Miss Cameron or her curator do not appear to have any interest in desiring that it should be so held, seeing that their claim would be amply secured as against the Gows' legacies."

Against this interlocutor the claimants William Cochrane Gow and others reclaimed.

At advising—

LORD JUSTICE-CLERK—My Lords, on the first two points contained in the Lord Ordinary's interlocutor I concur with the findings of his Lordship, but I do not feel disposed to concur in the third and fourth findings. These are as follows:—"(3) Finds that any abatement arising from a deficiency of funds that it may be necessary to make, in terms of the 4th or next finding in this interlocutor, from the general legacies or bequests of the testatrix, must, in so far as it may affect the share of the testatrix's estate and effects directed to be held for her sister Elizabeth, be taken and made up from 'the further sum of £5000' left by the testatrix to Benjamin Gow, his wife and family, as referred to 'in the second place' in the second of the foresaid two codicils; and (4), Finds in reference to all the bequests of the testatrix, so far as not disposed of by the preceding findings, that they are of the nature of general legacies, having no priority or preference, and are therefore liable, in the event of there being a deficiency of trust estate or funds to pay and satisfy them in full, to suffer abatement *pro rata*, and in proportion to their respective amount, the abatement applicable to the share falling to the testatrix's sister Elizabeth falling to be made up as aforesaid from or sustained by the second £5000 left to the Gows." The result there arrived at, I think, is not quite a sound one. What I regard as the reading of the codicil is, that the £5000 left to the Gows is not to diminish the share otherwise appointed. A condition of legacy is not preferable, and all that is here is merely a condition. The true construction of this will and the codicils is based upon the ascertainment of what Elizabeth would have got in the existing state of the funds if the £5000 had not gone to the Gows.

LORD BENHOLME—I quite agree with your Lordship's observations as to the slight modification which it is advisable we should make on the Lord Ordinary's interlocutor.

If this modification is not made Elizabeth takes a benefit—actually takes a benefit from the £5000 having been granted to the Gows. Under the Lord Ordinary's interlocutor, by the granting of the second legacy she draws back from the Gows not only the difference between the two legacies but also the loss she would have suffered by abatement. That is, she would be better by the granting of the second legacy than if it had never been granted at all.

LORD NEAVES—I am of the same opinion, and think that all must suffer a proportional abatement. The granting of the second legacy was to remedy a supposed injustice done in the will of Elizabeth herself. I think that the Lord Ordinary has rather overlooked that.

Counsel for the Gows—Geo. Webster and Balfour. Agent—C. S. Taylor, S.S.C.

Counsel for Pursuers and Real Raisers and second set of Claimants—Clark, Q.C., and Hall. Agents—J. & R. D. Ross, W.S.

Counsel for Trustees and the *Curator Bonis* to Elizabeth Cameron—Watson and Pearson. Agents—Webster & Will, S.S.C.

Saturday, February 28.

SECOND DIVISION.

SPECIAL CASE—THE SCHOOL BOARD OF PEEBLES.

Education Act, 1872—*School Board—Burgh School—Parish.*

Two schools in a burgh (part of a parish having also a landward district) were supported out of the common good. Under sec. 11 of the Education Act the Board of Education ordered that for the purposes of that Act the burgh should be deemed a part of the parish; and, a School Board having been elected for the parish,—*held*—(1) that by the Act the two schools in question were vested in the Board; and (2) that the Magistrates were bound to contribute towards their support out of the common good the same annual sum they had been in use to do.

This was a Special Case, in which the School Board of the parish of Peebles were parties of the first part, and the Magistrates and Town Council of that royal burgh were the parties of the second part. At the date of the passing of the Education (Scotland) Act, 1872, on the 6th of August of that year there were situated within the royal burgh of Peebles two schools, one of which was termed the Burgh Grammar School, and the other the Burgh English School. Both of these Schools were then, and had been from time immemorial, burgh Schools, under the exclusive control and management of the Magistrates and Council of the burgh, and had been erected and maintained by them out of the common good. Until the passing of the Act it was the custom of the burgh to make contributions to the burgh schools out of the common good, and the sum paid was £100 annually, of which one moiety was paid to the teacher of each school in name of salary. The other emoluments of the teacher of the English school consisted of school fees and parliamentary grant; and of the grammar school of fees only.

The parish of Peebles contains within its limits not only the burgh, but also a considerable landward district. No parochial school was ever established in the parish under the Act 1696, entituled "Act for Settling Schools," or of any of the subsequent statutes, viz., 43 Geo. III., c. 54, 1st and 2d Vict., c. 87, and 24 and 25 Vict., c. 107. And accordingly no assessment for support of parish schools or schoolmasters was ever laid upon the heritors of the landward district of the parish, and they had no concern with the burgh schools. Shortly after the passing of the Education Act, the Board of Education for Scotland, established by that Act, in virtue of the powers conferred on them by the 11th section, ordered that the burgh of Peebles should be dealt with under the Act, and for the purposes thereof, as part of the parish of Peebles. Therefore, in terms of the 8th and 12th sections of the Act, a School Board was elected for the parish of Peebles, including the burgh, and under the provisions of the Act, and particularly

