of shares to the manager or ordinary directors for the purpose of registration shall *ipso facto* infer the acceptance of the capital stock therein mentioned and the liabilities of a partner of the company. It may be doubted whether executors of a deceased shareholder must be held to have been acquainted with the particular terms of the contract in such a matter, and to be bound by such a stipulation as to the effect of merely sending the confirmation in for registration. But even if that be assumed, it would not affect my opinion. If such a stipulation is to be founded on as creating a contract, its terms must have been expressly complied with. It appears that ordinary transfers were brought before the manager and directors at the meetings of the board, but the practice in regard to confirmations was different. They were received and passed through the books of the bank without the intervention of any subordinate officials, and in this case the confirmation was not produced to the manager or directors, and was not seen by any of them.

But further, taking the provisions of the contract with reference to this subject as a whole, I think that the argument attributes greater force to section 38 than its language warrants, in saying that the mere act of presentment of the confirmation really creates partnership, or an agreement with the bank to become partners. The section proceeds thus:—"But it is hereby declared that no . . . . . successor to shares so acquired shall be recognised as a partner until the writing constituting his title is recorded in the books of the company in manner above specified." The true force of the section is, I think, that by presenting the transfer or confirmation the party authorises his name to be placed on the register, but it is only by the act of registration that, under sections 39 and 40 of the contract, which must be read with section 38, parties in the position of executors become partners, or can be precluded from withdrawing a mandate given to put them on the register.

A separate and independent argument was presented for Mr Dickson, for whom it was maintained that he had not given authority to make him a partner by placing his name on the register. There is room for a similar contention on the part of Mr Macdonald, but his counsel explained that he did not maintain that Mr Ranken had not authority for all he did.

Mr Dickson merely authorised Mr Ranken generally "to do what was necessary," meaning by this to make up a title to the estate of the deceased, heritable and moveable. He was not made aware that the deceased held bank stock. If it be necessary to decide the point thus raised, I shall only say that I am not prepared to hold that a general instruction and authority of the kind given by Mr Dickson was sufficient as authority to put his name on the register of the bank, and so to make him a partner, liable as an individual for the debts of the company. A title to the stock of a joint-stock company is properly made up by obtaining decree of confirmation. Such a decree gives a complete title for all purposes of administration, including, I am disposed to think, the right to draw dividends, unless the contract of the company provides otherwise; and a title so obtained is sufficient to enable executors under section 24 of the Act of 1862 to grant an effectual transfer of the stock to a purchaser, without themselves becoming members of the company. I am unable to hold, in the absence of any act indicating knowledge and approval on the part of an executor of his name having been put on the register of such a company—as, for example, receipt of dividends paid to him as partner—that a mere general authority or instruction to make up a title to the executry estate is sufficient as authority to make an executor a partner as an individual by putting his name on the register.

For these reasons, I concur in the judgment proposed by your Lordship.

The Court directed the liquidators to remove the names of the petitioners from the register of shareholders and from the first part of the list of contributories, and appointed their names to be entered on the second part of the said list of contributories, as executors of the late Mr Macdonald Hume, who was a member of the company to the extent of £400 consolidated stock.

Counsel for Petitioners (Macdonald and Ranken)—Lord Advocate (Watson)—M'Laren. Agents—Mackenzie & Kermack, W.S.

Counsel for Petitioner (Dickson)—J. P. B. Robertson. Agents—W. & J. Cook, W.S.

Counsel for Liquidators—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

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*Friday, February 7.**

FIRST DIVISION.

[Lord Curriehill, Ordinary.

REFORMED PRESBYTERIAN CHURCH OF SCOTLAND *v.* THE FERGUSON BEQUEST FUND AND OTHERS.

Trust—Charitable and Educational Bequests—Object of Bequest, and Powers of Trustees—Church.

A truster directed his trustees to apply certain funds for the "maintenance and promotion of religious ordinances and education and missionary operations." This was to be done by the erection of churches and schools, and the payment of stipends and salaries to missionaries and teachers in connection with five distinct religious denominations in Scotland. The members of one of these churches, viz., "The Reformed Presbyterian Church," separated into two bodies, the larger body subsequently joining the Free Church, which was another of the five included in the bequest. The smaller body raised an action to have it declared that they, to the exclusion of all other denominations, constituted the church to which both bodies had originally belonged, and therefore were alone entitled to the benefits of the trust. *Held* that in the circumstances of the case the question fell to be decided by the intention of the truster, that that intention was to include in the scope of the bequest all churches which held certain theological tenets and adopted a certain simple form of public worship, and that therefore it was unnecessary to determine whether the larger or the smaller body truly held the original principles of the individual

* Decided January 7th 1879.

denomination named, but that both being within the terms of the trust were entitled in the discretion of the trustees to benefit by it.

Observed by the Lord President that the Court will not institute an inquiry into the doctrines and rules of particular religious societies unless where such a course is absolutely necessary as a means of deciding some question of civil right.

Observations per the Lord President upon the origin and history of the Reformed Presbyterian Church as affecting the respective rights of the majority and minority into which the denomination was split up in the year 1863.

The previous procedure in connection with this case will be found reported *ante*, November 29, 1877, 15 Scot. Law Rep. 163. The case now brought before the Court was the action of declarator there narrated. The facts are there, and in the opinions narrated below, set forth sufficiently for the purpose of the report.

The pursuers pleaded, *inter alia*—"(1) The pursuers are entitled to decree, in respect that by their adherence to and maintenance of the constitution and fundamental principles and doctrines of the Reformed Presbyterian Church, as the same existed at the date of Mr Ferguson's codicil and of his death, they fulfil the designation contained in the said codicil. (2) The majority of the Synod of 1863, to whose principles the individual defenders and others adhere, having by their actings in 1863 and subsequently, and at all events by their union with the Free Church of Scotland in 1876, departed from the distinctive position and principles of the Reformed Presbyterian Church, they have not been since 1863, nor are they now, entitled to the name of the Reformed Presbyterian Church, or to any of the principles or advantages belonging thereto or connected therewith; and in particular they are not entitled to participate as such Church in any of the privileges and benefits of Mr Ferguson's trust."

The Ferguson Bequest trustees pleaded, *inter alia* — "(1) The pursuers have no title to sue. (2) The claim of the pursuers is barred by personal exception, and is contrary to public law, and founded on *pactum illicitum*. (5) On a sound construction of the codicil libelled there is thereby conferred on the trustees of the Ferguson Bequest Fund the power of determining what particular churches, schools, ministers, missionaries, teachers, or libraries should be aided by grants from the fund, providing only that such objects of aid are connected, as pointed out in the codicil, with one or other of the churches or classes of congregations designated in the codicil. (7) The pursuers having no connection with the Reformed Presbyterian Church designated in the Ferguson Bequest Fund Act 1869, they are by the terms of the said Act excluded from all interest in the Ferguson Bequest Fund. (8) The pursuers are not entitled to decree, in respect that they do not constitute or represent the Reformed Presbyterian Church as constituted and existing in and prior to the year 1863."

The majority pleaded, *inter alia*—"(1) No title to sue. (2) The claim of the pursuers is barred by personal exception, and is contrary to public law, and founded on *pactum illicitum*. (3) *Mora* and acquiescence. (4) The pursuers having no connection with the Reformed Presbyterian Church designated in the Ferguson Bequest Act 1869, they are by the terms of that Act and by the codicil interpreted thereby excluded from all interest in the Ferguson Bequest Fund. (6) The pursuers, having cut themselves off from the Reformed Presbyterian Church in 1863, have no interest in its relations to the Ferguson Bequest Fund, and have no right or title to found on its ecclesiastical proceedings of 1876. (7) The resolution of the Reformed Presbyterian Synod of 1863 being not a change of principle, much less a change of fundamental principle, but merely a regulation as to the administration of discipline in certain classes of cases, it formed no sufficient ground for the minority seceding from the body and calling themselves by its name. (13) The Ferguson Bequest Fund ought to make grants from the fund to the Reformed Presbyterian Church, which in 1876 formed an ecclesiastical union with the Free Church, in respect—1. That the objects of the testator's bounty were individual congregations, schools, &c., that the designations used by him were not used for the purpose of favouring political or theological tenets peculiar to one section of Scotch Presbyterians, but for the purpose of designating certain existing classes of Presbyterian and Independent congregations so as the better to distribute his bounty, and that the said united Reformed Presbyterian Church still represents one of these classes. 2. That it was not the testator's intention that any of the churches or classes of congregations favoured in his codicil should be deprived of the benefits of his bequests on account of union with one or more of the other churches so favoured. (14) The said Church and its congregations having, after the union as before, a separate and recognisable existence, the Ferguson Bequest Fund can have no difficulty in exercising the discretion vested in it as to payments, or in appointing a trustee in secession from the membership of the said congregations."

