nection with, the bequest in question.

For instance—to take two of the many cases relied on by the third parties—in the case of *Ross* v. *King* (9 D. 1327) the question arose in regard to the interest of a certain William Bowie under the settlement of his father Captain James Bowie. The leading direction in Captain Bowie's will was—"I hereby direct that my said trustees shall hold my whole heritable property, &c., in trust for my said son William Bowie in liferent, and his lawful issue in fee, whom failing." Then followed a series of life-renters and fiars, and at the end of the list, in a separate sentence, comes the words, "And I ordain my said trustees to convey my property accordingly." The Court held, and I think rightly, that the direction to convey must be construed consistently with the leading purpose of the trust. As Lord Jeffrey put it, "They must convey to each what is due to each when the proper time has come; but they are entitled to refuse to a mere liferenter everything but the liferent; and as to the fee, they must hold it."

Again, in the case of *Mein* v. *Taylor* (4 W. & S. p. 22) the truster disponed his whole estate, heritable and moveable, to his three brothers, James, Thomas, and William. It was declared that the subjects should be *held* by them in liferent and *belong to* their children in fee in certain proportions. The truster appointed that four and one-half shares or parts should be held by his son James Taylor in liferent during all the days and years of his lifetime, and that at his decease the fee and property thereof should be divided among his children. If the deed had stopped there, there might have been a question whether James Taylor was not entitled to the fee under the rule in *Frog's* case; or, on the other hand, it might perhaps have been argued that there was a fiduciary fee in James Taylor. But the direction that the fee should be divided among the children of James was followed by this declaration (which specially affected the interests of two of James's daughters who were named), "That the survivors or survivor of my said disponees shall see the share devised to the said Mary Taylor and Ann Taylor equally divided between them, the half belonging to the said Mary Taylor secured to her in liferent and to her children equally among them in fee, and the other half secured to the said Ann Taylor in liferent and to her children equally among them in fee"; a direction which entirely negatived the idea of there being a fee in James Taylor, the parties to divide the fee being the survivors of the disponees.

That this was the ground of judgment clearly appears from the opinion of the Lord Ordinary, Lord Corehouse, printed in a note in 4 W. and S. p. 24, and from the remarks of the Lord Chancellor during the argument and in delivering judgment. The Lord Chancellor (Lord Lyndhurst) says (p. 27)—"The case is very clear. The testator says: 'The survivors of my said disponees shall see the share devised to Mary Taylor and Ann Taylor equally divided between them,' and when it is said 'that at his [James's] death the real property shall be divided,' that imports that it is to be divided by the trustees. But if there be a trust continuing during the life of James Taylor, how can the fee be said to be *in pendente?*"

I have already, I think, sufficiently shown how widely different are the terms of the deed in this case. The continuing trust directed by the truster has reference solely to other purposes, and the solitary point upon which the argument for the third parties comes to depend is the expression, "shall belong to," which, as I have shown, can and does bear the meaning that the beneficiaries are entitled to an immediate conveyance.

Therefore, even assuming that the Court ought to be astute to limit the rule in *Frog's* case, I think, with great respect, that in order to reject the claim for the second party, a more malignant construction would require to be put upon this deed than even the rule in *Frog's* case deserves.

On the whole matter, agreeing with Lord Kyllachy, I am of opinion that the second party is entitled to our judgment, and that the first question should be answered in the affirmative and the second in the negative.

The Court pronounced this interlocutor—

"The Lords having resumed consideration of the special case with the opinions of the consulted Judges, in conformity with the opinions of the majority of the whole Judges of the Court, answer the first question of law therein stated in the negative, and the second question of law therein stated in the affirmative: Find and declare accordingly, and decern."

Counsel for the First and Third Parties—Smith, K.C.—Macphail. Agents—Mackenzie & Black, W.S.

Counsel for the Second Party—Clyde, K.C.—Cullen. Agents—Mackenzie, Innes, & Logan, W.S.

Tuesday, March 10.

SECOND DIVISION.

THE TRUSTEES OF DR GRAY'S HOSPITAL, ELGIN *v.* THE MINISTERS AND KIRK-SESSION OF ELGIN.

Process—Special Case—All Parties Interested not Parties to Special Case—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 63.

Special case presented for the opinion and judgment of the Court, on a question of law, *dismissed*, upon the ground that all the parties interested in the question were not parties to the case.

