Wednesday, June 2.

SECOND DIVISION.

SPECIAL CASE—VEASY *v.* MALCOLM'S TRUSTEES.

Codicil—Testing Clause.

Where the testing clause to a codicil was filled up after the testator's death, and where it was admitted (1) that everything set forth in the testing clause was true, and (2) that it was added before the deed was produced and founded on in Court—*Held* that the deed was a tested deed.

Counsel for Reclaimers—Dean of Faculty and Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Malcolm's Trustees — Solicitor-General (Watson) and Pearson. Agents—Dewar & Deas, W.S.

Saturday, June 5.

SECOND DIVISION.

SPECIAL CASE FOR THE SCHOOL BOARD OF SELKIRK PARISH AND THE SCHOOL BOARD OF SELKIRK BURGH.

Education (Scotland) Act, clause 23—Parish School.

The Parish School of Selkirk, previous to the Education (Scotland) Act, was the parish school of a partly landward parish; it was situated within the burgh, and when the Act came into operation it was the school of the landward district of the mixed parish, in which there was a School Board distinct from the Burgh School Board. In a Special Case, to which the School Boards of the Burgh and Parish of Selkirk were parties, *Held* that the school, with the teachers' houses and land attached came under the exemption in clause 23 of the Education Act, and was vested in the School Board of the Parish of Selkirk.

This was a Special Case at the instance of the School Boards of the parish and of the burgh of Selkirk, brought to settle the question whether the parish school was vested in the School Board of the parish or of the burgh. The facts were:—The parish of Selkirk is partly landward and partly burghal, and it includes the Royal Burgh of Selkirk. Prior to the passing of the Act 1696 there were within the parish and burgh of Selkirk a Grammar or Latin School, and an English School. They were carried on under one roof, but were separate schools taught by separate teachers. The question between the parties to this case referred solely to the parish or Latin school. The teacher of the English school was appointed, and his salary paid, by the Corporation alone. The Corporation of the burgh are amongst the largest heritors of the parish. By an agreement between the Corporation and other heritors the Corporation were allowed two votes in the appointment of schoolmaster, and they agreed to pay the half of his salary and to furnish a school-house. In 1780 the Corporation rebuilt the school-house, and the other heritors gave £40 as a donation to defray the expense. In 1791 the school-house was sold by the Corporation, and in terms of the foresaid agreement the site of the present school-house was purchased by the Corporation, in whose name alone the title was taken. With the aid of £100 from the other heritors, and the price of the former school, school-houses were erected by the Corporation on the ground so bought, which was situated within the burgh. The buildings erected in 1791 consisted of two separate school-houses under one roof, the one the English school, known as the Burgh School, and entirely under the charge of the Corporation, the other, the school of Selkirk parish. In 1830, when considerable repairs were made on the parish school, more than half the cost was defrayed by the heritors, exclusive of the Corporation. In 1863 a new burgh school-house was erected on another site, and in 1872 it became vested in the School Board of the burgh; on the removal of the burgh school in 1863 the parish school was enlarged and improved Towards the expense of erecting the new school and enlarging the parish school the landward heritors, exclusive of the Corporation, contributed a large amount.

The school in question was, from its foundation down to the date of the passing of the Education (Scotland) Act, 1872, the only parish school of the parish of Selkirk, and it was treated by all parties as falling under the statutory provisions relating to parish schools; and, in particular, under the provisions of the Acts 43 George III., cap. 54, and 24 and 25 Vict. cap. 107, but subject always to the conditions of the said agreement of 1791. The fabric of the said school was all along maintained at the expense of the Corporation, under the obligation contained in the foresaid agreement supplemented by voluntary contributions; while the furnishings for the school-room were always provided at the expense of the landward heritors (exclusive of the Corporation) by assessment on valued rent. The school is largely resorted to by the children of persons resident within the burgh, and in a lesser proportion by children of persons residing within the landward district.

In the year 1868, on the application of the schoolmaster of the parish of Selkirk, the heritors provided for him a dwelling-house and garden, in terms of the said Acts 43 George III., cap. 54, and 24 and 25 Vict., cap. 107, and this is the house and garden to which the questions in this case have reference. The cost was about £650, one half whereof was paid by the landward heritors other than the Corporation, and the other half by the Corporation, in terms of the 13th section of the said Act of 43 George III. The title of the ground feued for the purpose was taken to the heritors of the parish and their successors and assignees. Before 1868 an allowance was in use to be made to the schoolmaster in lieu of a house in terms of said Act, which was paid in equal proportions by the landward heritors and by the Corporation; and the salary of the schoolmaster was paid by the same parties and in the like proportions, in terms of the agreement of 1791 and Act of Parliament.

Under the Education (Scotland) Act, 1872, a School Board (the first party to this case) was elected for the parish of Selkirk, and another School Board (the second party hereto) was elected for the burgh of Selkirk. On the said Act coming into operation, both parties proceeded on

the assumption that the school in question, as the school of the parish, became vested in the Parish Board, and the Burgh School in the Burgh Board. Accordingly the Parish Board entered into possession of the said school and schoolmaster's house, and carried on the management thereof.