The Lord Ordinary (CURRIEHILL) in this action assoilzied the defenders, *i.e.*, the trustees and the majority of the Reformed Presbyterian Church, appending to his judgment this note:—

"*Note.*— . . . At the date both of Mr Ferguson's settlement (13th May 1853) and of his death (8th January 1856) there existed a body of Christians in Scotland known as the Reformed Presbyterian Church, composed of about fifty or sixty congregations, distributed among several presbyteries, and united in one synod, called the Synod of the Reformed Presbyterian Church in or of Scotland. In 1863, some years after Mr Ferguson's death, in consequence of a resolution passed by the majority of the body at a meeting of Synod, the minority, consisting of about six or eight congregations, protested that the majority had abandoned the principles of their Church, and they withdrew from the majority, and have ever since, with some addition to their number, called themselves the Synod of the Reformed Presbyterian Church of Scotland. The majority, however, likewise continued to design themselves by the same appellation, and they also received certain additions to their number; but in 1876 they formed a union with another body of Christians designing themselves 'The Free

Church of Scotland,' and the united body is now known simply as the Free Church of Scotland, although by the Act of Union the foresaid uniting 'majority' retain their corporate designation of the 'Reformed Presbyterian Church of Scotland *quoad civilia*.' Ever since the separation in 1863 the Ferguson Bequest Fund trustees, including Mr Reid (the trustee amongst the body who, in terms of the testator's directions, was the one representative of the Reformed Presbyterian Church), who adhered to the 'majority,' have declined to recognise any of the congregations or ministers of the minority as belonging to the Reformed Presbyterian Church, and they have excluded them from all participation in the benefits of the fund. They have, however, regularly distributed a portion of the income of the fund among the ministers and churches of the majority ever since the union with the Free Church.

"The present action has been raised by the said 'minority,' designing themselves the Reformed Presbyterian Church of Scotland and Synod thereof, against the 'Ferguson Bequest Fund,' against the said Thomas Binnie, as acting or claiming to act as a trustee under said fund, and against the said 'majority' which has formed the foresaid union with the Free Church. The conclusions are—(1) For declarator that the Church or Association, or body of Christians, of which the individual pursuers are the accepting members of committee and representatives, is the Reformed Presbyterian Church of Scotland, and that the individual defenders either never were, or have ceased to be, ministers, elders, or members thereof, and have no right or title to participate in any of the ecclesiastical rights or privileges, or in any of the property belonging to said church; (2) For declarator that the term 'The Reformed Presbyterian Church,' or 'The Reformed Presbyterian Church in Scotland,' contained in Mr Ferguson's settlement, is applicable to and designative of the pursuers, and that they are entitled to have one of their members in full communion with them nominated, assumed, and appointed to the place and office of a trustee of the Ferguson Bequest Fund; (3) To have the 'Ferguson Bequest Fund' ordained forthwith to nominate, assume, and appoint to said office a person in full communion with the pursuers; and (4) For declarator that the Church of the pursuers, being the Reformed Presbyterian Church of Scotland, and the churches, schools, ministers, missionaries, &c., of that body are entitled to participate in the application, appropriation, and benefits of said fund or annual income thereof, along with the other five churches mentioned in the settlement, and that to the exclusion of the individual defenders, 'in so far as they may claim or pretend any right thereto founded on their alleged connection or identity with the Reformed Presbyterian Church of Scotland, all in terms of the said codicil, but subject always to the option and discretion of the quorum of the trustees as to the proportions of the said fund or income to be applied to the several objects therein mentioned.'

"It is not disputed that the minority of the Synod who separated from the majority in 1863, and who are now represented by the pursuers, did then adhere, and have ever since adhered, to the testimonies and fundamental principles of the body which up to that time had been known as the Reformed Presbyterian Church; and the first question raised by the summons is, Whether the majority then abandoned these fundamental principles, or any of them? The second question raised is, Whether, assuming the first question to be answered in the affirmative, the Act of 1869 has, notwithstanding such abandonment by the majority, recognised that section as the Reformed Presbyterian Church? And the third question is, Whether, assuming the second question to be also answered in the affirmative, the union of the majority with the Free Church in 1876 has deprived that majority of its title to be called the Reformed Presbyterian Church, to the effect of entitling the pursuers to be now regarded as the Reformed Presbyterian Church in terms of Mr Ferguson's settlement? Various other subordinate questions arise, which shall be noticed in the sequel.

"In dealing with questions such as the first and third now stated, the Court will not inquire into the principles maintained or professed by either party for the purpose of deciding whether they are doctrinally sound or correct. All that the Court will do is to ascertain as matters of fact which of the contending parties adheres to the fundamental principles held by the Church or Association while it remained undivided. But if, in course of such inquiry, it shall appear that the principles held by either party are opposed to public policy, or *contra bonos mores*, it is the duty of the Court to refuse its aid to vindicate any patrimonial rights which are claimed by such party in respect of adherence to such unlawful principles. And if the principles of both parties are equally unlawful, the maxim '*in turpi causa melior est conditio possidentis*' will apply. In the present case the defenders maintain that the principles which the majority abandoned in 1863—in vindication of which the minority then withdrew from their brethern—and which the pursuers now adhere to and assert as their distinctive fundamental principles, are of that unlawful character, and they plead '*pactum illicitum*' as a ground for absolvitor from the whole conclusions of the action. As I am inclined to be of opinion that this plea is well founded in fact, I might perhaps have disposed of the case by simply stating the circumstances attending the separation in 1863, and the grounds assigned by the pursuers for that separation. But as a different view of the plea may be taken elsewhere, I shall, as requested by the parties, state as shortly as I can—though I fear I cannot do so very shortly—the views which have occurred to me, not only on this but on the other important questions which have been raised for decision. For this purpose it is necessary to trace the history of the 'Reformed Presbyterian Church' from its commencement till the year 1863.

"The Roman Catholic religion was abolished in Scotland in 1560. The First and Second Books of Discipline, defining the form of government of the Church of Scotland by presbyteries, were framed in 1578. In 1580 and 1581 the National Covenant, directed chiefly against Popery, was subscribed and sworn to by the king and the people; the Acts in favour of the Church of Scotland were renewed and confirmed by the Act 1592, c. 116; and thus what is called the First Reformation was effected. It ended when prelacy was imposed on Scotland by King James VI.; but in 1638 the General Assembly at Glasgow

abjured Episcopacy, re-enacted the Second Book of Discipline, and renewed the National Covenant. Then commenced the Second Reformation. The National Covenant was subscribed by the people in 1639; and the proceedings of the Assembly of 1638 were ratified by the King and Parliament in 1640 and 1641. In 1643 and 1644 the Solemn League and Covenant was subscribed by the nation, and by King Charles II. in 1650; and in 1645 and in the following years the Westminster Standards and Confession of Faith were approved of and adopted. The Solemn League and Covenant is directed chiefly against prelacy, and binds its adherents to endeavour to bring about 'Conjunction and uniformity in religion, confession of faith, form of Church government, and directory for worship and catechizing' in the Churches 'in the three kingdoms,' and to endeavour the 'extirpation' of prelacy, and to endeavour to discover and bring to 'public trial' and 'condign punishment' all parties 'hindering' the Reformation. As the First Reformation was from Popery, so the Second Reformation was from prelacy; and the latter ended when, on the Restoration, Episcopacy was reimposed on Scotland. In 1661 an Act was passed annulling all the Acts of previous Parliaments favourable to the Church since 1633. The Revolution Settlement in 1689–1690, by which Presbyterianism was re-established in Scotland, proceeded on the basis of the Act of 1592, but did not in several respects restore the Church to the position attained by it during the period of the Second Reformation.

"The Revolution Settlement was accepted or acquiesced in by the great body of the people of Scotland, and the Church as thus established became the Church of the nation, although at various times between 1733 and 1843 secessions of greater or less magnitude took place, the last being the secession in 1843 of those members who then formed themselves into the body now known as the Free Church. But from 1660 and afterwards there were several small scattered bodies of persons who, adhering firmly to the principles of the Second Reformation, and especially to the National Covenant and the Solemn League and Covenant, and to the perpetual obligation of these Covenants, refused to accept or in any way recognise the Revolution Settlement, mainly on the ground that it ignored the Covenants and the Second Reformation, and went back to the Act of 1592.

"Those persons, who came to be designed in popular language as 'Cameronians,' and whose ecclesiastical successors afterwards formed themselves into the Reformed Presbyterian Church, never were members of the Church of Scotland as established at the Revolution. They had during the two previous reigns been continually protesting against the persecutions to which the Church of the Second Reformation was then subjected, and against what they considered the defection of many of its members, who were disposed to hold laxer views than themselves as to the connection between the Church and the State. And when at the Revolution the establishment of the Church was settled and was accepted by the great majority of the nation, the persons referred to, whose scattered communities had been in correspondence with each other, gave expression to their views in a document of great length, entitled —'An Informatory Vindication of a poor, wasted' misrepresented remnant of the suffering anti-popish, anti-prelatic, anti-Erastian, true Presbyterian Church of Christ in Scotland united together in a general correspondence. By way of reply to various accusations in letters, informations, and conferences given forth against them.'—[*His Lordship then quoted at length various passages from the Vindication'.*]

"From these quotations it will be seen that the fundamental principles thus set forth by the ecclesiastical ancestors of the Reformed Presbyterian Church are shortly the following:—(1) the perpetual obligation of the Covenants, National and Solemn League; (2) the sinfulness of the British Constitution, by which prelacy is recognised and established in England, and the sovereign becomes bound to maintain and support prelacy in that part of the kingdom; (3) the unlawfulness of the Parliament of which bishops are a component part; (4) the unlawfulness of taking the oath of allegiance to the sovereign, and of taking any part or share in the British Parliament. I have given these quotations at considerable length, inasmuch as they throw much light upon the latter testimonies of the Reformed Presbyterian Church, to which I shall have occasion afterwards to advert.

