But this lameness is characterised by the word "slight," and I think we must look at the evidence to say what effect ought to be given to this adjective, applied to the lameness, as rendering the insured peculiarly liable to accidents. I am inclined to accept the view of the Lord Ordinary on the evidence, and to conclude that the lameness was such as to be manifest to anyone who saw Mr Cruikshank upon his feet. When Mr Black proposed that he should take out a policy I agree with the Lord Ordinary in thinking it proved that Mr Cruikshank rose and walked across the room. Mr Black, who wrote the replies into the form of proposal, having seen this lameness, described it as slight, and reading this word so written, I cannot regard it as an untrue answer on which a defence to this action can be founded. I think that this lameness was expressly described as making Mr Cruikshank peculiarly liable to accidents, and that the degree of this lameness being so written by their agent cannot be founded on by the defenders as untrue. Taking this as a written contract, the terms of which must be complied with, I think that so far the plea stated in defence to this action that the conditions of the contract were not complied with must fail.

With regard to the declaration that the insured had not had paralysis or a fit of any kind, I think that we must take the language of the declaration in the sense in which it was probably and reasonably understood. I think that when a man applies for insurance, and states that he is afflicted with lifelong lameness which renders him peculiarly liable to accidents, that a statement in regard to "paralysis" is not to be understood as declaring that paralysis in any form was not the source of the lameness which was disclosed. I think the fair view is that "paralysis" is to be taken in connection with the words "fit of any kind." Paralysis is commonly understood as a fit or shock. I do not think it is commonly used so as to suggest such paralysis as is the result of a fall causing paralysis. I think the Lord Ordinary is of opinion that it was not proved that Mr Cruikshank ever had paralysis, and I agree with him. There are certain attacks of illness which produce forms of paralysis. I suppose that a fainting fit is, while it lasts, a species of paralysis. It is at least a paralysis of the nerves of motion. But I do not think that the word "paralysis" is used in this declaration as designative of less serious seizures to which the term might with more or less accuracy be applied. I think it is used as applicable to that graver form of attack which is associated with lesion of the brain. I agree with the Lord Ordinary that it is not proved that Mr Cruikshank had paralysis in any sense in which the word is used in this declaration. But the declaration proceeds—"I have no physical infirmity;" and the question is, what bearing this declaration has on the liability of the defenders when taken in connection with the lameness of the insured. I do not think it is to be taken literally, for I suppose there is not any human being, or indeed any animal, free from physical infirmity. An ear which hears less distinctly than the other, an eye which sees less clearly than its fellow, a weak voice, might each be described as physical infirmity. The effort would be endless to attempt to express the varieties of physical infirmity to which all living beings are liable.

But in what sense, then, did the defenders understand this declaration on the part of a man who had declared that he had slight lameness from birth? I think the two statements must be taken together. I think the insured must be taken to have meant that he had no physical infirmity except the lameness, which, I think, was fairly disclosed. I am therefore of opinion that the declaration cannot be read as importing a warranty that the insured was absolutely free from all physical infirmity.

I can understand that the defenders might at any time during the currency of the policy have desired to know what was the kind and extent of the lameness of the insured, but they were quite satisfied to take it as it stood, the insured remained in good health, and I am not surprised that the defenders did not desire to have any further information as to his condition.

On the whole matter I conclude, along with the Lord Ordinary, that the defence of breach of warranty existing in misstatements in the proposal for insurance and in the declaration is not proved.

LORD TRAYNER—I entirely concur, and can add nothing usefully to what has been said. I therefore agree that the Lord Ordinary's interlocutor should be affirmed.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuers—Vary Campbell—M'Clure. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Defenders—Balfour, Q.C. —Crole. Agents—J. & R. A. Robertson, S.S.C.

Friday, November 22.

FIRST DIVISION.

COUNTY COUNCIL OF RENFREWSHIRE *v.* BINNIE AND OTHERS.

Process — Special Case — Court of Session Act 1868, *sec.* 63—*Competency.*

A Special Case which discloses no true *lis* or controversy between the parties is incompetent.

This Special Case was presented by the County Council of Renfrewshire, first parties, and Robert Binnie and others, trustees for the Orphan Homes of Scotland for Destitute Children, second parties, to determine a question of assessment.