those contained in sections 24, 25, and 26 the School Board took possession of the two schools on the assumption that by virtue of the Act the schools were transferred to the Board. The Board have ever since continued to be, and still are, in the possession and management of these schools. On the 15th of November 1873 the School Board made application to the Magistrates and Council of the burgh for payment, in pursuance of section 46 of the Act, of the sum of £100, which prior to the passing of the Act it had been the custom of the burgh to contribute to the burgh schools; but under deduction of one-half thereof for the year 1873, in respect the burgh paid the teachers their salaries up to Whitsunday in that year. The Magistrates and Council maintained that they were not liable to pay the sum demanded, or to continue in future years the contribution of £100, and also, that the schools themselves were not, by force of the statute, transferred to the School Board, and that the burgh was entitled to retain or resume possession of the schools.

The questions of law which were submitted for the opinion and judgment of the Court of Session were the following, viz.:—"(1) Whether, in virtue of the provisions of the Education (Scotland) Act, 1872, the Burgh Grammar School and Burgh English School are now vested in and belong to the party hereto of the first part as the School Board of the parish of Peebles? (2) Whether the parties hereto of the second part are bound, in pursuance of the 46th section of the Education (Scotland) Act, 1872, to pay at the term of Martinmas yearly, to the parties hereto of the first part, the sum of £100 sterling, being the sum which it was the custom of the burgh prior to the passing of the said Act to contribute to the Burgh Schools out of the common good of said burgh; the said sum to be applied and administered by the parties hereto of the first part for the purpose of promoting higher instruction."

Argued for the School Board—The Act, by section 12 and section 24, clearly seems to hand these schools over to the Board. The words "Public School" receive in the interpretation clause a specific meaning. Under even the section (section 24) on which the Magistrates rely, the School Board for the parish becomes that for the burgh also. This is putting it in the supposition even that the Court takes a view of section 26 unfavourable to the parties of the first part.

Argued for the Magistrates—These schools are purely burgh schools, and entirely supported from the common good. We do not need to consider any point but whether the expressions of the Act are strong enough to operate a transfer of property. We maintain that (1) either the Magistrates are intentionally not within the Act, or (2) that there has been on this matter an omission in the Act. Section 18 seems to provide for some such position. The schools in this burgh (section 23) are not within the recited Acts at all. Taking the School Board view, the burgh school would cease to be so, and would become a parish one. [LORD NEAVES—If for educational purposes the burgh has ceased to exist, how can there be a burgh school?] Unless the Act expressly takes these schools out of the management and control of the Magistrates, they remain with them. Now, looking at the Act, section 25 and section 26, we maintain it does not so remove them.

At advising—

LORD JUSTICE-CLERK—The questions raised by this Special Case do not seem to me to be invested with any difficulty at all. I am clearly of opinion that the statute covers the position of matters at Peebles, and that the two schools in question are vested in the School Board of the parish of Peebles. That being so, the two questions must both be answered in the affirmative.

LORDS BENHOLME and NEAVES concurred.

Counsel for School Board—Clark, Q.C., and Marshall. Agents—J. & F. Anderson, W.S.

Counsel for Magistrates—Watson and Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Tuesday, March 2.

SECOND DIVISION.

[Lord Gifford, Ordinary.

M'DONALD'S TRUSTEES *v.* M'DONALD.

Process—Expenses.

Circumstances in which *held* that no expenses should be given against any of the parties.

This case of *M'Donald's Trustees*, reported in the current volume of the Scottish Law Reporter (*ante* p. 290 to p. 302), came before the Second Division to pronounce judgment in accordance with the decision arrived at by the majority of the seven Judges before whom it was reheard. On the question of expenses—

LORD BENHOLME—I do not think that any expenses should be given in this action. In arriving at this decision I am influenced by a consideration of the nature of the questions raised and of the circumstances under which the parties have come into Court.

LORD NEAVES—I am of the same opinion, and there are several circumstances which lead me to that result. No one can suppose that in this case Sir John and Lady M'Donald had any desire other than that of doing what they deemed their duty in making this deed of settlement and division, nor can it be supposed that the eldest son, Colonel M'Donald, is actuated by other than a natural and pious desire to carry out the intentions of his parents. On the other hand, these ladies are getting a handsome addition to their fortunes which otherwise they would not have obtained.

LORD JUSTICE-CLERK—Then your Lordships find no expenses due to either party since the date of the Lord Ordinary's interlocutor.

Counsel for Colonel M'Donald (Reclaimer)—Fraser and Moncrieff. Agents—H. G. & S. Dickson, W.S.

Counsel for John Allan M'Donald—Watson and Trayner. Agents—Dewar & Deas, W.S

Counsel for Misses M'Donald—Clark, Q.C., and Balfour. Agents—Webster & Will, S.S.C.

Counsel for A. B. M'Grigor and Pursuers—Millar, Q.C., and Marshall. Agent—A. J. Napier, W.S.