"The 'remnant, as these persons design themselves, of the 'suffering, etc., true Presbyterian Church of Christ in Scotland,' thus consisted of persons who had never joined the Church of Scotland as established in 1690. They are therefore not seceders from the Church, but dissenters from it—that is to say, they dissented from the basis upon which the Church as well as the State was established. They are very well described in a pamphlet published by authority of the Reformed Presbytery in 1806, entitled—'A Short Account of the Old Presbyterian Dissenters.' It is there said—'The old Presbyterian Dissenters have assumed and received the appellation of dissenters on account of the part which their forefathers acted at the Revolution in 1689, while they openly and candidly dissented from the public deeds of the nation's representatives in both Church and State, considering these deeds as involving a mournful departure from former laudable attainments. The epithet OLD has ordinarily been prefixed to signify that they are of longer standing, as a distinct body, than any other denomination of Presbyterians who have separated from the Established Church. In some parts of the country, especially in Ireland, they have been called Covenanters, because of their avowed attachment to the National Covenant of Scotland, and the Solemn League and Covenant of the three kingdoms.' In 1689 all their ministers appear to have deserted them, and to have given in their accession to the judicatories of the Established Church; and the 'Short Account' goes on to say:—'Thus the people who wished closely to adhere to the Reformation attainments were left as sheep without a shepherd. Having long before this time formed themselves into praying societies, they still continue these, and had at particular times a general correspondence of all the societies together, in order to ascertain the state of matters through the body at large, and to cultivate a closer acquaintance with one another. In this very trying and rather singular situation, without any change of sentiment, they stedfastly adhered

to the very same principles which were openly espoused by and solemnly ratified by the Covenanted Church of Scotland in the times of her purest Reformation, as can be clearly and fully proved from their written deeds and declarations. Thus they remained for about the space of sixteen years, till in 1706 the Rev. John M'Millan, formerly minister of Balmaghie in Galloway, having previous to this left the Established Church, acceded to them and espoused their cause.' Other accessions were received, and at length Mr M'Millan, and those who held the like principles, 'formed and constituted a Presbytery in the name of Christ, the alone King and Head of His Church, on the 1st of August 1743, under the title of the Reformed Presbytery.' That title continued until 1811, when the various Presbyteries which composed the body united themselves into a Synod, which was thenceforward known as the Synod of the Reformed Presbyterian Church in Scotland, and continued to be undivided and bound by a common testimony until 1863. The identity of that body with the 'suffering remnant' already described is not and cannot be disputed.

"In addition to the Informatory Vindication, and the various Protestations and Declarations from 1689 to 1707 already referred to, the foresaid 'Remnant' in the year 1712, at a meeting held at Auchinsaugh, renewed the National Covenant and the Solemn League and Covenant, adding an acknowledgment of sins and engagement to duties, which however it is not material to notice here at length. But in 1761 the Reformed Presbytery prepared and issued a solemn testimony which is described as an 'Act, Declaration, and Testimony for the whole of our Covenanted Reformation, as attained to and established in Britain and Ireland, particularly between the years 1638 and 1649 inclusive, as also against all the steps of defection from said Reformation, whether in former or later times, since the overthrow of that glorious work down to the present day.' It is unnecessary to enter into any detailed account of the contents of that Testimony, because it was revised and issued in a new and more convenient shape by the Reformed Presbyterian Church in 1837 and 1839, the doctrinal part of the Testimony having been issued in 1837, and the historical part in 1839. These later testimonies, it is admitted, are substantially identical with the Testimony of 1761, and they must be regarded as the testimonies which from and after 1839 were the testimonies or contract by which the body known as the Reformed Presbyterian Church held its distinctive and peculiar existence, and unquestionably they were the testimonies to which both the majority and minority of the Synod adhered—and by which they were all alike bound—at the date of Mr Ferguson's will and at the date of the separation in 1863. In the historical part of the Testimony the whole history of the body is traced, and it is shown very clearly that the Reformed Presbyterian Church considered itself to be the Church of the Second Reformation, bound by the National Covenant and Solemn League and Covenant, and regarding the obligation of these as perpetual. It is also shown that although the arrival of William Prince of Orange in Great Britain was at first hailed by the 'Remnant' with joy, their joy was soon turned into lamentation when they found that by the Revolution Settlement prelacy and the royal supremacy in regard to the Church were to be admitted into the Churches of England and Ireland, and that to a certain extent the State reserved to itself some control over the proceedings even of the Church of Scotland.—[*Here followed quotations from the Testimony, from both the historical and the doctrinal portions of it.*]

"Such being the general nature of the testimonies recognised and adhered to by the Reformed Presbyterian Church as a body prior to 1863, there is little difficulty in seeing that in addition to the perpetuity of the obligation of the Covenants, National and Solemn League, the doctrine that presbytery was the only divinely instituted form of Church government, and the protests against the Revolution Settlement and the Union, it was a distinctive principle of the Reformed Presbyterian Church that its members should take no part in the administration of the affairs of the country by either entering Parliament themselves or voting for the election of members of Parliament, and that no member should by entering the military or civil service of the Crown voluntarily place himself in such a position as should require him to take the oath of allegiance to the sovereign. The exercise of the elective franchise and the taking the oath of allegiance were declared in the Testimony to be 'immoral' acts, which no member could perform without a breach of his Testimony and subjecting himself to the discipline of the Church—certainly to admonition, possibly to suspension or excommunication.

"Prior to the legislation in 1833, by which the elective franchise was greatly extended, the question does not seem to have been of much practical importance in the Reformed Presbyterian Church, as comparatively few of its members possessed the franchise. But after 1833 the question became of more importance, and the records of the various kirk-sessions of the body show that in numerous cases discipline was exercised upon members in respect of their having voted at elections. In like manner, the question as to the oath of allegiance did not assume very formidable proportions until in and after the year 1859, when the volunteer movement became general throughout the country; and in several cases discipline appears to have been exercised by sessions upon members who entered the volunteer service and consequently took the oath of allegiance. It is quite evident from the proof that from 1833 to 1863 the great majority of the members, both lay and clerical, of the Reformed Presbyterian Church had come to regard with disfavour the parts of the Testimony which dealt with the oath of allegiance and elective franchise; and in 1862 an overture was sent down to all the presbyteries and sessions, to the effect, *inter alia*, that taking the oath and the exercise of the elective franchise should no longer be grounds for the infliction of the ecclesiastical penalties of suspension and expulsion from the Church. At the meeting of the Synod in May 1863 it was found that a large majority of the presbyteries and congregations were in favour of the overture in so far as relating to the exercise of discipline, and the Synod, by a majority of 46 to 11, passed a resolution to the effect, that while recommending the members of the 'Church to abstain from the use of the franchise, and from taking the oath of allegiance, discipline

to the effect of suspension and expulsion shall cease, and earnestly enjoin upon all under their charge to have respect to this decision, and to follow after the things which make for peace, and things wherewith one may edify another. Thereupon the minority protested against the decision now adopted as the law of the Church by the majority of this Court as opposed to the Word of God and to the testimony of the Church, and unconstitutionally adopted; and seeing that they have thereby abandoned in regard to the matters referred to in that decision the principles of the Reformed Presbyterian Church, clearly set forth in her Testimony, to which we are all solemnly pledged, and have thereby departed from the scriptural position which the Church has occupied for more than 170 years, we do hereby protest and claim for ourselves, and for those adhering to us, to be constitutionally the Synod of the Reformed Presbyterian Church in Scotland — resolved, in the strength of divine grace, to stand by the solemn vows we have made to God and to His Church, retaining the position, holding the principles, and maintaining the testimony of the Reformed Presbyterian Church of Scotland, as witnesses for the crown and covenant of the divine Redeemer; and we do also protest and claim all the powers, rights, and privileges of said Synod, and resolve to meet as a Synod in the Religious Institution Rooms, Glasgow, to-morrow, being Friday, at 11 A.M.; and we do also protest and claim for all the members of our congregations adhering to us all the rights and privileges which do or shall appertain to them or any of them as members and congregations of the Reformed Presbyterian Church of Scotland; and we do accordingly protest for all remedy as accords, and thereupon take instruments in the hands of the clerk, and crave extracts;' and on the following day the minority made a more formal and material protest.

"From the foregoing narrative it is abundantly clear that the only point on which the minority separated from the majority, and which led the minority formally and solemnly to declare that the majority had abandoned the principles of the Reformed Presbyterian Church, was the resolution of the majority to abolish discipline by suspension or expulsion in the case of those members who should take the oath of allegiance or exercise the elective franchise. The minority thus declared in the most solemn manner possible that, according to their interpretation of the Testimony and principles of the Reformed Presbyterian Church, no member could take the oath of allegiance or exercise the elective franchise without forfeiting his right to remain a member of the Church, because either of these acts was an immoral act, the performance of which involved the penalty of suspension or expulsion. Now, it appears to me that if these were truly the principles of the minority, and are the principles now held by the pursuers, who represent the minority, they are of a most dangerous tendency, being opposed to public policy and to the well-being of the country. Were the whole, or a large body of the whole, community to adopt and act upon these principles, anarchy would be the result. The sovereign could not obtain soldiers or civil servants for the defence of the country or the administration of its affairs, and one branch of the Legislature would become extinct. Persons who hold these principles may be, and I doubt not are, peace-loving and peaceable subjects; and they may hold these views as individuals without interference on the part of the State. The case is different, however, when such persons become bound, by a solemn contract or Testimony, not only as matter of conscience, but by the sanction of the heavy penalty of expulsion from the body, to abstain from voluntarily entering the service of the sovereign in any capacity, civil or military, and from exercising the privilege of electing members of the Legislature, and when, in respect of that particular part of their contract, they invoke the aid of the Civil Courts for the vindication of civil rights. It appears to me that the principles held by the pursuers are such as to disentitle them to appeal to the Courts of the country for the vindication of civil and patrimonial rights, their sole title to which, as in competition with the defenders, is their adherence to those unlawful principles, and to an illicit pact which the defenders have abandoned. For it must not be overlooked, that in all other respects, and as regards every iota of the Testimony, the views of the majority and of the minority were in 1863, and continued to be at all events until 1876, absolutely identical. I am, therefore, as I have already indicated, inclined to hold that the pursuers have no *locus standi* in this Court at all, in consequence of the illicit nature of their contract, and that the action ought therefore to be dismissed upon that ground alone.

