Tuesday, July 17.

FIRST DIVISION.

THE CHURCH OF SCOTLAND MINISTERS' WIDOWS' FUND *v.* NESS AND OTHERS (PATON'S CASE).

THE CHURCH OF SCOTLAND MINISTERS' WIDOWS' FUND *v.* SWAN AND OTHERS (ROBB'S CASE).

Church — Stipend — Vacant Stipend — Ministers' Widows' Fund — Income of Bequests by Private Individuals—Church of Scotland Ministers' Widows' Fund Act 1814 (54 *Geo. III, cap. clxix*), *sec.* 9.

The Church of Scotland Ministers' Widows' Fund Act 1814, section 9, enacts "That when any parish in the Church of Scotland becomes vacant by the . . . translation . . . of an incumbent holding the pastoral cure and benefice of such parish, and that vacant stipend thereby arises subsequent to the crop and year 1813, such vacant stipend, in so far as it has heretofore been applicable by the patron to pious purposes, shall thenceforth and in all time to come be levied in manner hereinafter mentioned, and paid to the said general collector. . . ."

The Reverend Robert Paton left £300 to the Presbytery of Glasgow, "the interest to be added to the stipend of the minister of St David's Parish, Glasgow." George Robb left £1200 to the kirk-session of the same church, "the free annual revenue . . . [to] be paid . . . to the minister of the church for the time being." On 24th September 1914 the church became vacant by the translation of the incumbent and continued vacant till 13th April 1915. Stipends vest half-yearly at Whitsunday and Michaelmas (29th September). In a competition between the Ministers' Widows' Fund and the donees of the bequests, *held* that the half-year's income for the period following Whitsunday 1914 in the case of the Paton bequest fell as vacant stipend to the trustees of the Ministers' Widows' Fund, as the testator's intention was that the bequest should be treated as stipend, and (*dis.* Lord Johnston) in the case of the Robb bequest did not fall to be treated as vacant stipend, as no such intention on the part of the testator could be inferred from the terms of the bequest.

The Church of Scotland Ministers' Widows' Fund Act 1814 (54 Geo. III, cap. clxix), section 9, is quoted *supra in rubric.*

The Trustees of the Church of Scotland Ministers' Widows' Fund incorporated by the Church of Scotland Ministers' Widows' Fund Act 1890 (53 and 54 Vict. cap. cxxiv), *first parties*, and the Reverend David Ness, M.A., and others as a committee appointed by the Presbytery of Glasgow to represent it, *second parties*, brought a Special Case for the determination of questions relating to the disposal of the income of a legacy left by the Reverend Robert Paton, D.D., during the vacancy of St David's (Ramshorn) Parish Church in Glasgow owing to the translation of the minister.

A similar case was brought by the first parties and the Reverend John A. Swan, B.D., and others as a committee of the Kirk-Session of St David's Parish Church, appointed by the Kirk-Session to represent it, *second parties*, for the determination of similar questions relating to a bequest by George Robb.

The cases were heard together.

Paton's Case. — The Reverend Robert Paton, D.D., left a *will* dated 4th July 1870 which provided, *inter alia*—"I bequeath to the Presbytery of Glasgow £300, the interest to be added to the stipend of the minister of St David's Parish, Glasgow."

The Special Case set forth—"3. After the death of the said Robert Paton the said sum of £300 was, on or about 8th January 1879, paid by his trustees to the Presbytery of Glasgow. Since the last-mentioned date the said Presbytery of Glasgow have held the said sum, and collected the income thereof, which amounts to £12, 14s. per annum, and accrues to them at four terms in the year, Candlemas, Whitsunday, Lammas, and Martinmas, and paid the said income to the minister of said church for the time being, once a year in the month of February. . . . 5. On or about 24th September 1914 the said parish became vacant by the translation of the Reverend Ernest Sherwood Gunson to the parish of New Monkland, in the Presbytery of Hamilton, and continued vacant till 13th April 1915. Payment of a year's income of the said legacy was made to the said Rev. Ernest Sherwood Gunson in February 1914, and thereafter half a year's income was paid to him at the date of his vacating the benefice."

