Wednesday, May 23.

FIRST DIVISION.

SPECIAL CASE—SIR JOHN P. GRANT AND CAW'S TRUSTEES.

Charity—Charitable Bequest—Trust—Residue.

A testator bequeathed the produce of a fund "to the person officiating for the time as schoolmaster in connection with the Established Church" in a certain parish. At the date of the bequest there was a school in the parish built and maintained in connection with the Established Church by a private party. Upon the passing of the Education Act 1872 the school ceased to be conducted upon that footing, and the buildings were let on lease to the School Board. There was no other school which answered the testator's description.—*Held* in the circumstances of the case that the object of the bequest had not failed.

This was a Special Case, in which Sir John Peter Grant of Rothiemurchus, K.C.B., was the party of the first part, and the Reverend Hugh Duff Macqueen and the Reverend Donald M'Dougall, trustees under a bequest made by John Caw, sometime residing in Rankeillor Street, Edinburgh, were parties of the second part.

John Caw died without issue on the 18th May 1870, leaving a trust-disposition and settlement, dated 14th June 1867, by which he, *inter alia*, made the following bequest:—"In grateful remembrance of many benefits I have derived from my connection with the parish of Rothiemurchus, I direct and appoint my said trustees to pay and make over the sum of £2000 stg. to the clerk of the Presbytery of Abernethy for the time being, and to the minister of the Established Church at Rothiemurchus (of which the Crown is patron) for the time being, to be invested at the sight and under the direction of my said trustees, and to be held by the said clerk and minister, and their respective successors in office, in all time thereafter, in trust for the purposes following, viz.,—For payment of one-half of the clear annual interest or produce of the said sum to the parliamentary minister of the Established Church at Rothiemurchus; one-fourth part of the said clear annual interest or produce to the person officiating for the time as schoolmaster in connection with the Established Church in said parish; and the remaining fourth part thereof to the minister and kirk-session of the said parish of Rothiemurchus, for behoof of poor persons residing in the said parish: . . . . And I direct and authorise my trustees to make and execute, at the expense of my estate, any deed or deeds which they may consider necessary for giving permanency to the said investment and full effect to the three several purposes above expressed in all time coming." Sir John Grant, the first party to the case, was the residuary legatee named in the trust-disposition, and the second parties were the clerk of the Presbytery of Abernethy and the minister of the Established Church at Rothiemurchus for the time being.

The parish of Rothiemurchus, which was formerly part of the united parishes of Duthill and Rothiemurchus, was, on 16th February 1859, disjoined and erected into a separate parish *quoad sacra*, but it still remained part of the said united parishes for all other purposes. A good many years previously Mr Grant, the former proprietor of the estate of Rothiemurchus, had built a schoolhouse and schoolmaster's house in the parish of Rothiemurchus, and paid the teacher's salary himself. The school was entirely supported by Mr Grant, and had always been maintained in connection with the Established Church, the teacher having always been a member of that church. It had always been under the superintendence of the Presbytery until the passing of the Education (Scotland) Act 1872. On Mr Caw's death his trustees had made over the legacy of £2000 to the second parties to the case, and at the date of the case it stood invested in their names and in those of their successors in office. One-fourth part of the annual interest thereof was regularly paid by them to the teacher of the school until Whitsunday 1875, the last payment having been made at that term. Upon the passing of the Education Act 1872 the school ceased to be supported by the then proprietor of Rothiemurchus, and the buildings were at the date of the case leased from his successor by the School Board, the school being wholly supported from the rates. The former teacher left the school on being informed by the then proprietor that his services were no longer required, and his successor, at the date when this case was presented was a member of the Established Church, and received his salary from the School Board.

There was no other school in the parish of Rothiemurchus in connection with the Established Church except a Sunday school under the charge of the minister and kirk-session of the parish.

The School Board and the teacher had declined to become parties to the case.

The party of the first part contended that the school in question could no longer be said to be in connection with the Established Church, and that, as there was not at present in the parish any school falling under the description in the bequest, the bequest had lapsed, and fell to be paid to him as residuary legatee. The parties of the second part denied that the bequest had lapsed, but were in doubt as to the proper application of the bequest until a scheme should be settled by the Court; and in these circumstances the opinion and judgment of the Court was asked upon the following questions:—"(1) Whether the bequest in favour of the person officiating for the time as schoolmaster in connection with the Established Church in the parish of Rothiemurchus has lapsed, and the first party hereto, as residuary legatee, has thus right to one-fourth part of the said sum. (2) Whether the said second parties hereto are entitled to retain the administration of said fourth part, and to continue to pay the clear annual interest thereof to the person officiating as schoolmaster of the united parishes of Duthill and Rothiemurchus, under the provisions of the Education (Scotland) Act 1872, so long as he continues to belong to the Established Church?"

The second question was withdrawn at the request of the Court.

Argued for the first party—There was a failure of the object of the bequest, and that being so, the fund fell to residue.