"Nor should I arrive at a different result if it were to be maintained, as I think it was maintained, that the question upon which the majority and minority split in 1863, being merely one of discipline, the Testimony remained a binding contract upon both parties, to the effect of subjecting to the censure of admonition and rebuke any members who should take the oath of allegiance or exercise the electoral franchise. Were such really the case, the principles of both parties would be, in my view, equally objectionable—that is to say, equally opposed to public policy. But as the pursuers have thought it right to separate from the defenders, and as the defenders have for the last fifteen years been, *de facto*, in the enjoyment of the advantages of the Ferguson Bequest Fund, I should be inclined to say *melior est conditio possidentis*, and dismiss the action.

"If I am right in these views, it is of course unnecessary to add more; but as different views may be taken elsewhere, I shall endeavour to prepare the cause for full and final decision upon all the questions raised, by expressing my opinion upon these also. Assuming, then, that I am wrong in holding that the principles held by the minority, and in the assertion of which they separated from the majority in 1863, were not opposed to public policy, then the question arises, whether the resolution come to by the majority in 1863 to dispense with discipline in the cases mentioned, was or was not an abandonment by them of one of the essential and distinctive peculiarities of the Reformed Presbyterian Church? I am inclined to answer that question in the affirmative; and if the minority had, either in 1863 or within a reasonable time thereafter, raised an action with conclusions like the present, I would have been disposed to hold that the majority had ceased to be the Reformed Presbyterian Church; and in that view the minority might,

with much force, have contended that they were entitled to participate in the benefits of the Ferguson Bequest Fund, and to have one of their members appointed a trustee of the fund, to the exclusion of the defenders. It appears to me that dispensing with the punishment of suspension or expulsion for a breach of the Testimony is virtually eliminating from the Testimony the prohibition of those acts which had previously been held to be a breach of the Testimony. This might, as I have said, have given the minority a title to challenge the right of the majority to participate in the benefits of the fund; but the minority did not adopt that course. They applied, it is true, more than once to the trustees of the fund to be recognised as the Reformed Presbyterian Church, but although their applications were invariably refused, they took no steps to vindicate their claim under Mr Ferguson's will. And it was decided in the case of *Cairncross* v. *Meek*, 28th May 1858, 20 D. 995, that, in cases like the present, parties in the position of the present pursuers are, by their failure to take proceedings *debito tempore*, barred from insisting in an action for the assertion of their alleged legal rights. But, further, when the private Act of Parliament was applied for by Mr Ferguson's trustees in 1869, the bill was remitted to two of the Judges of the Court of Session for inquiry, and it was open to the minority to have attended that inquiry and stated their objections to the majority being recognised as the Reformed Presbyterian Church. But they made no appearance, and took no steps to oppose the passing of the Act, although it expressly declared Mr James Reid, who belonged to the majority, to be a trustee, as being a member of the Reformed Presbyterian Church in Scotland. Now, two things are certain—First, That during the year 1869, while this Act was passing through Parliament, there existed in Scotland two bodies or associations of Christians, each designing itself the Reformed Presbyterian Church in Scotland, one being the Church of the minority, the other of the majority; and, Second, That Mr Reid, who was declared by the Act to be a trustee, as being a member of the Reformed Presbyterian Church, did not belong to the body now represented by the pursuers, but to the Church of the majority. I think, therefore, that from and after the passing of that Act it was impossible for the incorporated Ferguson Bequest Fund to recognise as the Reformed Presbyterian Church in Scotland any Church or association other than that of which Mr Reid was a member. Accordingly they continued, in distributing the trust funds, to ignore the pursuers' Church, and to allot a proportion of the income to the Church of the majority. So also, on Mr Reid's death in 1871, the trustees elected and assumed as his successor the defender Thomas Binnie, also a member of the Church of the majority, and in doing so they simply obeyed the enactment of the 7th section of the statute, which provides, in terms of one of the directions of Mr Ferguson's settlement, that the trustee to be elected and assumed, in the case of a vacancy arising in consequence of any trustee ceasing to act by death or otherwise, shall 'be a member of the Church of which the trustee so ceasing to act was a member.' Mr Binnie was a member of the Church to which Mr Reid belonged at the dates both of the Act and of his death, *i.e.*, the Church of the defenders, and it would have been *ultra vires* of the trustees to elect as the successor of Mr Reid a member of the Church to which the pursuers belong. These considerations, if I am right in the views now expressed, appear to me to go far to dispose of the whole case. And but for the union of the majority with the Free Church in 1876, I should have thought the case quite clear, and that the pursuers were excluded from insisting in their present claim not only by their delay in asserting their alleged rights but by the Act of Parliament passed in 1869.

"A difficulty, however, does arise in consequence of the union of the majority with the Free Church in 1876, and it was in view of that difficulty, and for the purpose of comparing the fundamental principles of the two Churches, that I considered it necessary in the early part of this note to state in detail the leading principles on which the Reformed Presbyterian Church was founded, and on which, apart altogether from the questions as to the oath of allegiance and exercise of the franchise, that body while undivided, and both the majority and minority after 1863, have all along taken their stand. These are, as I have already more than once pointed out, their claims to be the Church of the Second Reformation, their insisting in the perpetual obligation of the Covenants, National and Solemn League, their assertion of the divine right of presbytery—meaning thereby that it is the only form of church government which is agreeable to the Word of God—and their protest against the Revolution Settlement and the civil and ecclesiastical establishments which were thereby settled, and against the Union of the kingdoms. Now, the body of Christians known as the Free Church does not adopt these fundamental principles. I am fortunately saved the necessity of entering into any detail in this branch of the case, because the whole question as to the distinctive principles of the Free Church formed the subject of anxious consideration and deliberate judgment in the case of *Couper* v. *Burn*, December 2, 1859, 22 D. 120. The question there arose in consequence of the union in 1852 of the body of dissenters called the 'United Associate Synod of Original Seceders' with the Free Church. A minority of that synod refused to accede to the union, and in one of the congregations which did accede a minority was opposed to the union, and brought an action against the clergyman and majority of the congregation in order to vindicate their right to the chapel. In that case it was held that as the property of the chapel had been vested in trustees for the associate congregation of Thurso in connection with the said Associate Synod the majority of the congregation were not entitled to retain the property as in connection with the Free Church, and that the minority were entitled to the property in respect of their adherence to the original principles of their body—the ground of judgment being that the fundamental principles of the two churches were essentially different. In that case Lord Wood, who delivered the judgment of the Court, in a long and elaborate and carefully-prepared opinion traced the history of the two bodies, and arrived at the result that the majority of the Associate Synod by uniting with the Free Church had abandoned their distinctive principles. It is enough to state shortly that three most important fundamental principles of the Original Seceders were—(1) Their resting

upon the National Covenant and the Solemn League and Covenant; (2) the divine right of presbytery, as being the only form of church government which has the divine sanction; and (3) the unequivocal assertion that the Associate Synod stood on the ground of the Second Reformation, as preceded by the National Covenant, and followed by the Solemn League and Covenant, and that it protested against and condemned the Revolution Settlement and the Union; whereas the authoritative Standards of the Free Church treated all these matters in an entirely different point of view. The Court then had before them the same authoritative Standards of the Free Church which have been produced and founded upon in the present case as these are specified in a claim of right made before the secession took place in 1843, and the Act and Declaration of the General Assembly of the Free Church in 1851, and they came to be clearly of opinion that on all the points mentioned, viz., the perpetual and descending obligation of the Covenants, the claim to be the Church of the Second Reformation, the divine right of presbytery, and the Revolution Settlement and the Union, the Free Church held entirely different views. The Free Church does not make it an article of her testimony that the obligation of the Covenants is perpetual and descending; while maintaining that the Presbyterian form of church government is agreeable to the Word of God, it does not maintain that it is the only form sanctioned by Scripture; it does not maintain that it is the Church of the Second Reformation; and although regarding the Revolution Settlement as not in all respects satisfactory, it appeals to that Settlement and to the Treaty of Union as the grand bulwarks and securities of the Presbyterian Church in Scotland. And it will not do for the defenders to say that in the present case there has been a full proof, whereas the judgment in the case of *Couper* v. *Burn* was pronounced without any proof as to what were the authoritative Standards of the Free Church. I do not think that a single document of the slightest importance has been proved to be an authoritative Standard of the Free Church which was not before the Court and fully and anxiously considered in the case of *Couper* v. *Burn*. I lay out of view the verbal expositions of some of these Standards given by some of the witnesses, eminent as these gentlemen are in the Church of which they are members. It is for the Court to interpret the documents, and I should have considered myself bound to adopt the interpretation put upon them by the Second Division in the case of *Couper* v. *Burn* even if I had felt (as I do not feel) any doubt as to the soundness of that interpretation. If, then, in that case, dealing with the Associate Synod of Original Seceders, whose doctrines as to the Covenant, the divine right of presbytery, the Second Reformation, the Revolution Settlement, and the Treaty of Union, were certainly not more distinctly laid down than the corresponding doctrines of the Reformed Presbyterian Church — with which indeed they are substantially identical — the Court had no difficulty in holding that the corresponding doctrines of the Free Church on these points were so materially different that by uniting and merging themselves in the latter body the Associate Synod abandoned their own distinctive principles, it is impossible for me in the present case to hold that the Reformed Presbyterian Church by uniting with the Free Church did not virtually abandon their distinctive fundamental principles. I am not moved by the fact that in order to retain their patrimonial rights in their churches the majority when they united with the Free Church retained their corporate name of the Reformed Presbyterian Synod *quoad civilia*, because I think that a minority of any one of these congregations could have *debito tempore* vindicated the property of such congregation from the majority uniting with the Free Church.