The first parties' *contention* was "that the income of the legacy in question forms part of the stipend of the benefice in the sense of the Act 54 Geo. III, cap. 169, and that in respect that the benefice was vacant at the term of Michaelmas 1914, one half of a year's income, amounting to the sum of £6, 7s., is vacant stipend in the sense of section 9 of the Act 54 Geo. III, cap. 169, and is payable to the first parties for the purposes of the fund administered by them."

The second parties' *contention* was "that said income is not vacant stipend in the sense of said Act, and is not payable to the first parties."

The *questions* for the opinion of the Court included, *inter alia*—"3. In respect that the benefice in question was vacant at Michaelmas 1914, is one-half of a year's income of the said legacy payable to the first parties for the purposes of the Acts relating to the Church of Scotland Ministers' Widows' Fund?"

Robb's Case. — George Robb, sometime carting superintendent of the Caledonian Railway Company, left a *trust-disposition and settlement* which directed his trustees "to pay to the Kirk-Session of Ramshorn Church, Glasgow, the sum of One thousand two hundred pounds, the free annual reve-

nue of which shall be paid by the Kirk-Session to the minister of the church for the time being."

The Special Case set forth—"3. After the death of the said George Robb the said sum of £1200 was on or about 20th August 1909 paid by his trustees to the Kirk-Session of the said St David's (Ramshorn) Church (commonly known as the Ramshorn Church of Glasgow). Since the last-mentioned date the said Kirk-Session have held the said sum and collected the income thereof, which amounts to £42 per annum, and accrues to them at 30th June and 31st December annually, and paid the said income to the minister of the said church for the time being at 1st January and 1st July in each year by equal portions. . . . 5. On or about 24th September 1914 the said parish became vacant by the translation of the Rev. Ernest Sherwood Gunson to the parish of New Monkland in the presbytery of Hamilton, and remained vacant till 13th April 1915. At 1st January 1915 a proportion of the income of £21 accruing at 31st December 1914, corresponding to the period from 1st July to 24th September 1914, was paid by the Kirk-Session to the said Reverend Ernest Sherwood Gunson."

The contentions of parties were similar to, and the questions of law were identical with, those in the *Paton* case.

Argued for the first parties—In the Paton Bequest the income of the fund was earmarked as stipend. There was no express bequest to the minister, and no provision for accumulation or application of the fund in any other way except as stipend. Further, the testator was a minister who presumably wished the fund when there was no minister in the cure to be treated in the same way as stipend. Accordingly the presumption was that the first parties being entitled to vacant stipend in the ordinary sense were also entitled to the income of this fund when the parish was vacant. In the Robb Bequest the income was not earmarked as stipend, but unless it fell to be treated as stipend when the cure was vacant it was undisposed of. In both cases the income was part of the permanent endowment of the church. Had the income been ordinary stipend payable out of teind during a vacancy those parties would have been entitled to it, but stipend was not limited to stipend paid out of teind. It included all the permanent annual fruits of the benefice—Duncan, Parochial Ecclesiastical Law, 1903 ed., pp. 230, 289, and 296. It might be derived from private mortifications such as the present—*ibid.* p. 298; Ersk. Inst., i, 5, 23. In a *quoad sacra* parish the vacant stipend went to the Widows' Fund—*Grant* v. *Macintyre*, 1849, 11 D. 1370. The stipend of a *quoad sacra* church derived from funds privately raised had been held when vacant to go to the Widows' Fund—*Cheyne* v. *Cook*, 1863, 1 Macph. 963; *M'Lagan* v. *Brown*, 1887, 14 R. 1083, 24 S.L.R. 759. "Stipend" and "benefice" were used as synonyms in the present connection—Act 1644, cap. 20. Stipend had been treated as equivalent to the "fruits of the benefice"—*Gordon* v. *Earl of Kinnoull*, 1845, 4 Bell's App. 126, *per* Lord Cottenham at p. 137. Where the stipend was derived from a parliamentary grant as in parliamentary churches it was held during a vacancy to go to the Widows' Fund as being a permanent endowment of the Church—*Gordon* v. *Trustees of Ministers' Widows' Fund*, 1836, 14 S. 509. *Irvine* v. *Trustees of the Ministers' Widows' Fund*, 1838, 16 S. 1024, was not a decision upon the nature of the stipend derived from such funds, but merely decided that the ministers in question did not fall within the class to which the Widows' Fund statutes applied. The same principles applied to burghal churches as to parliamentary churches, the permanent endowment being treated as stipend—*Dundee Magistrates* v. *Nicol*, 1829, 8 S. 66; *Stirling Magistrates* v. *Gordon*, 1837, 15 S. 657. As a matter of history the patron founding the benefice originally got the vacant stipend, but later he became bound to apply that to pious uses—Act 1685, cap. 18. If the second parties were right only part of the vacant stipend would be applied to pious uses. The rest would fall into the heritors' own hands. The first parties were entitled to half of a year's income of the funds in question. As regards glebes the rule *messis sequitur sementem* applied.

