workman's illegitimate pupil daughter, who at the date of his death was partially dependent upon him under a decree of affiliation and aliment, and (2) of his father, the Sheriff-Substitute found, *inter alia*, that the sum available for compensation was £150; that the deceased's father was entitled to payment out of that sum of £5, 10s., being the amount paid by him for the deceased's funeral expenses; and that the illegitimate daughter was entitled to a reasonable sum proportionate to the injury to her, which he assessed at £144, 10s. At the date of the workman's death the capitalised value of the decree of aliment was £78.

Held, in an appeal, that in awarding the whole balance of the sum available for compensation as compensation to the illegitimate daughter the Sheriff had proceeded on a wrong principle, the Act not requiring the whole sum to be disposed of, and a *remit* made to him to put a value on the prospective contributions which the deceased would probably have made had he lived towards his daughter's support.

Opinion per curiam that reasonable funeral expenses were a proper charge on the fund available for compensation. *Bevan* v. *Crawshay Brothers (Cyfartha), Limited*, [1902] 1 K.B. 25, *followed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), First Schedule, enacts—"(1) The amount of compensation under this Act shall be—(*a*) Where death results from the injury—(i) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds. . . . (ii) If the workman does