"But although these are my views as to the essential dissimilarity of the fundamental principles of the Reformed Presbyterian Church and of the Free Church, and although I think that the majority of the Reformed Presbyterian Church must be held to have abandoned all their distinctive fundamental principles by uniting with the Free Church, it does not follow that the pursuers are now entitled to prevail in their demand to be recognised by the Ferguson Bequest Fund as the Reformed Presbyterian Church in Scotland. If indeed the union had been formed immediately after the separation of 1863, and before the Act of Parliament of 1869 had been passed, I should have been inclined to give much weight to the claim of the minority. But it appears to me that by their own delay, and by the operation of the Act of 1869, they have lost all right which they may at one time have had to claim the character of the Reformed Presbyterian Church in Scotland within the sense and meaning of Mr Ferguson's will. I think that at all events from and after 1869, and therefore in 1876 when the union took place, the church of the pursuers was not within the sense and meaning of Mr Ferguson's will the Reformed Presbyterian Church in Scotland—that character being held exclusively by the church of the defenders, the majority. Now, did the events of 1876 confer upon the pursuers a character which, prior to that date, they did not possess? I think not. I think it is impossible to hold that by uniting with the Free Church that section of the original Reformed Presbyterian Church, which had been recognised by the Act of Parliament as being the Reformed Presbyterian Church entitled to the benefits of the fund, not only deprived themselves of their right to participate in the benefits of the fund, but opened the door for participation to a body which up to that time had not right to participate. Then, again, let it be assumed that the church of the majority by uniting with the Free Church ceased to be the Reformed Presbyterian Church in Scotland, and that Mr Binnie having ceased to be a member of that Church thereby also ceased to be a trustee. From what body is the vacancy thereby created to be supplied? The Act of Parliament says that it shall be supplied only by electing a member of the Church of which the trustee so ceasing to act was a member. Now, the trustees could not by electing one of the members of the pursuers' Church make a legal appointment of a trustee under the Act of Parliament, because Mr Binnie did not belong to the pursuers' Church. It may be that the Ferguson Bequest Fund may find some difficulty on the death or resignation of Mr Binnie in supplying his place, and I can readily conceive that questions may be raised even at an earlier date either by the other trustees or by the other Churches entitled to participate in the benefit of

the fund as to the legality of Mr Binnie continuing to act as a trustee. But no such questions are now before me, and upon none of them do I express any opinion. The pursuers, however, do not appear to me to be *in titulo* to raise any such question.

"On the whole matter, therefore, I have come to be of opinion that the defenders are entitled to be assoilzied from the whole conclusions of the action, not merely on the grounds that the fundamental principles maintained by the pursuers are so opposed to public policy as to disentitle them to invoke the aid of the Court to vindicate a patrimonial claim which they could not make without asserting these principles as being at the foundation of their contract, but because they, from and after 1863, or at all events from and after 1869, ceased to be the Reformed Presbyterian Church in Scotland within the sense and meaning of Mr Ferguson's will. And although in arriving at this conclusion I have, as it will be seen, been much influenced by the *mora* of the pursuers and the terms of the Act of Parliament, I cannot help thinking that the judgment is one of which Mr Ferguson himself would have approved had he been now in life. I think a consideration of the whole tenor of his will shows that by selecting as the objects of his liberality not only certain churches in connection with the Established Church, but other four Churches which comprised the great bulk of the Protestant dissenters in Scotland, Mr Ferguson did not mean to encourage sectarianism or disunion or proselytising, or to assist one or more of these bodies in propagating their own distinctive doctrines, but that he meant to encourage and assist those five religious bodies in improving the condition of his fellow-countrymen. I think he did not mean to discourage union between two or more of the bodies whom he favoured. On the contrary, I think that the catholicity of spirit which prompted his bequest would have been gratified by such union. He may not have thought such a union probable, or even possible; but I do think that he would have cordially approved of the union which took place in 1876 between the Free Church and the great majority of the Reformed Presbyterian Church (a movement with that object in view having begun long before he died), and that he would not have approved of the small minority of 1863 asserting for themselves the right to have one of their own body nominated as a trustee, and to participate in the benefits of the fund, to the exclusion of the majority, whose doctrinal tenets remained substantially unaltered. In conclusion, I have only to say, that although I hold the opinion that if the present had been a question like that in *Couper* v. *Burn*, raised *debito tempore* between the minority and majority of a congregation of which the majority had joined the Free Church, I should have held that the minority were entitled to vindicate the property of their chapel as a place of worship in connection with the Reformed Presbyterian Church. The present case does not really belong to that class of cases at all. We are not here dealing with the patrimonial rights of a congregation, where the title to the property expressly bears to be for behoof of a congregation in connection with a specified religious association. We are dealing with a bequest which is vested in trustees for behoof of five classes of beneficiaries, all of which were at the date of the bequest separate religious associations. The true question therefore is, what was the intention of the truster? Did he intend that as long as there remained one Reformed Presbyterian congregation in Scotland, that congregation should receive all the benefits and be entitled to exercise all the rights which were competent to the large body of which that class was composed at the date of the will and at the death of the testator? I think not. It rather appears to me, as indeed I have already indicated, that the intention of the testator was that, in the event of a split taking place in any one of these bodies, the majority of the body, and not the minority, should continue to be the beneficiaries, especially where the majority was very large and united with another of the classes which he designed to benefit. The result of my opinion on the whole case is that the defenders should be assoilzied, with expenses."

The pursuers reclaimed, and consideration of the petition proceedings reported *ante*, vol. xv. p. 163, was resumed. As to the materiality of the difference between them, the Court, they maintained, was not entitled to inquire if they themselves were satisfied on this point. The authorities relied on were *Couper* v. *Burn*, 2d Dec. 1859, 22 D. 120, and cases referred to there. [Lord President—I may remark that Lord Wood's judgment in that case was very carefully considered in consultation by the Second Division.] *Cairncross* v. *Meek*, 28th May 1858, 20 D. 995, H. of L. 3 Macq. 827.

On the question of *pactum illicitum*, the trustees argued that the fundamental principle of the Church was to protest against the present form of government and the constitution of the country.

The majority maintained that having regard to the changes that had from time to time taken place in the doctrines of the Church, they did not in 1863 do anything to forfeit their right to be considered the Reformed Presbyterian Church, and that the minority should have followed their decision.

The argument as to the legal bearing of the union with the Free Church in 1876 upon the case was not required by the Court.

At advising—

Lord President—There has been before the Court in this case a great mass of oral and documentary evidence, which has been fully and most ably discussed and digested by the Lord Ordinary, and we have heard an elaborate and exhaustive argument by the counsel for the three parties on the record.

According to the view which I take of the case it will not be necessary to enter into a full detail of all the topics which have been discussed.

The late Mr Ferguson of Cairnbrock, by his trust-disposition and settlement and codicil, dated respectively 13th May 1853 and 22d September 1855, directed the residue of his large fortune to be applied to the promotion of religious ordinances and education and missionary operations, and that by means of payments for the erection and support of churches and schools in connection with the Established Church of Scotland (excepting parish churches and parish schools), and in connection with the Free Church, the United Presbyterian Church, the Reformed Presbyterian Church, and the Congregational or Independent Church in Scotland, or for the pur-

pose of augmenting the salaries of ministers and schoolmasters and missionaries connected with these churches; also for the purpose of forming and maintaining libraries for the use of the general public; declaring that the application and appropriation of the trust-funds should be entirely at the option and discretion of the quorum of his trustees as to the proportions thereof to be applied to the said several objects.

After the death of Mr Ferguson, and after his trust had been in operation for some years, one of the churches above mentioned, the Reformed Presbyterian Church, which had up to that time received the benefits of the bequest under the administration of the trustees, became separated into two parties, each party maintaining that they kept pure and entire the distinguishing tenets and practices of the body. The majority maintained that the changes which they had introduced and carried into operation against the opposition of the minority were quite within the competency of a majority of the body; while the minority contended that these changes were a depârture from the principles of the communion to which both parties belonged. This separation occurred in 1863, and the question then arose whether the trustees of the Ferguson bequest were entitled to treat both parties as being still qualified to receive, in the discretion of the trustees, some share of Mr Ferguson's bounty, or whether the occurrence of the separation forced on the trustees the necessity of selecting one of the two parties as for the future representing the body intended by the testator to be benefited under the name or description of the Reformed Presbyterian Church. The trustees seem to have considered that they were bound to make such selection, and they preferred the party of the majority as for the future the only proper recipients of that portion of the benefits of the trust which the trustees in their discretion may devote to the Reformed Presbyterian Church.

