they may be taken to be *personæ delectæ* and their contingent interest is sufficient to suspend the vesting of the estate. But if the legatees of the second order are described as the children, or issue, or heirs of the institute (there being no ulterior destination), those are to be considered in this question as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit which it was possible for the truster to give him, consistently with the benefits previously given to liferenters or other persons. For these reasons I am of opinion that General Crawford Hay took a vested interest under the direction to convey to him and his heirs, and that the Lord Ordinary's interlocutor should be altered to this extent and effect.'

"The views thus stated by Lord M'Laren are in accordance with Lord Justice-Clerk Moncreiff's opinion in *Jackson* v. *M'Millan*, 3 R. 630 — 'In order, therefore, to determine in any given case whether survivance of such a term be a condition of the gift or the postponment be only a burden on it, it is of the last importance to ascertain what is the primary object of the testator in postponing payment, and if the words indicate that the primary object was to secure an interposed interest, especially if they disclose no other, the presumption is strong that the legacy is not conditional, and that its enjoyment only is qualified. It is this consideration which gives importance to any ulterior destination which may be adjected to the gift, for if there be any separate and independent interest contingently favoured it will then be easier to presume that favour to that interest was in part at least the reason for postponing payment. But to have this effect the interest must be substantially separate and such as to indicate specific favour on the part of the testator. But a legacy to A and his heirs, or A and his children, is not the separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee whose children or heirs are mentioned. They only find a place in the destination through the relation which they bear to the *persona prædilecta* and in cases like the present in which the gift is only inferred from the direction to divide the instruction to the trustees to pay to the heirs of the legatee if he predecease the period of division, may be regarded more as the natural result of the legacy having vested than as an indication of the reverse." The direction in that case was on the expiry of the liferent to divide the property among the testator's younger children "or if dead their nearest lawful heirs, share and share alike."

"In the present case I am unable to find sufficient indication of intention that as to the shares of residue liferented vesting should be suspended until the expiry of the liferent. The solitary indication of such an intention is the use of the words 'whom failing' which are the appropriate words to introduce an independent destination. But it is clear that the *persona prædilecta* was Mrs Hotson. She alone is named in connection with the fee of the residue. She took one-third of it absolutely on surviving the testator, and would undoubtedly have taken the remaining two-thirds absolutely if she had survived the liferenters. Her children are not mentioned by name, they are called as a class, and there is no ulterior destination. The words 'whom failing' used in connection with the one-third directed to be paid to Mrs Hotson on the death of the testator, would simply have had the effect of preventing a lapse of the legacy had she predeceased that date. If the words used had been 'and' (or 'or') 'her lawful children,' the result would have been the same, they would in that event have taken as conditional institutes, 'and' being read as equal to 'whom failing.' Now, I do not think that the testator intended to confer any higher right on Mrs Hotson's lawful children in connection with the shares liferented, and the elliptical expression which he uses in regard to those shares, viz., 'whom failing to her children as aforesaid,' strengthens this view.

"It was argued that Mrs Hotson's children might not necessarily have been her heirs. But in point of fact they all survived her, and took what estate she left as her heirs *ut mobilibus*. Besides, whether necessarily her heirs or not, they were in the words of Lord Moncreiff and Lord M'Laren favoured by the testator out of regard to the legatee whose children they were, and thus had only a derivative interest. On those grounds, though reluctantly, I think the Crown's claim must be sustained on the footing that right to the shares liferented by her sisters vested in Mrs Hotson *a morte testatoris*."

Counsel for the Pursuer — Asher, Q.C. A. J. Young. Agent—Solicitor of Inland Revenue.

Counsel for the Defender — Ure — Low. Agents—Campbell & Smith, S.S.C.

Wednesday, May 30.

OUTER HOUSE.

[Lord Wellwood.

THE GOVERNORS OF THE INNER-PEFFRAY MORTIFICATION *v.* DRUMMOND.

Interest—Interest Due on Bond—Legal Interest—Repeal of Usury Laws (17 *and* 18 *Vict. c.* 90).

Under a heritable bond, granted in 1696, the interest payable was 6 per cent., the highest rate then exigible, or such other rate as might thereafter be exacted as the highest legal rate. *Held*

that the interest due upon the bond subsequent to the repeal of the Usury Laws was 6 per cent., being the interest originally prescribed by the bond.