Argued for the parties of the second part—It was not conceded that there was a failure of object. The words of the bequest were never applicable to the state of the parish at any time. The school was a private school, and although it had ceased to exist for the time it might be revived. The fund therefore fell to be retained until that time, or until some scheme in accordance with the testator's intention should be devised.

Authorities — M'Laren on Trusts, i, 457; *Burnett* v. *King's College of Aberdeen*, Feb. 23, 1844, 6 D. 731, revd. Aug. 28, 1846, 5 Bell's Apps. 409; *Murdoch* v. *Magistrates of Glasgow*, Nov. 30, 1827, 6 S. 186; *Incorporated Trades of Edinburgh* v. *Governors of Heriot's Hospital*, June 3, 1836, 14 S. 873.

At advising—

Lord President—I do not entertain any difficulty. The residuary legatee under Mr Caw's settlement claims one-fourth of the fund of £2000 as having fallen into residue, on the ground that the object of the bequest which the testator had in view has failed. The way in which the trustees are to dispose of this part of the fund is to pay "one-fourth part of the clear annual interest or produce to the person officiating for the time as schoolmaster in connection with the Established Church in said parish," by which I understand the *quoad sacra* parish of Rothiemurchus. The person who answered to that description at the time Mr Caw made his settlement, and also at the time of Mr Caw's death, was the teacher of a private school voluntarily established by the late Mr Grant of Rothiemurchus in connection with the Established Church. Subsequent to that time Mr Grant thought fit to discontinue that school and to dispense with the services of the teacher. It is said that this was done in consequence of the Education Act of 1872, but that point does not appear to me to affect the question. In point of fact he did discontinue the school in the year 1873, as he had a right to do, as he had mortified no buildings or ground for the purpose of keeping it up. In consequence of this there is now no one answering to the precise description of the schoolmaster for whom the benefit was intended. Accordingly the object of the testator has failed, and the consequence is said to be that the legacy lapses into residue. I am not prepared to accept that result, and no authority in the law of Scotland has been quoted in support of it. I think, on a fair consideration of Mr Caw's settlement, the application of the money may be required at some future date when there may be some one answering to the description of a schoolmaster in connection with the Established Church. There is nothing to prevent this, and the schoolmaster may occupy a great variety of positions. The bequest is not confined to the old parish schoolmaster. It is quite clear that it was not the testator's view so to confine it, as there was no parochial school in the parish. Although at present there may not be any schoolmaster in connection with the Established Church, I see no reason for supposing that the object of the charity has permanently failed, and unless it has there is no ground for the contention of the first party. I am therefore for answering the first question in the negative.

I only desire to add that if any application be made to us in a different form for power to appropriate the income of the fund it will call for the exercise of a different species of jurisdiction. We would be exercising that species of jurisdiction which we exercise in framing schemes when a testator has not sufficiently stated his intention in the donation of a charitable bequest. I do not think that in existing circumstances there would be any difficulty in framing such a scheme for applying this fund to some useful and beneficial purpose within the intention of the truster.

Lord Deas—There is no question here raised upon the footing of the bequest being void for uncertainty—there is no uncertainty here at all—the fund is in the hands of trustees and the manner in which it is to be applied is distinctly stated. One-fourth of the income is to go to the schoolmaster in connection with the Established Church of the parish, and that for all time coming. On the bequest taking effect the money was to be handed over to the trustees and was invested apparently without any difficulty.

But afterwards the late Mr Grant, who had built the school-house and teacher's house, determined to give up the school. It would be very odd that the result should be to put the money into the pocket of his successor. I know of no authority, and none was quoted, which countenances such a contention. Supposing that the money could no longer be applied to the truster's purpose, I desiderate authority for the proposition that the residuary legatee is in that case entitled to get it.

But there is no reason for saying that the purpose has failed, even taking the deed in its literal construction. There are many ways in which there might still be a schoolmaster "in connection with the Established Church." I do not wish to suggest what these are, but if an application is made to us to prepare a scheme for carrying out this bequest I do not see that my duty would be to do anything but give effect to it. Whatever may be the law when the purpose has failed, I concur in holding that the money cannot be paid over to the residuary legatee.

Lord Mure—I concur. The words of the bequest are very general, and it does not appear that it is necessarily implied that the school is to be a parliamentary school, or that the benefit is to be confined within such strict limits. I am very clearly of opinion that the bequest has not fallen to the residuary legatee.

Lord Shand—I am of the same opinion. If it could be shown that the particular object of the truster in making the bequest had absolutely failed, I am not prepared to say that the contention of the residuary legatee would not have been a good one. But I rather think that the funds having been placed in the keeping of special trustees they might obtain the leave of the Court to apply them to general purposes in accordance with the intention of the truster. It cannot be said that there is a failure of object, and if there is, it is merely of a temporary character. A person answering the description of the beneficiary under the bequest may come immediately into existence. It is therefore

clear that the residuary legatee cannot claim the fund.