The party of the minority having however protested against their exclusion, a petition was on 15th October 1877 presented to the Court in name of the Ferguson Bequest Fund, which had by that time been incorporated by the Statute 32 and 33 Vict. c. 6, praying the Court, under the powers conferred by section 18 of that Act, to direct the petitioners whether they ought to prefer the majority or the minority, or either of them, as constituting the Reformed Presbyterian Church within the meaning of the codicil of Mr Ferguson's settlement and of the said statute, or whether the petitioners were in the meantime (while the action of declarator at the instance of the minority remained undisposed of) entitled in the exercise of their discretion to make such grants to churches, schools, &c., connected with both or either of the said parties.

On this petition the Court on the 29th November 1877 pronounced a deliverance directing the petitioners during the dependence of the action of declarator to administer the fund under their charge so far as concerned the Reformed Presbyterian Church in the same manner as they had administered the same from and after the year 1863.

This interim deliverance proceeded on the rule *uti possidetis*. But we are now to dispose both of the action of declarator and the petition of the Ferguson Bequest Fund.

In the action of declarator the minority insist that they are, to the exclusion of the majority, the Reformed Presbyterian Church, and as such are entitled to participate in the bequest along with the other four churches named by Mr Ferguson, to the entire exclusion of the majority.

The conclusions of the action are resisted both by the majority of the separated body and by the trustees of Mr Ferguson, on the ground that the majority are the only persons now constituting or representing the Reformed Presbyterian Church, and are entitled as such to be treated as objects of the testator's bounty. There are other preliminary or prejudicial pleas stated by the defenders which I shall notice by-and-bye. But this is the substance of the defence on the merits.

The decision of the question so raised would, in one view at least, require the Court to investigate the claims of the rival parties respectively to the name of "The Reformed Presbyterian Church," and for this purpose to form an opinion as to what the essential and distinguishing tenets of that body were before the separation, and how far the changes introduced by the majority were inconsistent with these tenets. But I am of opinion that no such inquiry is necessary for the disposal either of the action of declarator or of the petition, and that the Court are neither bound nor entitled in the circumstances to undertake such a task.

No doubt there are cases in which the Court institutes an inquiry into the doctrines and rules of particular religious societies, but only when such a course is absolutely necessary as a means of deciding some question of civil right. Where two parties in the position of those now before us each claim exclusive right to the property of the religious association to which they both originally belonged, it is sometimes impossible to decide the question of property so raised without inquiring which party has adhered to and which has departed from the doctrines and rules of the association. And the same occurs where a particular congregation, having separated itself from the rest of the body, claims to retain the buildings or other property occupied by the congregation, but held on titles permanently connecting the property with the society or church, and justifies its separation on the ground that the majority of the body have renounced or departed from the articles of belief or the general laws which formed the bond of union. In such cases it must be observed that the claim is based on allegations of breach of contract. But the subject in dispute is matter of civil and patrimonial right, and the Court cannot decide that question of right without reading and interpreting the contract which imposes on the members adherence to particular doctrines, laws, or usages as conditions of membership of the association.

A competition for a legacy might also unavoidably raise the same kind of question for decision by this Court, as, for example, where the testator, being himself a member of a particular religious denomination, has bequeathed a sum of money directly to that body, and has clearly shown that he thereby means to promote the interests and give support and encouragement to the doctrines of the denomination. If in such a case there are two parties, each claiming to constitute in themselves the religious society designated by the testator, to the exclusion of the other, on the

ground that they have adhered to, while the other have renounced or abandoned, the distinguishing principles of the society, the Court may be compelled, as in the case of competition for the property of the society, to read and interpret the contract for the purpose of deciding what party has adhered to the conditions and which party has broken them, for on that medium only can the right to the legacy be adjudicated.

But the case before us differs from any of those which I have supposed in several essential points.

I shall specify and explain in some detail three of these essential points of difference which in combination lead me to the result which I am about to recommend to your Lordships.

In the first place, it is difficult if not impossible to affirm of the Reformed Presbyterian Church that it is bound together by a contract or bond of union so definite and ascertained that it is essential to the extension of this body of religionists that they should all remain permanently under the supervision and control of the same synod or other superior church judicatory. Certainly their history very clearly shows that the sect (popularly known as "Cameronians") have in former times, and for long periods, continued to exist and to maintain and profess their peculiar principles without being associated in or subjected to either presbyteries or synods. They differ from other nonconformist bodies in Scotland in this more than in any other respect, that they never were in the position of having seceded or separated themselves from the existing Established Church, for they never belonged to it. When a secession takes place from the Established Church, the seceders naturally, and indeed necessarily, record in some written and authentic form the reasons of their separation, so as to vindicate them from the charge of schism, and this statement becomes the basis of union which thereafter keeps them together in one community —the contract—according to the conditions of which it may be determined by a court of law, where necessary for the decision of a question of civil right, whether there has been a departure by any portion of the body from the principles of the communion. But with the Cameronians there was no occasion for any such formal record of the conditions on which they were associated together. They remained simply in all times, according to their own view, the representatives of the Church of Scotland as it stood from 1638 to 1649, and though at various periods in their later history they published what was called a "Testimony," this was only for the purpose of recalling to recollection and recommending to the world the doctrines and discipline of that church and vindicating their own position, and not by any means as creating any new bond of union, or indicating any new point of departure. The only important parallel to their history is that of the Episcopalian Communion in Scotland. Both of these bodies refused to join the Church established at the Revolution. The Episcopalians refused because they represented (whether they profess to do so now or not) the Church of Scotland as it existed during the two last reigns of the Stuart dynasty, and adhered to its discipline and form of church government. The Cameronians represented, and still represent, what they call the Church of the Second Reformation, —that is to say, the Church of Scotland as it was between 1638 and 1649—that covenanting church which was not content with embracing within the obligations of the Old Covenant of 1580 the whole people of Scotland, but sought by the terms of the Solemn League and Covenant to impose the same obligations, and to enforce an absolute uniformity of Presbyterian Church government, and discipline on the people of England also.

Both before and after the settlement of the Church of Scotland in 1690 they describe themselves as a "poor, wasted, misrepresented remnant of the suffering anti-Popish, anti-prelatick, anti-Erastian, anti-sectarian, true Presbyterian Church of Christ in Scotland;" and in a great measure this was an accurate description, for from a historical account of the body, published in 1806 "by authority of the Reformed Presbytery in Scotland," we are informed that this body of faithful and earnest disciples of the Church of the Second Reformation, after having lived through the "dismal clouds of Cromwell's usurpation," and survived twenty eight years of "the most inhuman and bloody persecution" under Charles II. and James VII., having lost their greatest preacher, Renwick, who suffered martyrdom in 1688, and being deserted by their only remaining pastor Alexander Shields, who, with two young ministers recently sent to them from Ireland, joined the Established Church in 1689, were in their own pathetic language "left as sheep without a shepherd." And as the narrative proceeds to say—"Thus they remained for about the space of sixteen years, till in 1706 the Rev. John M'Millan, formerly minister of Balmaghie, in Galloway, having left the Established Church, acceded to them and espoused their cause." It must have been between thirty and forty years after this before they found a second minister in the person of Thomas Nairn, who left the Secession Church to join them. Then Mr M'Millan and he, with some ruling elders who had been regularly ordained before, formed and constituted a presbytery on the 1st of August 1743, under the title of 'The Reformed Presbytery.' After this"—the narrative goes on to inform us—"the Reformed Presbytery from time to time received small accessions to the number of both their ministers and people." One cannot but be interested by the indomitable spirit of this peculiar people, who, after the Revolution settlement had quenched the ardour of the great bulk of their countrymen for the divine right of presbytery and the perpetual obligations of the covenants, still stuck fast to these convictions of religious truth. But the important facts for the present purpose are that they remained steadfast and united for sixteen years without a minister, and for more than half a century without a presbytery, to which must be added this fact also, that it was more than a hundred and twenty years after the Revolution before they succeeded in establishing a synod.

In these circumstances it would be a contradiction of historical fact to say that no one can be held to belong to this body and to profess its principles who does not acknowledge the authority of the Reformed Presbyterian Synod, which was constituted for the first time in 1811. I am very far from intending to suggest that the Cameronians at any time undervalued the Presbyterian form of church government, or were satisfied

with their condition when deprived of its benefits. On the contrary, their leading dogmas were the divine right of presbytery and the perpetual obligations of the covenants. But they were quite able to maintain and assert these dogmas when they could not from their small and scattered numbers exhibit to the world any practical embodiment of these opinions. Such historical facts appear to me of the greatest importance when the Court are endeavouring, according to the ordinary rules of construction applicable to testamentary instruments, to ascertain who are the persons whom the testator intended to favour under the description of the Reformed Presbyterian Church.

In the second place, the exclusive pretensions both of the pursuers (the minority) and of the defenders (the majority) are, in my opinion, negatived by what is expressed as well as by what is clearly implied in the words of the testator's deed of settlement and codicil.