In October 1873, the Burgh School Board, with the view of obtaining additional school accommodation for the burgh, opened negotiations with the Parish School Board for the purchase of the school in question and said dwelling-house and garden, upon the footing that these subjects had vested in the Parish School Board under the Education Act. The terms of sale and transfer were agreed upon by the parties, and the Education Board having signified their approval thereof, and of a proposed new parish school and schoolmaster's house to be erected by the Parish Board, in lieu of said school and schoolmaster's house and garden on another site, the Burgh Board entered upon the possession and management of the subjects as at Martinmas 1873. Thereafter a doubt was raised by the Burgh Board as to whether the Education Act had the effect of vesting the subjects in the first party, and the parties accordingly agreed to cancel the contract, and to submit the question to the decision of the Court.

The first party hereto maintained that the said school is the Parish School of the landward district of a parish partly landward and partly burghal, and as such is, together with teachers' houses and land attached thereto, vested in them and under their management as the School Board of the parish of Selkirk, under the provisions of the Education (Scotland) Act, 1872, and, in particular, under the 23d section of that Act. The second party maintained that the school is not and has never been the parish school of the landward district within the meaning of the 23d section, and that the school, with its pertinents, being situated in the burgh of Selkirk, is vested in them and under their management as the Burgh School Board, in terms of the Act.

The questions submitted for the opinion of the Court were:—"1. Whether, under the provisions of the Education (Scotland) Act, 1872, the school in question, together with teachers' house and land attached thereto, or either of them, is vested in and under the management of the party hereto of the first part, as the School Board of the Parish of Selkirk? Or, 2. Whether, under the provisions of the said Act, the said subjects, or any part thereof, are vested in and under the management of the party hereto of the second part, as the School Board of the Burgh of Selkirk?"

At advising—

LORD JUSTICE-CLERK—This is a question with regard to property situated in the burgh of Selkirk, but which was the parish school-house for the parish of Selkirk prior to the passing of the Education (Scotland) Act. The facts are clearly stated on record, and I think the Board have taken the best course in bringing up the question in this form. I have come to be of opinion that this property belongs to the School Board of the parish of Selkirk. I do not think the prior agreement between the corporation and the heritors enters into the question. The question really depends on the meaning to be put on the 23d section of the Act, and in order to arrive at a true construction of that section the context is important. The Act first defines parish and burgh. "Parish shall mean any parish which does not wholly consist of a burgh or part of a burgh within the meaning of this Act, and shall include any school district formed under this Act." "Burgh shall mean, 1st, any royal burgh; 2d, any parliamentary burgh; and 3d, certain places specified in a schedule appended to the Act.' Then in the 8th section the Act says:—"Within twelve months after the passing of this Act a school board shall be elected in and for each and every parish and burgh." The 9th section provides that "the area of a parish shall be exclusive of the area of any burgh or part of a burgh situated therein for which a school board is required to be elected, and the area of every such burgh shall for the purposes of this Act be taken to be the limits within which the municipal, or where there are are no municipal then within which the police assessments thereof are levied." The effect of all these provisions is, that there can under the Act no longer be a parish partly burghal and partly landward. The 23d section provides for the division of burgh and parish territory, and the general enactment is that the parish and other schools existing in any parish go to the school board of the parish, or, if situated in a burgh, to the school board of such burgh. The exception to the rule is, "unless such parish school is the parish school of the landward district of a parish partly landward and partly burghal." Any ambiguity arises from the use of the words, "parish partly landward and partly burghal," but there the word parish must have a different interpretation from that in the interpretation clause, as the schools referred to in the exception must be in the situation specified before the passing of the Act, not when the question arises. The characteristics of a school under the exception are—1st, It must be in a burgh; 2d, It must before the date of the Act have been the school of a parish partly landward and partly burghal; 3d, It must be managed by a school board other than the school board of a burgh; 4th, It must be now the school of the landward or enlarged district of a burgh. As regards the school in question, all these conditions are fulfilled. The school here appears to me to be the parish school of the landward district of a parish partly landward, partly burghal, and as such to be, together with the teachers' houses and land attached thereto, vested in the School Board of the Parish of Selkirk.

It was maintained in argument that as the "recited Acts," mentioned in sect. 23, did not apply to parishes whose whole area was burghal, the construction which we are inclined to put upon sect. 23 would have the effect of rendering the exception which is introduced by the words "unless such parish school," &c.. co-extensive with the rule to which it is an exception. But this argument omits to keep in view the meaning given to the word "burgh" by the interpretation clause of the Education Act. Several cases might be put in which Schools would fall under the rule in sect. 23, and not under the exception; as, for instance, in the case of a Royal burgh, the school of a parish which consists wholly of territory lying outside of the Royal burgh, but within the municipal bounds; or again, the case of a parish consisting wholly of a Parliamentary burgh, or of a part thereof; or of a parish lying within one of the towns specified in

schedule A. annexed to the Act. We therefore answer the first question in the affirmative, and the second in the negative.