Argued for the second parties—"Vacant stipend" in the Act 54 Geo. III, cap. 169, sec. 9, meant stipend proper and not emoluments derived from private mortifications. The latter must be dealt with according to the testator's intention. Stipend was also applied to income derived from the permanent endowment of the benefice at the date of its erection—Duncan, Parochial Ecclesiastical Law, 1903 ed., p. 290. In a *quoad sacra* church the stipend was the annual proceeds of the permanent endowment of the church existing at the date of its erection—Division of Parishes (Scotland) Act 1844 (7 and 8 Vict. cap. 44), sec. 8. Income derived from private mortifications such as the present was regarded as a "supplementary provision"—Duncan, Parochial Ecclesiastical Law, p. 298. In all the cases the vacant stipend not derived from teind falling to the Widows' Fund had been limited to stipend derived from the original permanently fixed endowment of the church. A private mortification not forming part of the permanent original endowment of the church did not fall to the Widows' Fund during a vacancy—*Cheyne* v. *Cook* (*cit.*) at p. 964, and *per* the Lord Ordinary (Jerviswoode) at p. 967. The dicta of the Lord Justice-Clerk (Inglis) at p. 970 had reference to stipend derived from the permanent endowment of the church at its erection. Gratuitously paid sums added to the stipend of the minister were not regarded as attached to the benefice—*Cheyne* v. *Dundee Magistrates*, 1866, 4 Macph. 1002, *per* Lord Justice-Clerk (Inglis) at p. 1005, 2 S.L.R. 157. A private bequest was not taken into consideration in fixing the amount of the stipend—*Rainie* v. *Magistrates of Newton-on-Ayr*, 1897, 24 R. 606, *per* Lord Stormonth Darling (Ordinary) at p. 609, 34 S.L.R. 447. Neither was the revenue derived from feuing the glebe—*Minister* v. *Heritors of Kilmalcolm*, 1875, 3 R. 32, 13 S.L.R. 16. Income derived

from the glebe was not regarded as part of the stipend—Ersk. Inst., i, 5, 14. The feu-duties derived from feus of the glebe were specially dealt with during a vacancy by statute—Glebe Land (Scotland) Act 1866 (29 and 30 Vict. cap. 71), sec. 15. The questions should be answered in the negative.

At advising—

LORD JOHNSTON—The Church of Scotland Ministers' Widows' Fund Act of 1814, when it made (section 9) provision for the occasion of vacant stipend arising subsequent to crop and year 1813, and enacted that such vacant stipend should be levied and paid to the collectors of the Widows' Fund, limited the application of its own enactment to "such vacant stipend, in so far as it has heretofore been applicable by the patron to pious uses." At the same time it made this provision (section 12) for the collecting of said vacant stipend, viz. —the Moderator of the Presbytery was required to intimate to the collector that such stipend was vacant, and to accompany the intimation by an attested list of the several heritors or others by whom it was payable, and in what proportions; and he was further directed to intimate to the several heritors and others that they were required under the authority of the Act to make payment to the collector. When "stipend" is read in collocation with "crop and year" and with "heritors," the meaning of the term would appear to be confined to its natural meaning, viz., the stipend proper, modified out of and localled on the teinds. But there may be virtue in the words "or others" used along with "heritors," and the Act of 1814 has been the subject of authoritative construction to that effect, which I shall immediately notice.

We have here to deal with, 1st, a bequest to the Presbytery of Glasgow of £300, "the interest to be added to the stipend of the Minister of St David's Parish, Glasgow" (commonly known as Ramshorn Parish, Glasgow), and 2nd, a bequest of £1200 to the Kirk Session of Ramshorn Church, Glasgow, "the free annual revenue of which shall be paid by the Kirk Session to the Minister of the Church for the time being."