The main design and end of the foundation is expressed to be the "maintenance and promotion of religious ordinances and education and missionary operations," and the instruments or agencies whom he directs his trustees to subsidise for this end are the Established Church of Scotland, the Free Church, the U.P. Church, the Reformed Presbyterian Church, and the Congregational or Independent Church. There is here a selection of five out of about twelve, being the number of distinct religious denominations in Scotland, and there is valuable light to be had from a consideration of what is excluded as well as what is included by this selection. There is an exclusion of all denominations which are under the Episcopal form of church government, whether Protestant or Catholic. There is also an exclusion of all those who differ, or may be supposed to differ, in matters of Christian doctrine from the Church of the Reformation and of the Revolution. On the other hand, the testator cannot have been animated by any great zeal for Presbyterian Church government, and cannot have attached any great importance to the doctrinal standards (subordinate to the Scriptures) of any of the churches selected, for the Congregationalists or Independents have in all times been, and are now, distinguished from the other four included communions in two marked and important particulars. They recognise no church organisation or rule beyond or superior to that of each particular congregation, and therefore reject equally the Presbyterian and the Episcopal form of church government. They have no particular or subordinate standards, but reject all creeds, symbols, and *formulæ*, and take the Bible alone as their standard of faith and rule of life. The principle of selection must be sought therefore in something quite different from forms of church government or special standards and creeds—in something that is common to the five selected communions. The search is not attended with much difficulty. For the selected communions have two things in common which were likely to commend themselves to a Scotchman zealous for the "promotion of religious ordinances and education and missionary operations," and yet of so catholic a spirit as to disregard differences not involving a divergence of opinion on any important doctrine of Christianity. They all teach and preach that evangelical theology which in the same age distinguished the English Puritans under Queen Elizabeth and the Scottish Reformers, and which may be said fairly to be represented in Mr Ferguson's selection, by the Congregationalists as the successors of the English Puritans, and by the other four communions as representing the Scottish Reformers of the sixteenth century. They are all at one, too, in adhering with more or less strictness to the very simple form of public worship introduced in both countries at the time of the Reformation.

If, then, this was the main design of the testator's bequest, and this the spirit in which it was conceived, and these the reasons which induced him to select the five communions or churches named by him as the instruments for carrying his design into execution, the next question must be how the scheme of his foundation may or ought to be affected by a change in the outward form and composition of each of these churches through a separation of one of them into two or more parties, or in consequence of an union of two or more of them.

That the testator must have been fully alive to the possibility, if not probability, of such occurrences may be taken for granted, for the history of Scotland for the past century and a-half affords plentiful examples. The comparatively recent formation of the Free Church, and the complicated history of divisions and sub-divisions and unions and reunions among the numerous small sects who are now all brought together under the name of the United Presbyterian Church, were without doubt present to his mind. And yet he makes no provision to meet such emergencies. How is this to be accounted for? Not by supposing it to be a careless omission, for that is inconsistent with the careful and practical manner in which his scheme is developed, but by holding that in the view of the testator such occurrences were no emergencies at all so far as concerned the administration of his bequest, which was by him intended to advance the vital interests of religion without regard to sectarian zeal or profitless controversy.

If the Court were to take an opposite or different view of the intention of the testator, the absorption of the majority of the Reformed Presbyterian Church by the Free Church in 1876, and the identification of the two bodies so far as concerns doctrine, discipline, and church government, would present another difficulty in the practical administration of the trust, and perhaps quite as great a difficulty as that arising from the isolated or independent position of the minority. But what happened in 1876 was simply an occurrence belonging to the same general class as the separation of 1863. Neither of them, in my opinion, disturbs the scheme of the testator, or prevents the trustees in the exercise of the discretion committed to them from dispensing the benefits of the foundation substantially in the same way as before these events happened.

But, in the third place, this is rendered still more clear by the large discretion which the testator has committed to his trustees—a discretion very necessary in such a trust, and which ought to enable the trustees to deal with the difficulty and dispute which have here arisen.

The permanent trust for the administration of the bequest contained in the codicil is to consist of thirteen members—three from the Established

Church, four from the Free Church, four from the United Presbyterian Church, one from the Reformed Presbyterian Church, and one from the Congregational Church, and provision is made for keeping up the full number and the prescribed proportions in all time coming. Such a body acting harmoniously seems well qualified to carry out the benevolent intentions of the testator if left unrestricted by conditions that would at any time hamper them in the exercise of a wise discretion. The necessity of leaving them thus unfettered comes from the permanent character of the trust and the very general definition or description of the objects of the testator's favour. No doubt all trustees, however wide their discretion—and perhaps all the more on that account—may be restrained from abuse of their trust by this Court in the exercise of its equitable jurisdiction, and in this trust (though it may seem almost discourteous to suggest such a possibility) a departure from the obvious intention of the testator by excluding any object which he intended to benefit, or showing undue favour for a class of objects or for one particular communion to the prejudice of others, would justify an aggrieved party in invoking the aid of the Court. But, subject to this qualification, I do not see how anyone can claim a special benefit for a particular church or school or mission, stipend or salary, except by an appeal to the discretion of the trustees. I am clearly of opinion that such a separation as has occurred between the two portions of what was the Reformed Presbyterian Church at the date of the testator's death does not disentitle any members of that separated body, whether of the majority or minority, from claiming benefits under the Ferguson Bequest, or prevent the trustees from entertaining, considering, or disposing of such claims in the fair exercise of their discretion.

Such being the nature and limits of the discretion vested in the trustees, I am quite unable on the merits, and irrespective of the preliminary or prejudicial pleas of the defenders, which I shall now proceed to consider, to give effect to the contention of either party in the action of declarator by a declaratory finding in terms of any of the conclusions of the summons, or by pronouncing judgment of absolvitor in respect of what is pleaded by the defenders.

Both sets of defenders have pleaded that the pursuers have no title to sue. But their plea requires no separate notice. If the pursuers had a good claim on the merits to a judgment in terms of any of the conclusions of the summons, their title to sue would be clear. But having no such right to prevail on the merits, they have, as the result of failure on the merits, no title to sue.

But the defenders, the Ferguson Bequest Fund, maintain as their seventh plea that "the pursuers having no connection with the Reformed Presbyterian Church designated in the Ferguson Bequest Fund Act 1869, they are by the terms of the said Act excluded from all interest in the Ferguson Bequest Fund."

The statute incorporating the Ferguson Bequest Fund proceeds on the preamble that "it is expedient for the better management of the trust property and the proper distribution of the income derived therefrom, and for carrying out the purposes of the trust and the benevolent designs of the truster, and establishing the fund on a permanent and secure basis, and providing for a constant succession of proper and fit persons to act as trustees of the said property, that the trustees should be incorporated, and that further and additional power should be . . . . . vested in them."

It is not the purpose of the statute to vary in any respect the terms of Mr Ferguson's codicil, or to interfere with the rights or claims of any persons who may be entitled or eligible to take benefit under it, but only to give more easy and practical effect to the benevolent purposes of the testator. The statute must therefore be read *secundum subjectam materiam*, and in all questions affecting beneficial interest the intention of the testator as disclosed in his own deed continues, notwithstanding any possible ambiguity or implication in the statute, to be the *regula regulans*.

At the time the statute was passed in 1869, in consequence of the trustees having for the past six years recognised the majority as constituting the Reformed Presbyterian Church, to the exclusion of the minority, the one trustee representing that Church in terms of the codicil was Mr James Reid, merchant in Glasgow, a member of the majority. In the bill presented to Parliament by the trustees his name accordingly appears in the list of existing trustees, recited in the preamble as "James Reid, being one member of the said Reformed Presbyterian Church." In the incorporating clause, sec. 3, he is again described in the same terms. The 5th section provides that any trustee "who shall cease to be a member of the Church as aforesaid to which at the time of his election he belonged shall *ipso facto* cease to be a trustee." And lastly, sec. 7 provides that in the case of a vacancy the trustees shall elect a successor, "the trustee so elected and assumed to be a member of the Church of which the trustee so ceasing to act was a member." The object of these provisions plainly was to maintain the full number of thirteen in the proportions specified in the codicil. The bill so framed by the trustees passed into an Act.

If the trustees should find that in consequence of the judgment we are to pronounce they are by the terms of this Act involved in any difficulty as to the mere machinery provided for filling up vacancies (which I am very far from saying will be the case), the proper remedy would be an application to Parliament to vary the terms of the Act of incorporation so as to make it more consistent with the objects and intentions of the testator.

But if the meaning of the seventh plea is that this Act of Parliament determined that for all time coming the pursuers should cease to be or to be dealt with as members of the Reformed Presbyterian Church, and that the defenders are the sole legitimate representatives of that Church, this would be a very strange intention and effect to impute to such a piece of legislation. It may, I think, be confidently affirmed that no such dispute as has here occurred between the majority and minority of the Reformed Presbyterian Church ever was settled by Act of Parliament, and it may admit of grave doubt whether a private Act for such a purpose would be constitutionally within the competency of the Legislature. It is enough, however, for the present purpose to say that the Act before us was very clearly not designed to have any such effect. But unless the

Act of incorporation is to have this effect, then the pursuers are entitled, just as before the Act was passed, to contend that they are members of the Reformed Presbyterian Church, either exclusively or in common with others, and the question whether the churches, schools and missions of the pursuers may be competently made the objects of grants or benefits out of the Ferguson Bequest Fund in the discretion of the trustees depends, just as it did before the Act was passed, on the intention of the testator, as the same is to be gathered from the words and meaning of his bequest.