The Special Case stated that the second parties were, as trustees foresaid, heritably vested in certain subjects in Kilmalcolm parish, known as "The Orphan Homes of Scotland for Destitute Children." These subjects are entered in the Valuation Roll for the current year at a *cumulo* rental of £1950, and, with one or two trifling exceptions, are entered in the said roll as occupied by "trustees for managers and children," the proprietor being described as "The Orphan Homes of Scotland, per Wm. Quarrier here." (Stat. 7) . . . "The whole premises and the whole contributions received, which constitute the entire income of the Homes, are exclusively devoted to the gratuitous education and maintenance of children of the poorest classes whose natural guardians have either died or have abandoned or neglected them."

Mr Quarrier, as representing the second parties, appealed against the consolidated rates assessed on them by the County Council in respect of the ownership and occupancy of said property, and maintained that the whole of the consolidated rates should be discharged in respect that the subjects were owned and occupied solely for charitable and religious purposes. (Stat. 9)—"The Rates Appeal Committee of the County Council, before whom Mr Quarrier was heard in support of the appeal, were not aware of any authority for giving relief from the rates unless possibly that contained in the Sunday and Ragged Schools (Exemption from Rating) Act 1869, but being desirous as far as possible to give effect to the appeal, they gave him the benefit of any doubt that might exist on the terms 'Ragged School,' and held it to extend not only to the subjects entered in the valuation roll under the description of 'school,' but to all the subjects assessed except the superintendent's house, and they accordingly discharged the occupier's rates on the whole subjects (except that house), amounting to £58, 0s. 7d., and refused the appeal so far as regards the proprietor's rates, amounting to £81, 6s. 11½d." (Stat. 10)—"Mr Quarrier being dissatisfied with the decision of the Rates Appeal Committee, appealed to the County Council, and at a meeting of County Council held at Paisley on 14th March 1895 he was heard in support of his appeal. . . . The County Council could not accept the interpretation put upon the Act of 1869 by Mr Quarrier, and a motion was proposed that the appeal be refused, to which an amendment was proposed and carried that 'a Special Case be submitted to the Court of Session by the Council and the appellant, in order to ascertain the extent, if any, to which the Council have power to relieve the property referred to of assessments, and that after the decision of the Court has been got, the appeal be dealt with by the Council, and relief given to that extent.' Mr Quarrier stated that he acquiesced in this course."

The following questions were accordingly submitted for the judgment of the Court:—"1. Have the County Council, as a rating authority, any power, statutory or otherwise, to relieve the property referred to, or any part thereof, of the whole or part of the consolidated rates levied by them? 2. If they have such power, to what extent may relief be given—(*a*) From the consolidated rates levied in respect of the ownership of the subjects? and (*b*) From the consolidated rates levied in respect of the occupancy of the subjects?"

The Sunday and Ragged Schools (Exemption from Rating) Act 1869 (32 and 33 Vict. c. 40), section 1, enacts that "Every authority having power to impose or levy any rate upon the occupier of any building or part of a building used exclusively as a Sunday school or ragged school may exempt such building or part of a building from any rate for any purpose whatever which such authority has power to impose or levy." Section 2 defines "Sunday school" and "ragged school."

The Court having at the outset of the discussion raised the question of the competency of this Special Case, the second parties craved leave to amend the case by substituting the two following questions for those which, as above set forth, originally appeared in the case:—"(1) Are the subjects assessed a Sunday school and ragged school, or a Sunday school, or a ragged school, within the meaning of the Act? (2) If so, have the first parties, as a rating authority, power to relieve the said subjects or any part thereof—(*a*) From the consolidated rates levied in respect of the ownership of the subjects? or (*b*) From the consolidated rates levied in respect of the occupancy of the subjects?"

Argued for the second parties—This case was competent. The test of competency was that one of the parties should be entitled to declarator; and here the second parties would be entitled to declarator, the conclusions being (1) that these subjects were Sunday schools, or ragged schools, or both; (2) that the County Council had power to exempt; and (3) that the County Council must apply its mind to the question of exemption. A declarator of the meaning of a particular Act of Parliament was not incompetent, wherever the pursuer wished and had an interest to have that meaning declared—*Edinburgh and Glasgow Railway Company* v. *Meek*, November 23, 1849, 12 D. 153; *Leith Police Commissioners* v. *Campbell*, December 21, 1866, 5 Macph. 247; *Hogg* v. *Parochial Board of Auchtermuchty*, June 22, 1880, 7 R. 986.

Counsel for the first parties were not called upon.