The following interlocutor was pronounced:—

"The Lords having considered the Special Case as now amended at the bar, and heard counsel for the parties thereon, Find, decern, and declare that the bequest in favour of the person officiating for the time as schoolmaster in connection with the Established Church in the parish of Rothiemurchus, in the trust-disposition and settlement in the case mentioned, has not lapsed; and the first party, as residuary legatee, has no right to one-fourth part of the sum of £1800 in the case mentioned: Find the first party liable in expenses to the second parties, and remit to the Auditor to tax the account of said expenses and report."

Counsel for Party of the First Part—Rutherfurd. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Parties of the Second Part—Lee. Agents—Menzies, Soote, & Coventry, W.S.

Saturday, May 26.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

FERRIER'S TRUSTEES *v.* BAYLEY.

Superior and Vassal—Mid-Superiority—Singular Successors—Entry of Heirs—Conveyancing (Scotland) Act 1874, *sec.* 4.

Held (*diss.* Lord Gifford) that the proprietor of the *dominium utile* of lands, who was a singular successor of a former vassal, and who was infeft in the lands but not entered with the superior at the commencement of the Conveyancing Act of 1874, could not defeat the demand of the superior for payment of the casualty of composition due by a singular successor, by offering himself for entry in the character (which he also possessed) of the heir of the orginal investiture, on payment of the relief duty alone.

This was an action of declarator and for payment of a composition, raised by the trustees of the late Walter Ferrier, W.S., against George Bayley of Manuel, W.S. The question arose under the following circumstances:—Until 1832 the lands of Manuel belonged to Principal Baird, grandfather of the defender. He was duly infeft in them, and held of the late Walter Ferrier by tenure of feu-farm. The superiority was at the date of this case in the pursuers as testamentary trustees of Mr Ferrier. Principal Baird in 1832 sold to his son-in-law Isaac Bayley the *dominium utile* of the lands, and granted, on May 12, 1832, a disposition containing an obligation to infeft *a me vel de me*, and a procuratory of resignation and precept of sasine. Upon this precept Mr Bayley was infeft. He died in 1873, and his trustees made up a title to the lands by notarial instrument recorded 15th December 1873, and subsequently conveyed them to the defender George Bayley on 27th December 1873, he being infeft on 19th January 1874. Isaac Bayley did not enter with the superiors as vassal, but in 1868 Thomas Elder Baird was entered as vassal by precept of *clare constat* as eldest son and nearest lawful heir of Principal Baird, and was infeft. This was a voluntary entry by Mr Baird, the effect being that so long as he lived the pursuers could not call upon the defender to enter as vassal, the fee being already full. In January 1876 Mr T. E. Baird died, and his nephew George Bayley was his heir-at-law, and therefore heir under the original investiture in favour of his grandfather Principal Baird, while at the same time, as already mentioned, he was infeft in the *dominium utile* of the lands as singular successor of his grandfather. The summons concluded for declarator that in consequence of the death of Thomas Elder Baird, who was the vassal last entered and infeft in the lands of Manuel, under the operation of the law as it stood prior to the passing of the Conveyancing Act 1874, a casualty, being one year's rent, became due to the pursuers as superiors of the lands; that the casualty was still unpaid, and that the full rents, mails, and duties of the lands did, after the date of citation, belong to the pursuers until the casualty was paid.

The pursuers pleaded—"(1) The pursuers being superiors of the lands described in the summons, are entitled to decree of declarator as concluded for. (2) The defender having become, by virtue of the fourth section of the Conveyancing Scotland Act 1874, the vassal of the pursuers, and having refused to pay the composition which became due upon the death of the last entered vassal, the pursuers are entitled to decree for the sums concluded for, or for such other sum as shall be found to be the true and just amount of one year's rent, subject to the usual deductions, with expenses. (3) The pursuers are entitled to draw the full rents, maills, and duties of the said lands described in the foregoing summons from and after the date of the defender's citation. (4) The defender, as a singular successor in the lands described in the foregoing summons, is liable to the pursuers in a composition of one year's rent."

The defender pleaded—"(1) The pursuers are not in the position of parties entitled under the provisions of the Conveyancing Act 1874 to raise the present action. (2) The defender being the heir-at-law of the last entered vassal, and willing to enter or to pay the duty exigible on the entry of an heir, is not liable to pay a composition as a singular successor. (3) The sum sued for being greatly in excess of the rent of the lands of Manuel Miln, of which the pursuers are superiors, decree therefor cannot be pronounced."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 21*st November* 1876.—The Lord Ordinary," &c., "Finds, decerns, and declares that, in consequence of the death of Thomas Elder Baird, Esquire, who was the vassal last entered and infeft under the operation of the law as it stood prior to the passing of the Conveyancing Act 1874, in All and Whole the mill of Manuel, called Manuel Mill," &c., "a casualty, being one year's rent, became due to the pursuers, as the late Mr Walter Ferrier's trustees, as superiors of the said lands, upon the 18th day of January in the year 1876, being the date of the death of the said Thomas Elder Baird, and that