The Court answered the first question in the affirmative.

Counsel for Parties of the First Part—Dean of Faculty and Pearson. Agents—Gibson & Strathearn, W.S.

Counsel for Parties of the Second Part—Solicitor-General (Watson) and Kinnear. Agents—Dove Lockhart, S.S.C.

Wednesday, June 2.

FIRST DIVISION.

[Lord Young, Ordinary.

GOURLAY (PINKERTON'S TRUSTEE) *v.* HODGE.

Bankrupt—Sale—Statute 1696, *c.* 5—*Reduction.*

On 15th May a firm of merchants received from A, brother-in-law of one of the partners, the sum of £500, and granted in return a letter acknowledging receipt, and promising to give him, "within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Indian corn, to the full value, viz., £500." Between 22d May and 8th June the firm delivered to A peas, oats, and beans to the value of £238, 5s., and on 25th June they were sequestrated,—*held* that the transaction was reducible under the Act 1696, c. 5, and that the goods so delivered belonged to the bankrupt estate.

This was an action of reduction, delivery, and payment, at the instance of John Gourlay, chartered accountant in Glasgow, trustee on the sequestrated estate of James Pinkerton & Son, merchants in Glasgow, against William Hodge, brickmaker and contractor there. The following were the circumstances of the case:—

The estates of Messrs Pinkerton & Son were sequestrated on 25th June 1874, and thereafter the pursuer was elected trustee. Previous to the sequestration, and on 16th May 1874, the bankrupts received from the defender the sum of £500, granting at the same time a letter in the following terms:—"Dear Sir,—We have this day received from you the sum of (£500) five hundred pounds sterling, and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value, viz., £500." Thereafter, at various dates between 22d May and 8th June, the defender received from the bankrupts various quantities of peas, oats, and beans, of the value of £238, 5s. The defender did not pay for the grain so delivered, but the deliveries were taken as in implement of the obligation entered into in the letter of 16th May. The pursuer required the defender to pay the price of the grain delivered, but he refused to do so, and this action was brought to reduce the account and deliveries of the grain, for declarator that such portion of the grain as was still in the defender's possession belonged to the pursuer as trustee, and for payment of £238, 5s.

The pursuer pleaded—"(1) The pursuer, as representing the creditors of said sequestrated estate, and as trustee thereon, is entitled to insist in this action. (2) The oats, beans, and peas specified in the foresaid account having been given in security of or satisfaction of a prior debt within sixty days of bankruptcy, contrary to the terms of the statute 1696, c. 5, the pursuer is entitled to have the transaction reduced and set aside as concluded for. (3) The parties being conjunct and confident, and delivery having been given without any just, true, and necessary cause, the transaction is null and reducible. (4) The defender being indebted in the value of the said oats, beans, and peas, the pursuer is entitled to decree for the same."

The defender pleaded—"(1) The pursuer's averments are not relevant, or sufficient in law to support the conclusions of the summons. (2) The goods in question having been delivered in partial implement of a contract of sale, under which the price had been paid by the defender, the action is untenable. (3) The action, so far as founded on the statute 1696, cap. 5, cannot be maintained, in respect the deliveries were made not in satisfaction or security of a prior debt, but in fulfilment *pro tanto* of the bankrupts' obligations under the contract of 16th May 1874, which were the counterpart of the payment then made to them by the defender. (4) The deliveries not having been made to a conjunct or confident person, without a just, true, or necessary cause, to the prejudice of prior creditors, they are not challengeable under the Act 1621, c. 18. (5) The defender having under the transaction in question paid the sum of £500 to the bankrupts within sixty days of bankruptcy, in consideration and on the faith of performance of their counter obligations as to delivery, and the deliveries made in pursuance of the contract having been of much less value than the said sum, the defender ought to be assoilzied. (6) The pursuer's material allegations being unfounded in fact, the defender is entitled to absolvitor, with expenses."

The Lord Ordinary allowed a proof, of which the following are the important portions:—

The defender deponed:—"The transaction came about in this way: My son-in-law called upon me. I had intimated to him that I would give him no more accommodation bills, and that at any time I had money beside me I could purchase grain, so far as I pleased, for my horses. My son-in-law did not want accommodation at that time, and did not propose it. He inquired if I stood in need of grain, and said he was a little tight for money for the following day. I agreed to give him £500, and he was to give me grain at the market price as I required it for feeding purposes. . . . I had never had any transaction of the same kind with the bankrupts previously. I had been in the habit of getting grain from them—sometimes less and sometimes more—but I did not get one-third from them of the total grain I required. I generally paid for it within the month. I called at the bankrupts' office shortly afterwards, in order to begin to get the grain according to the arrangement. I pressed them for it, because I required it. I called on or before 22d May. At that time I had not the slightest knowledge that the bankrupts were insolvent—quite the opposite; and nothing had occurred to excite my suspicion. I