On 29th July 1807 Dr Alexander Gray, H.E.I.C.S., died at Calcutta, leaving a last will and testament and codicil thereto, dated respectively 1st March 1807 and 18th

July 1807, whereby he appointed certain executors and bequeathed £20,000 for the establishment of a hospital in the town of Elgin, the money to be under the control of a committee consisting of the member of Parliament and Sheriff of the county of Moray, Dr Thomas Stephen, who was appointed governor and physician of the hospital, the two clergymen of the town of Elgin, and the testators' executors. On the death of Dr Stephen the committee were authorised to appoint persons to be directors of the hospital. The testator further provided—"I do also invest the said Provost and Town Council of Elgin with a power to see that the above sum of Twenty thousand pounds sterling, and other sums I may appropriate to the said hospital, and for other purposes in the town of Elgin, be secured and laid out by the committee as above, and hereinafter directed."

The testator further directed that when his wife's liferent interest in £7000 which he had settled on her came to an end, £4000 of this £7000 was "to be appropriated to the building of a new church in the town of Elgin, the said £4000 to be kept in the hands of my executors and the committee, invested by them on the British Funds, and to be remitted by instalments to persons they may entrust on superintending the building the said new church, under the inspection of the two clergymen of the town of Elgin; the interest of the foresaid £4000 sterling to be appropriated in the meantime to the use of the hospital, and until it shall be required for building the said new town church." The testator further bequeathed the residue of his estate to the use of the foresaid hospital.

In December 1902 a special case was presented for the decision of questions which had arisen as to the disposal of the above sum of £4000. The first parties to the case were the trustees of Dr Gray's Hospital, Elgin, consisting of the member of Parliament for the county of Moray, the Sheriff of Inverness, Elgin, and Nairn, and the two collegiate ministers of the parish of Elgin. The second parties to the case were the managers and directors of Dr Gray's Hospital, Elgin. The third parties to the case were the Ministers and Kirk-Session of the parish Church, Elgin.

In the special case the parties, after giving the terms of Dr Gray's settlement, made the following statements:— 6. The £4000 legacy to be appropriated to the building of the new church in the town of Elgin, or a sum representing it on a division of the £7000, of which it formed a part, was in or about the year 1817 invested in Consols under an order of the Court of Chancery, into which it had been found necessary to throw the estate for division. The said sum so invested still remains in Chancery under an account called the New Church Legacy Account. The amount of the legacy, owing to the price of Consols at the time of division, represented on 19th March 1836 the sum of £4996, 15s. 9d. 3 per cent. Consols, and this sum, together with £187, 19s. 3d. in cash, is still the nominal amount of capital standing at the credit of the account. 7. The annual dividends thence arising, which amount to about £137, have been regularly paid in terms of the settlement aforesaid to the trustees of the hospital, and have been applied by them to the uses of the hospital. Until recently no claim either to the capital sum of said bequest or to the interest and dividends thence arising has been advanced by any party. 8. In December 1900 the Kirk-Session of the Parish Church of Elgin (the third parties to this case) convened a meeting of the congregation, which was held on 17th December 1900 in the Parish Church hall. At that meeting a resolution was unanimously passed that a new church in connection with the Church of Scotland was urgently required in the town, and that its erection should accordingly be proceeded with. A large committee was appointed at the said meeting to carry out the project. 9. At a meeting of the Kirk-Session of the Parish Church (the third parties to this case), held on 22nd January 1901, a resolution in these terms was passed —'That as the congregation, at a meeting on 17th December last, were unanimously of opinion that additional church accommodation is required for the parish, the Kirk-Session resolve to communicate with the trustees of the late Dr Alexander Gray, to ascertain whether they will now proceed to apply the sum bequeathed for the purpose of providing a new church for the town in terms of the deed of settlement.' Communication was duly made in terms of the said resolution with the first parties.' 10. The Parish Church of Elgin is now, and has since the year 1607, been a collegiate charge with two ministers, and the ministers and Kirk-Session (the parties of the third part) have now called upon the parties of the first part to take the necessary steps to uplift the said church legacy from Chancery, and to apply the same towards providing a second church in the town of Elgin in connection with the Church of Scotland." The parties further stated that when the testator left Elgin for India in 1780 there were two churches in Elgin in connection with the Church of Scotland—(1) The Parish Church of St Giles, known as the "Muckle Kirk," which was a collegiate church served by two ministers. The "Muckle Kirk" was pulled down in 1826, and a new church was built on its site, which was still used as the parish church, and was in good order and repair. (2) The Little, Laigh or East Kirk. This formed part of the old parish church, but had a separate minister and congregation. In 1713 the House of Lords found that it belonged to the Magistrates of Elgin, "it being no part of the parish church." As the Magistrates refused to repair it, it fell into decay, and was demolished about the year 1800.