On 24th September 1914 the parish became vacant by the translation of its minister to the parish of New Monkland, and it remained vacant till 13th April 1915. As it was a case of vacancy by translation there was no claim to ann. So we have to determine simply whether the income of these bequests, both or either of them, is stipend of the benefice in question, in such sense that a half-year income thereof was at Michaelmas 1914 vacant stipend, and payable under the Ministers' Widows' Fund Act 1814 to the collector of the fund.

The law and practice of payment of ministers' stipends is fixed thus—The terms are Whitsunday and Michaelmas (29th September). Where a minister survives or retains the benefice till Whitsunday he is entitled to half the stipend, and if till Michaelmas to the other half. The rule, though derived from the idea of crop and year, and primarily applicable to stipend localled on teinds, has been extended to money stipends, such as occur in the case of *quoad sacra* parishes, &c.

The Ministers' Widows' Fund Act has been several times before the Court, and in the leading case of *Cheyne* v. *Cook*, 1863, 1 Macph. 963, it was decided on a very careful examination of the general statutes which had preceded in date that Act, that the term "stipend" as used in the section in question (section 9) was not confined to stipend proper, but covered the whole fruits of the benefice. The Lord Justice-Clerk (Inglis) bases the judgment of the Court on these considerations, viz., that prior to the Reformation the right of the patron during the vacancy was to possess the benefice; that the Statute of 1592, cap. 117, which enacted that should the Presbytery refuse to admit a qualified minister presented "it shall be lawful to the patron to retain the whole fruits of the benefice in his own hands," was merely a re-enactment of the common law right; that the Act 1644, cap. 20, and subsequent Acts to the same effect, which direct the patron to apply vacant stipend to pious uses, though they do not use the expression "whole fruits of the benefice," but speak of "vacant benefice and stipend," of "vacant stipend," &c., indicate clearly that they were intended to extend to the whole fruits of the benefice, whether in the form of stipend proper or not, and that in its use of the term "stipend" the Ministers' Widows' Fund Act must be interpreted accordingly. His Lordship adds (p. 970), "The provisions do not extend beyond the annual fruits of the benefice that take the shape of money, but they extend to all such fruits."

In the case of *Cheyne* v. *Cook* (*cit.*) the Ministers' Widows' Fund Act was held to apply to *quoad sacra* parishes where the stipend secured is purely a money stipend, in respect that they were proper benefices. Similarly in *Magistrates of Dundee* v. *Nicol*, 1829, 8 S. 66, and *Magistrates of Stirling* v. *Gordon*, 1837, 15 S. 657, it was applied to burghal parishes, in so far as the stipend payable by the magistrates was a fixed and permanent provision, and not a merely voluntary grant in supplement during a particular incumbency. Its application came up also in *Irvine*, 1838, 16 S. 1024, *Grant* v. *Macintyre*, 1849, 11 D. 1370, and *M'Lagan* v. *Brown*, 1887, 14 R. 1083, 25 S.L.R. 759. But I would only notice the following as having, I think, a close bearing on the present case. In *Cheyne* v. *Magistrates of Dundee*, 1866, 4 Macph. 1002, 2 S.L.R. 157, it having been found that there was in the hands of the magistrates of Dundee a mortification termed the "Hospital Fund," which they were bound to apply, *inter alia*, in augmenting when necessary the stipends of the ministers of the town churches, the collector claimed a retrospective effect for the decision, so that a claim for a vacant stipend should have the advantage of an augmentation which the magistrates were under decree compelled to give, but which had not yet been adjusted when the vacancy occurred. The fund out of which it had been held that suitable augmentations ought to