In 1696 William second Viscount Strathallan and fourth Lord Madderty executed a deed of mortification of the sum of 5000 merks, to be administered by himself and his successors in the lands and barony of Innerpeffray, for the purpose of maintaining a school and library at Innerpeffray, and for payment of the salaries of a schoolmaster and keeper of the library. By a relative heritable bond Lord Strathallan bound and obliged himself and his heirs and successors "'to make due and thankfnl payment of the annual rent of the said sum of 5000 merks to the keeper of the said library and schoolmaster, and for the other uses after-mentioned.' And for further security bound himself 'to duly and lawfully infeft and sease Andrew Pattoun, present of the said library, for the use thereof, and for himself and his successors, keeper of the said library and schoolmaster at Innerpeffrie, heritable, under reversion, always in manner after specified, in All and Haill ane annual rent of £200 Scots money, and in case annual rents be altered, in such ane annual rent as shall be correspondent to the foresaid principal sum of 5000 merks, conform to the laws of this kingdom made or to be made thereanent.' The bond also contained provisions with regard to the redemption of said sum of 5000 merks, and in addition a precept of sasine in virtue of which the said Andrew Pattoun was infeft on 23d September 1701, and the infeftment recorded on 30th October 1701. In said last-mentioned year the defender, who is the third son of Thomas Robert tenth Earl of Kinnoull, succeeded to the lands and barony of Innerpeffray, and from that time until 15th October 1889 the said endowment was held and administered by him. Thereafter the administration of the mortification was transferred by an Order in Council under the Educational Endowment (Scotland) Act 1882 to the pursuers, the Governors of the Innerpeffray Mortification."

In the present action the pursuers asked for a count and reckoning from the defender of his intromissions with the funds of the mortification from 1855 to 1889, and claimed, *inter alia*, that they were entitled to an annual rent of £200 Scots, or £16, 13s. 4d. sterling, representing 6 per cent. on 5000 merks, the sum mortified. Six per cent. was at the date of the bond (1696) the highest legal rate of interest, and the question raised was whether, under the terms of the bond, interest at this rate was due subsequent to the abolition of the Usury Laws by 17 and 18 Vict. c. 90, or whether the interest should, as suggested by the defenders, be fixed at the highest rate obtainable during the period in question, for money lent on first-class heritable security. On this footing the defenders offered to pay 4 per cent. on the bond.

On 30th May 1894 the Lord Ordinary (WELLWOOD) pronounced an interlocutor finding the pursuers entitled to the annual rent of £200 Scots, and remitting the other questions in the case to an accountant.

"*Note.*—The only matter which I can with advantage dispose of at present is whether, under the heritable bond (partially quoted above) the defender falls to be debited with an annual rent at rate of 6 per cent. on the sum mortified, or at the rate of 4 per cent. as offered by the defender. This depends upon the construction of the heritable bond, and raises a somewhat curious question. The sum mortified was 5000 merks, equal to £277, 15s. 6d. The heritable bond provided that the annual rent was to be 'ane annual rent of £200 Scots money, and in case annual rents be altered, in such ane annual rent as shall be correspondent to the foresaid principal sum of 5000 merks, conform to the laws of this kingdom made or to be made thereanent.'

"Now, £200 Scots money is exactly 6 per cent. on the sum mortified, being at the date of the bond (1696) the highest rate of legal interest. By various statutes the rate of interest had been reduced, first, from 10 per cent. to 8 per cent. and then from 8 per cent. to 6 per cent. The statutes in force at the date of the heritable bond were the Acts 1649, c. 29, and 1661, c. 49, which fixed the highest rate of legal interest at 6 per cent. By the Act 12 Anne, stat. 2, c. 16, the rate was reduced to 5 per cent., and by 17 and 18 Vict. c. 90, the Usury Laws were abolished, and it became lawful for parties to stipulate for any rate of interest they pleased.

"There may be a question whether the Act of Queen Anne affected the interest payable under the bond, because that statute is confined to future contracts. But assuming that between the date of that statute and that of 17 and 18 Vict. only 5 per cent. was exigible, on the passing of the latter statute 6 per cent. became no longer illegal.

"The defender suggests that the proper course is to allow interest at the highest rate obtainable for money lent on first class heritable security from time to time between 1855 and 1889. Although this seems a very reasonable proposal I do not think that such a course is warranted by the terms of the bond. Prior to the date of the bond the rate of legal interest had from time to time been altered and fixed by statute, and it was evidently contemplated that from time to time it might be still further altered in the same way. If such an alteration were made by statute it would be a simple thing to substitute the one statutory rate of interest for another, and that rate would remain exigible so long as the statute which effected the alteration remained in force.

"But now the rate of interest obtainable on money lent on heritable security varies from time to time in each case, and is fixed according to the stipulation of parties. I do not see how it would be possible to regulate the rate of interest payable under this bond by reference to such transactions. I must deal with the question just as if it had arisen when the obligation was still prestable by the defenders; and if that had

been the case, I do not think that the Court could have been called upon to adjust the rate of annual rent on every fluctuation of the current rates of interest.