At advising—

LORD PRESIDENT — The shape of the special case as it stands in type was such that it was announced at the outset that the parties proposed to substitute certain queries for those which are in the original case. We have before us this proposed amendment, and we have to consider whether it renders the case one which we can entertain. The first question is, "Are the subjects assessed a ragged school and a Sunday school, or a ragged school, or a

Sunday school within the meaning of the Act of 1869?" Now upon that query, the first question is, Who are the disputants? There are none; because, instead of dispute, there is practical agreement. The County Council have not on this question joined issue with Mr Quarrier, and they contend—and the special case defines their contention and its grounds for our consideration—nothing which is negative of the first query. On the contrary, I think the fair reading of their case is, that their desire is that that question should be affirmed. Now, it will not do for this Court, in questions of assessments, to give an answer to a query where there is no dispute, and no parties who take opposite views. Therefore I think that that question will not do. Then, as Lord Adam has pointed out, the second question is entirely dependent upon our answering the first in the affirmative. For it begins, "If so," &c. That seems to form a short and conclusive objection to our entertaining this second query. But I must go on to observe that I do not think the parties here have arrived at any stage at which there is such a *lis* or controversy that the Court is entitled to step in. If the County Council had disposed of Mr Quarrier's appeal in a way adverse to him, I can understand his challenging the legality of their decision in this form, or in a declarator. If it appeared, for instance, that the County Council had refused to consider some question on which a right to exemption depended, it is not too bold to say that the remedy might have been found. But they have not done so; and for aught that appears, they might exempt Mr Quarrier.

LORD ADAM—I agree with what has been said. No doubt a special case is a very valuable and quick and cheap way of getting the opinion of the Court on matters appropriate for that purpose. But it appears to me that in this case the form of a special case has been used where there is no dispute between the parties. About the first question there is no dispute. Mr Quarrier maintains that his is a ragged school. It is set forth in this case that the County Council admit that it is a ragged school. That is not a proper *lis* or a proper case to bring before the Court in the shape of a special case. Then look at the other question. One would naturally suppose that the County Council would be the parties who were maintaining that they had the power of exemption. It is not likely that a board of any sort would be willing to deny that they had a right to exercise a certain discretion; yet here it is Mr Quarrier who wants to insist that his opponents have it, and his opponents, as I understand, are supposed to say that they have not got it. I do not think that is a fair question. Supposing we did decide these questions, our judgment would come to nothing if the County Council chose to say, we will exercise our discretion either way.

LORD KINNEAR—I am of the same opinion. I do not say that it would not be possible to obtain a judgment upon some of the questions indicated by Mr Clyde in the course of his argument as being those questions upon which the judgment of the Court is desired, and I do not say that it would be impossible to obtain those judgments in the form of a special case. But I agree with your Lordships that this case cannot be entertained because it discloses no controversy between the parties. Neither in its form nor in its substance does it appear to me to raise any question on which the parties are opposed. The proper mode of stating a special case is, to set out in the first place an articulate statement of the facts on which the parties are agreed, and then to set out, as clearly and articulately, the opposing pleas of the parties. Here we have no opposing contentions. We may gather that different views of the statute may be maintained, but we have no statement of opposing pleas by the parties to the case. I therefore agree with your Lordships that this case as it now stands cannot be entertained.

LORD M'LAREN was absent.

The Court refused the motion of the second parties for leave to amend, and dismissed the special case

Counsel for First Parties — Dundas — R. Monteith Smith—R. S. Brown. Agent —F. J. Martin, W.S.

Counsel for Second Parties—Balfour, Q.C. — Clyde. Agents — Dove, Lockhart, & Smart, S.S.C.

Wednesday, November 27.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

GRAY'S TRUSTEES *v.* ROYAL BANK.

Compensation — Retention — Balancing of Accounts in Bankruptcy — Mutuality of Debt and Credit—Retention by Bank of Trust Funds for Debt of Truster.

The executors in a testamentary trust which ultimately proved to be insolvent, deposited, *eo nomine*, realised assets of the trust with a bank to which the truster was indebted at the date of his death.

Held (1) that there was no mutuality of debt and credit between the bank and the executors, and that the bank were not entitled to apply the deposited trust funds in satisfaction of their claim against the deceased; and (2) that assuming such an equitable right to exist, the bank were barred from exercising it by their knowledge that the estate was insolvent, and that the realised assets were held by the executors as trustees for the benefit of all creditors upon the estate.