have been made was the income of certain properties, formerly pertaining to the church, made over by the Crown at the Reformation to the magistrates of Dundee for sustentation of the ministry and support of the poor, and to be termed "Our foundation of the Ministry and Hospital of Dundee," commonly known in after years as "the Hospital Fund," and which had been increased by other benefactions. While the collector's claim was repelled, no exception was taken either at the bar or on the bench to the idea of a claim by the collector for vacant stipend covering a sum which, had it been given in the past and not to be given in the future, would have been given by virtue of a legal claim, and then would have been but a share of the income of a mortification, for it was recognised that sums which accrue annually in the shape of money, and are payable to the minister as matter of right, are fruits of the benefice. I may also refer to *Rainie* v. *Magistrates of Newton-on-Ayr*, 1897, 24 R. 606, 34 S.L.R. 447, as a good example of the many sources from which a minister's stipend in the wider sense may be made up, all except I think glebe rent being stipend in the sense of fruits of the benefice according to the interpretation which has been put upon the Ministers' Widows' Fund Act, but not stipend proper. These authorities to which I have referred are not questioned, and I therefore feel that I must approach this case on the footing that the Ministers' Widows' Fund Act 1814 has already been judicially construed, and by a judgment of this Division the authority of which is not impugned.

Are then these two sums here in question, one of which is expressly to be added to the stipend of the minister, the other of which is to be paid to the minister for the time being, any less fruits of the benefice than, say, the stipend of a *quoad sacra* minister, or one receiving in supplement a grant from the statutory small livings fund?

The question is in the first place one of intention, but not I think of intention pure and simple. The granters must be held to have had in view the incidents naturally attaching to their gift. They both give what produces an annual sum to augment the minister's stipend. The minister for the time being has a right to that sum in perpetuity. It is only *qua* minister of the parish that he has that right. And it appears to me that these annual sums are both annual fruits of the benefice, in the sense of the statute as it has been interpreted. I cannot myself draw any distinction between them. What is paid to the minister is added to his stipend, and, *vice versa*, what is added to his stipend is paid to the minister. And it is only to the minister for the time being—that is, as I understand, when the amount accrues due—that it can be paid. The granters must, I think, be held to have made their bequests with the intention that they should become part of the fruits of the benefice in time coming, and as such be subject to the incidents which attach to the fruits of the benefice, and one of these is that they pass as vacant stipend to the Widows' Fund during a vacancy. If not, where are they to go? The second parties in each of these cases carefully avoid touching this question; and I am not surprised, for they cannot retain them themselves for pious or any other uses, and the minister not yet presented has no more right to them than the minister who has vacated.

I think therefore, differing somewhat I am aware from your Lordships, that the last questions in each case should be answered in the affirmative. It is unnecessary to answer the first two.

LORD MACKENZIE—The answers to the questions in those two cases depend in my opinion upon the construction put by the Court upon the testamentary provision in each. I think a distinction has to be made between the case of the Paton Bequest, as to which I entirely agree with my brother Lord Johnston, and the case of the Robb Bequest, as to which I think the language used by the maker of the instrument requires us to come to a different conclusion. I agree with what has been said that the question is one of intention in dealing with testamentary provisions.

In the case of the Paton Bequest there is, I think, little room for doubt, because the language of the bequest is "I bequeath to the Presbytery of Glasgow £300, the interest to be added to the stipend of the minister of St David's Parish, Glasgow." The bequest there is of something which is stipend *eo nomine*, and it necessarily follows that the statutory provisions, particularly those set out in section 9 of the Act 54 Geo. III, cap. 169, apply. When the stipend became vacant the provisions in that section apply and payment must be made in accordance with its terms.

But when one turns to the language of the bequest in the case of the Robb Bequest, there the trustees are directed "to pay to the Kirk Session of Ramshorn Church, Glasgow, the sum of £1200, the free annual revenue of which shall be paid by the Kirk Session to the minister of the Church for the time being." Now I do not think that a bequest in these terms admits of a hiatus. There is no failure of the beneficiary. The direction is "to pay to the minister of the Church for the time being," and the construction I put upon a bequest in those terms is that the duty of the Kirk Session is to pay to the last minister down to the date when he terminated his connection with the parish, and then to pay to the incoming minister the income which commences to accrue from that date.

LORD SKERRINGTON—I think that it is a condition of the success of the first parties, the Trustees of the Widows' Fund, that they should demonstrate in the case of each of these bequests that if the Act of 1814 had never been passed there would have been a legal title in the patron of the parish to come forward and claim that some portion of the interest of these charitable bequests should be paid to him in order that he might apply the money to general pious purposes.