The questions of law were as follows:— "1. Is the legacy or bequest in question void from uncertainty, and if so, are the parties of the first and second parts, or either of them, entitled to apply the capital as well as the income of the same to the uses of the said hospital? 2. In the event

of question 1 being answered in the negative, is the said legacy or bequest, on a sound construction of said will and testament, intended by the testator to be applied, if and when the application of the moneys for that purpose should be required —(*a*) to the building of a new parish church in place of the then existing Church of St Giles; (*b*) to the building of a church in the town of Elgin in place of the before-mentioned Little Kirk; or (*c*) to providing an additional church for the town of Elgin in connection with the Church of Scotland? 3. On a sound construction of said will and testament, is it a condition of the said legacy or bequest that the church contemplated by the testator should be 'required' in the sense of being needed to meet the spiritual necessities of the town or parish of Elgin?"

A minute was put in for the Lord Provost, Magistrates, and Councillors of the Royal Burgh of Elgin and for the Heritors of the parish of Elgin, in which they craved the Court to dismiss the case. The minuters, the Lord Provost, Magistrates, and Councillors, stated that they were apprehensive lest they should be prejudiced, by the decision of the questions put in this case, in the proceedings which would hereafter have to be taken in the Chancery Division of the High Court of Justice in England for the purpose of determining who is entitled to the said fund. They also objected that their rights in the bequest arising from their relation to the said Little or Laigh Kirk were ignored. They further referred to the powers expressly conferred upon them by the will of the testator, and also averred and maintained as follows:—"For nearly a century they have exercised the rights of investigation, criticism, and supervision which the will confers upon them. They respectfully submit that the presentation of the special case, adjusted with persons who have no interest, or at all events have not the sole interest, and without these minuters' knowledge, and without their even having an opportunity of remonstrance, was contrary to the terms of the will as well as to the practice of parties in the past."

The other minuters, the Heritors, pointed out that the fund in question was bequeathed for building the said "new town church." They maintained "that the testator did not contemplate the building of a chapel of ease or church for a new *quoad sacra* parish, but the rebuilding of the town church—a matter not within the competency of any of the parties to the special case. These minuters being the persons liable in the cost of building the town church, have the legal interest in all funds bequeathed for the purpose, or which might be used for the more comfortable and seemly erection of the church in question. They object to their rights being invaded by the Kirk-Session—a body which has no legal status in the matter."

The minuters declined to become parties to the case.

The parties to the special case argued in answer to these contentions that as the minuters were not parties to the case their interests were not affected by it, the judgment in a special case not being *res judicata* against anyone who was not a party to it—*Barrie's Trustees* v. *Black*, February 23, 1899, 36 S.L.R. 475.

LORD TRAYNER—I think this is a case that we cannot entertain.

The rule is that in special cases which are presented to us for opinion and judgment the parties interested in the questions so presented must all be here. That is undoubtedly the general rule, and I do not think the case Mr Munro referred to is contrary to that view. In the case before us there appear to be three parties, but as I gather from the case, and what has been stated to us, there are only two. The first and second parties are practically the same and represent the same interests. The third parties are the ministers and Kirk-Session of the Parish Church of Elgin. I do not say that the Kirk-Session have no interest in the questions put before us, but at present I cannot see that they have. The two clergymen of the parish of Elgin are authorised by the truster Dr Gray to superintend the building of a new church, that is to say, it is to be built under their inspection, but that of itself does not authorise them to do anything until the church is being built. On the other hand, the truster invests the Provost and Town Council of Elgin with a power to see that any sums that he has appropriated to the Hospital and for other purposes in the town of Elgin are secured and laid out as directed in his will. This appears to me to give the Provost and Town Council a right to see to the proper application of the trust-funds. But they are not parties to this case, and decline to become parties. In these circumstances I do not think we can give any opinion or judgment on the questions put, as all parties interested therein are not represented.

There seems to me to be no question here proper for decision at present. The £4000 in question is in the hands of the Court of Chancery. So far as we know the trustees under the will will get the money from the Court of Chancery as soon as they apply for it, and when they have got it and made up their minds what they are to do with it all parties interested in its application may settle their differences, if any, under a special case. But until that is done it seems to me no useful or operative judgment can be given by us on the questions here submitted.

LORD MONCREIFF—I am also of opinion that the case should be dismissed. It is brought to our notice, and it is the fact, that all the parties *prima facie* interested in the fund are not parties to the case, and the minuters who aver that they are interested in the application of the fund decline to become parties to the case. Now, I think it quite clear that *prima facie* at least the Magistrates certainly have a right to see to the application of this fund both in connection with their relation to the Little or Laigh Kirk of Elgin, and

also under the express terms of the will, which gives them a power to see to the application of the money. From a very early stage of the argument I have not seen how it would be possible in the absence of the Magistrates to decide the question raised, although of course I express no opinion at all as to the merits of the question between the various parties.