"I therefore feel that I have no alternative but to revert to the sum named in the contract, which during the years in question was not forbidden by the laws of the Kingdom. I should add as regards the apparent hardship to the defender, that he might at any time have paid off the bond by borrowing money at 3½ or 4 per cent. or other current rate of interest.

"I shall therefore find that for the period from 1st October 1855 to 15th October 1889 the defender falls to be debited with an annual rent of £200 Scots, or £16, 13s. 4d. sterling; and with that finding I shall remit the defender's accounts to an accountant, upon whose report the remaining questions between the parties which relate to progressive interest and annual accumulations may be settled.

"I venture to suggest, however, that this is a case for compromise, and the pursuers must consider whether if they get an annual rent at the rate of 6 per cent. they will not rest content with progressive interest at the rate of 4 per cent. as offered by the defender."

Counsel for the Pursuers — Graham Murray, Q.C.—Maclaren. Agent—W. H. Curr, W.S.

Counsel for the Defender — Dundas. Agents—Dundas & Wilson, C.S.

Tuesday, June 5.

OUTER HOUSE.

[Lord Wellwood.

CAMPBELL (INSPECTOR OF BOTHKENNAR) *v.* HISLOP (INSPECTOR OF MID-CALDER) AND ALSTON (INSPECTOR OF NEW MONKLAND).

Poor—Settlement—Pupil Lunatic.

The settlement of a pupil lunatic derived from her father is not affected by her mother's second marriage and consequent change of settlement.

Jane Innes, a congenital idiot, was secured in Larbert Institution for Imbeciles in April 1890, and remained there till February 1891. She was in pupillarity, having been born in 1880. Her father died in 1884, possessed of a residential settlement in the parish of Mid-Calder. Her mother left Mid-Calder in 1885 and married again, her second husband's birth settlement being New Monkland. From the time of her father's death till her admission to the Larbert Institution, Jane Innes had resided with her step-father, who at the date of her admission was resident in the parish of Bothkennar, but had not acquired a residential settlement there.

The pursuer, the Inspector of Poor for the parish of Bothkennar, sought in the present action to recover from one or other of the defenders the expenses incurred by him on account, of the girl's maintenance during her year's residence in the Larbert Institution. The defenders were respectively the Inspectors of Poor for the Parish of Mid-Calder, the residential settlement of the lunatic's father, and the Inspector of Poor for New Monkland, the settlement of her step-father. Both defenders admitted that the girl was a proper object of parochial relief, and that her step-father was not bound to support her.

The Lord Ordinary (WELLWOOD) on 5th June 1894 decerned against the first defender, the Inspector of Poor for Mid-Calder, for the sum in question, holding that that parish was liable to relieve the parish of Bothkennar of the expenses incurred for the girl's maintenance.

"*Note.* — [*After narrating the facts as above*]—At her father's death the pupil had a settlement in Mid-Calder derived from her father; but the Inspector of Mid-Calder maintains that that settlement was lost on the second marriage of the mother, the child's settlement following that of the mother.

"On a review of the authorities, I am of of opinion that this contention is not well founded in the circumstances of the case. The settlement of a pupil derived from her father not affected by the second marriage of her mother. In particular, *Hendry* v. *Mackinson & Christie*, 7 R. 458, is an authority directly in point.

"Mid-Calder relied on the older cases of *Gibson* v. *Murray*, 16 D. 926, *and Greig v. Adamson & Craig*, 3 Macph. 575; and certainly these cases, taken by themselves and unexplained, go far to support the proposition contended for. But as explained in *Beattie* v. *M'Kenna & Wallace*, 5 R. 737, they can only be supported as proceeding on the ground that the mother was the pauper, not the child. *Greig's* case was the judgment of the whole Court, but it was decided by a majority of one against a formidable minority. Lord Deas, who gave the leading opinion among the majority, afterwards emphatically disclaimed in *Beattie's* case the construction which is now sought to be put on *Greig's* case, and indeed the opinions of the majority in *Greig's* case sufficiently show the limited scope of that judgment, be it sound or not. Here the child is the pauper; the mother is not pauperised by the support given to her imbecile child in an asylum. And as a pupil or a lunatic placed in an asylum cannot lose a settlement, the girl's settlement remains in Mid-Calder. What I have stated shortly can be so clearly demonstrated by an examination of the cases, and especially of the opinions in the cases of *Greig* and *Beattie*, that I think it unnecessary to say more."

Counsel for the Pursuer—Crole. Agent—Wm. B. Rainnie, S.S.C.

Counsel for the Defender Hislop—C. S. Dickson—W. Gray. Agents—J. & A. Hastie, Solicitors.

Counsel for Defender Alston—Orr Deas. Agents—Drummond & Reid, S.S.C.