In the case of the Paton Bequest I think

that his claim would have been successful, because the money having been left to the Presbytery of Glasgow they were directed by the testator to add the interest to the stipend of the minister of St David's parish, Glasgow. The testator did not in express words say to whom the stipend was to be paid, and accordingly one must resort to implication, but the necessary implication is that the interest of the bequest, having been added to the stipend, should be paid to the person for the time being legally entitled to receive the stipend. Accordingly if, as all the parties agree, the stipend proper during a vacancy would have fallen prior to 1814 to the patron for general pious purposes, then a corresponding proportion of the interest of the bequest would have gone to the same destination.

Different considerations apply to the Robb Bequest, because there the testator, having bequeathed the capital to the Kirk-Session of the Ramshorn Church, Glasgow, directed that the free annual revenue should be paid by the Kirk-Session to the minister of the church for the time being. That is a perfectly unambiguous direction, and it leaves no room for anyone except the minister to make a claim against the Kirk-Session for any portion of the revenue. In the event of there being two ministers entitled—as would happen in the event of the translation or death of a minister—then the natural division between the two beneficiaries would be in proportion to the period during which the stipend had accrued. But if there was a period of vacancy the language of the will is wide enough to give to a minister on his appointment a right not merely to the interest which would accrue after his appointment, but also to any income which had accrued prior to his appointment and which did not belong to his predecessor in office.

Accordingly treating this question as I do as a pure question of construction, I am of opinion that in the case of the Paton Bequest the third question of law ought to be answered in the affirmative, and that in the case of the Robb Bequest the third question of law ought to be answered in the negative. In each of these special cases the parties have put two preliminary questions, but I should say that these two questions do not require to be answered in either case.

The LORD PRESIDENT was absent.

The Court answered the third question of law in the Paton Bequest case in the affirmative, and the third question of law in the Robb Bequest case in the negative.

Counsel for the First Parties—Chree, K.C.—Hamilton. Agent—F. P. Milligan, W.S.

Counsel for the Second Parties—Anderson, K.C.—Leadbetter. Agents—Macpherson & Mackay, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Lord Cullen, Ordinary.

GLASGOW PARISH COUNCIL *v.* OLD KILPATRICK PARISH COUNCIL.

Poor—Settlement—Derivative Settlement—Forisfamiliation—Blind Girl Placed in Asylum by Parents Reaching Puberty.

Poor—Settlement—Derivative Settlement—Father of Unforisfamiliated Child Losing Residential Settlement while Child was Chargeable.

On application to the school board by the father, an able-bodied man who was at that time leading a low life, a blind female child born February 19, 1896, was placed in a blind asylum on December 30, 1904. The expense of her maintenance was defrayed by the school board up to February 19, 1912, but thereafter by the parish so far as in excess of the allowance granted by the institution for her work. Her parents continued to visit her, corresponded with her, and had her to spend holidays with them, but they left the question of having her removed to the town where they had gone to live to be decided by the matron and the girl herself. In 1905 the father went to another parish, where he acquired a residential settlement, but this he lost on February 23, 1914, through non-residence, having gone to live in Ireland. On chargeability beginning, intimation had been sent to the parish of the father's residential settlement, but it had repudiated liability. In an action against it to recover the advances, *held* (1) (*sus.* Lord Cullen) that the child was not forisfamiliated prior to 19th February 1912, when chargeability began, and (2) (*rev.* Lord Cullen) that the parish of the father's residential settlement when chargeability began continued to be liable after that date notwithstanding the father's loss of that settlement.

Leith Parish Council v. *Aberdeen Parish Council*, 1910 S.C. 404, 47 S.L.R. 263, *followed.*

The Parish Council of Glasgow, *pursuers*, brought an action against the Parish Council of Old Kilpatrick, *defenders*, concluding for decree of declarator that a child, Euphemia M'Dermid, was, on or about 22nd February 1912, when she became chargeable as a pauper to the pursuers, destitute and a proper object of parochial relief and had ever since continued to be so, and that she had when chargeability began and still had her settlement in the parish of the defenders, and for payment to the pursuers of £58, 17s. 1d., being the amount of advances made for the maintenance of the child from 22nd February 1912 to 21st January 1915.

The pursuers *pleaded*—"1. The pauper's settlement at the time when she became chargeable having been and still being in the parish of Old Kilpatrick, the pursuers are entitled to decree of declarator as con-