LORD JUSTICE-CLERK—That is my opinion also.

LORD YOUNG was absent.

The Court dismissed the special case and decerned.

Counsel for the First and Second Parties—C. D. Murray. Agents—Kelly, Paterson, & Co., S.S.C.

Counsel for the Third Parties—Munro. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Minuters—H. Johnston, K.C.—W. Æ. Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

LATTO *v.* MAGISTRATES OF ABERDEEN.

Superior and Vassal—Feu-Charter—Clause of Relief of Public Burdens—Burdens Imposed or to be Imposed—Poor-Rates—Building on Subjects Originally Agricultural—Rates Levied on Sub-Vassals.

In a feu-charter granted in 1752 the superior undertook to relieve the vassal of all public burdens imposed or to be imposed on the lands. At that date the lands were agricultural subjects. Subsequently the vassal granted subfeus, on which buildings were erected. He did not assign to the sub-vassals the benefit of the clause of relief in the charter of 1752, nor did he undertake any obligation to relieve the sub-vassals of public burdens. In 1900 the vassal brought an action against the superior, concluding for payment of the sums which had been imposed upon and paid by the sub-vassals as poor-rates on their sub-feus. After a proof, by which it was established that it could not be affirmed that the possibility of building on the lands was not within the contemplation of parties in 1752, *held* (1) that the superior's obligation was not limited to the sum which would represent the poor-rates on the subjects had they remained agricultural; (2) that the sum payable under the obligation was not limited to the amount of the feu-duty; but (3) that the obligation was a clause of relief expressed as a condition of the feudal contract and not a warranty, and therefore that the vassal, not having been assessed for poor-rates, and not being liable to relieve his sub-vassals of the poor-rates paid by them, was not entitled to recover them from the superior.

Opinion (*per* Lord M'Laren) that the vassal could not have assigned to his sub-vassals the benefit of the obligation undertaken by the superior, and that even if he had undertaken to relieve his sub-vassals of poor-rates he could not have recovered from the superior sums paid in respect of that obligation.

Montgomerie v. *Hamilton*, May 27, 1841, 3 D. 942, and *Hunter* v. *Chalmers*, July 16, 1855, 20 D. 1311, *distinguished and commented on.*

Superior and Vassal—Mid-Superiority—Liabilities to Feuars.

In 1752, A, a crown vassal, feued lands to B, with an obligation to relieve B of public burdens. In 1806 A granted a disposition containing procuratory of resignation by which he disponed the lands to C. C obtained a charter of resignation from the Crown, on which he was infeft, and then disponed the lands to A, to be held under him (C) in feu-farm. The disposition contained an obligation by A to relieve C of all public burdens. In 1863 B's successor obtained a writ of confirmation from A's successor as his lawful superior. In an action by B's successor to enforce the obligation of relief contained in the charter of 1752, A's successor maintained that the proper defenders were C's representatives. *Held* that the action was properly laid against A's successor.

This was an action at the instance of Alexander Latto and others, managers of the Aberdeen Trades Widows Fund, against the Lord Provost, Magistrates, and Town Council of Aberdeen, arising out of the following circumstances:—By feu-charter, dated 9th July 1752, Francis Leys, merchant in Aberdeen, the then treasurer of the burgh of Aberdeen, by virtue of his office, and conform to an Act of the Town Council of Aberdeen, bearing date the 30th day of May 1752, appointing him to grant said charter, disponed in feu-farm to John Dingwall, merchant in Aberdeen, and his heirs and assignees whomsoever, heritably and irredeemably, All and Haill the eighth lot of the lands of Gilcomston, consisting of 10 acres 3 roods, Scots measure, lying within the parish of Old Machar and sheriffdom of Aberdeen. The consideration for the feu-charter was an immediate payment of £61, 6s. sterling, and an annual feu-duty of £17, 17s. 5d. sterling to the said treasurer and his successors in office 'for the use and behoof of the public good' of the burgh, beginning the first yearly payment thereof at Martinmas 1752, together with the casualties on entries of heirs and singular successors therein mentioned."

The feu-charter contained a clause whereby Francis Leys, as treasurer aforesaid, undertook "to warrant, acquit, and defend this present charter and infeftment to follow hereon, together with the said eighth lott of the said lands of Gilcomston hereby disponed, with the pertinents, to be good, valid, and effectual, and to be free, safe and sure from all perills, dangers,