The plea of *mora*, especially when taken in connection with the passing of the Act of 1869, is a formidable plea as a bar to the assertion by the pursuers of any exclusive legal right. But as no such exclusive legal right can in my opinion be sustained, the plea necessarily falls to the ground; for no amount of neglect or acquiescence on the part of those who are within the description of the objects which the testator has authorised the trustees in their discretion to benefit can ever absolve the trustees from the duty of honestly exercising that discretion, except of course in so far as such neglect or acquiescence has led to this fund, which might have been applied to this one object in time past, having been expended on some other object of the bequest.

The only other plea which it is necessary to notice is maintained by both sets of defenders, in the following terms:—"The claim of the pursuers is barred by personal exception, and is contrary to public law, and founded on *pactum illicitum*." So stated, it is not very intelligible. But the Lord Ordinary has somewhat expanded it, and stated it in a more definite form, thus—"The principles held by the pursuers are such as to disentitle them to appeal to the Courts of the country for the vindication of real and patrimonial rights, their sole title to which, as in competition with the defenders, is their adherence to those unlawful principles and to an illicit pact which the defenders have abandoned." The unlawful principles here referred to are that members of the Reformed Presbyterian Church ought to avoid all occasions of being put to the necessity of taking the oath of allegiance, and to abstain from exercising the elective franchise, and that those members who transgress these rules ought to be subjected to church discipline.

The plea thus explained does not come with a good grace from the majority of 1863, for till then they held the same principles which they now denounce as unlawful. But this is of little consequence if the plea itself were well founded to the full extent of debarring all who hold these principles from seeking the aid of the law in any form as if they were in their collective capacity outlaws.

I am not prepared to affirm this proposition so maintained by the defenders and adopted by the Lord Ordinary. Indeed, I consider it to be inconsistent with the principles of religious toleration and with the modern constitutional views of personal liberty which secure to every member of the community freedom of thought and opinion, and freedom in expressing thought and opinion, so long as this freedom does not expand or degenerate into mischievous action, and is not used to incite others to violate law or to outrage public morality or public decency. But I cannot see how the avoidance of occasions to take oaths and attestations from voting for members of Parliament can be in any sense a violation of law or an outrage on public morality or decency.

None of the preliminary or prejudicial pleas of the defenders can in my opinion be sustained; and, for the reasons already fully stated, I am not prepared to give effect to any of the conclusions of the summons or to sustain any of the defenders' pleas on the merits. The result, therefore, is that we must dismiss the action of declarator.

But in the petition for the Ferguson Bequest Fund I should propose to find, that notwithstanding anything that occurred in 1863 or since that time, the pursuers are not disentitled as objects of the testator's favour to claim, and that the trustees of the fund are entitled, in the exercise of their discretion, to entertain their claim to participate in the benefits of the fund in the form of grants of money for religious and educational purposes connected with the congregations, schools, and missions of the pursuers.

Lord Deas—I have had an opportunity of deliberately reading the opinion delivered by your Lordship, and of conversing with your Lordship on its principles and details. I entirely agree with the substance of that opinion. I agree with its leading principles, and with a great proportion, to say the least of it, of its details. The leading principle I take to be, that this case is not to be dealt with on the same footing as if it were a dispute between two portions of a congregation to which portion of the two the property held for the body belonged. In the case of a dispute of that kind we must consider what is the contract and which of the two portions of the body has violated the contract, and which has adhered it. There is no room for a question of that kind here. The question is, What was or was not the intention of the testator—what sort of bodies or persons did he intend to benefit? I quite agree that he evidently was a person of a comprehensive and liberal mind. He had not perhaps that catholic spirit that could go the length of benefiting all sorts of bodies who might be supposed to be doing their best in spreading moral and religious principles. But he did comprehend a large number of persons differing in many respects among themselves, among whom he did not mean to make any distinction. When we see that this is not a case where we must decide who is right and who is wrong, we find no cause why we should prefer one portion of this body to another. The body may split, but the parts into which it splits are not thereby taken out of the scope of the testator's will. I do not see any reason for saying that Mr Ferguson would have preferred the majority to the minority, or that the split that has taken place brings one into the position of taking the whole benefit. I agree that there is a large discretion vested in the trustees, but yet I do not think they are entitled to prefer the majority to the minority. Their duty is to administer the fund so as to benefit both.

The only thing that is said to disqualify the minority from being entitled, subject to the discretion of the trustees, from sharing in this fund is that their principles are contrary to public policy. I agree in thinking that there is nothing in that plea. I have no conception that the testator would have put any value on that. If he

had, I rather think it would go to this, that the minority are more true to the distinctive principles of the body than the majority. If these principles are not unlawful, anything said on that subject goes to make the minority the true body. Among other objects the testator professes to have in view general education. He goes the length of authorising the trustees to supply a portion of the funds in instituting libraries for the use of the public. The libraries are to contain all sorts of books, and it cannot be said that his views are of so limited a nature as to compel us to decide between the majority and minority. It is not inconsistent with his intentions to give a portion of his funds to this and a portion to that. The only other observation I have to make is with reference to the difficulty of giving judgment in this action of declarator either one way or the other. There is not a single conclusion of the summons that can be sustained, nor is there a single plea for the defenders that can be sustained. This is a charity, and a great charity, and all charities are under the care of the Court, and when they come before the Court we are not limited to giving an open judgment without saying anything more. I daresay that a body of this kind might come to the Court for a scheme.

Lord Mure—I, like my brother Lord Deas, have had the benefit of perusing the opinion delivered by your Lordship, and I concur in the result and in substance in the whole grounds of the judgment. In particular, I think it is not necessary to consider what precise principles are said to have been violated by the pursuers. I have gone over the matter very carefully, and I find that there is no evidence sufficient to instruct that the proceeding of the majority in 1863 was such a violation of the tenets of the Reformed Presbyterians as to warrant us in holding that they had ceased to hold the leading doctrines of that body, and were thereby excluded from the benefits of this trust. There is no ground to warrant that. The claim of the pursuers depends on the testimony of 1837-9. A book has been furnished to us containing that testimony. If that is to be taken as the constitution of the Reformed Presbyterian Church in 1839, that constitution has been changed since 1761 in important particulars. The preface is sufficient to show that. At page 13 of the preface it is said—"Truth is immutable, but the forms of error and ungodliness are perpetually changing. That it may confront the varying forms of error, it is therefore indispensable that a testimony be progressive. The times are not the same, the controversies are not the same, the parties are not the same, that they were seventy-eight years ago. In a document published at so remote a period there must be many things which, however necessary and appropriate then, are inapplicable to modern times." Now the alteration made in 1839 was this, that whereas by the grounds of communion adopted in 1761 certain proceedings that had taken place at Auchensaugh in 1712, by which it was declared that resistance to the payment of taxes was incumbent on the body, had been approved of, in 1839 what was dealt with was that resistance to the payment of taxes should no longer be maintained, and that they should turn their attention to the exercise of the electoral franchise. But these things were dealt with as being mere matters of regulation, not as being in themselves the leading tenets of the body. What was done in 1863 with regard to the oath of allegiance was in principle not different from what was done with reference to the payment of taxes in 1839. On both occasions these were made open questions. I think, according to the evidence, that what the majority did was quite within their powers.

But while I cannot give effect to the exclusive claims of the pursuers, I am clear that they as well as the majority are within the scope of the testator's will. They admittedly hold the same tenets as the body of Reformed Presbyterians did at the date of his will and of his death. This, I think, is sufficient to show that they are still in the position of parties entitled to claim a share of the benefits.

Lord Shand—As I concur in the substance and result of the elaborate opinion delivered by your Lordship, I consider it only necessary to make a few observations on what I may call the merits of the case. I think it is plain that the question directly raised is one as to the intention of the truster. Each party has maintained that they represent the proper object of the testator's bounty, to the exclusion of the other. The determination of such a question in the construction of a testamentary bequest might involve an inquiry into the fundamental principles of the standards of different bodies of Christians. If a dispute had arisen between contending parties as to which particular body fell under the testator's description, it might have been necessary to look at the principles of the different bodies and see which truly answered the description of the testator. But he has given the benefit of the income of the residue of his estate to five different bodies. There are considerable differences among them, but they all hold in common the Christian doctrines of the Reformation, and all adhere to a particular form of public worship. There is an ample discretion given to the trustees as to the proportions of the income to be applied to the several objects. The general object of the testator is, that the income should be applied "in and towards the maintenance and promotion of religious ordinances and education and missionary operations." In order to secure that object the different churches he names are merely the agents selected by him. He goes on to say—And that by "means of payments for the erection or support of churches and schools (other than and excepting parish churches and parish schools) belonging to or in connection with *quoad sacra* churches belonging to the Established Church of Scotland, and belonging to or in connection with the Free Church, the United Presbyterian Church and Congregational or Independent Church all in Scotland, or any or either of them."

The case that has occurred is not that of one of these bodies abandoning the doctrines it held, or adopting doctrines not recognised by any of them, nor is it the case of one of the bodies named uniting with a body outside who cannot be described as within the class favoured by the testator's bequest. One of these bodies, sinking its differences, has united with another also within the range of the testator's bounty—Is it to be the

result of this union that one or both of these bodies are to forfeit all right to a share of the bequest? Take the case that the Free Church, the United Presbyterian Church, and the Congregational Church, finding that they have substantially the same rule of faith and the same simple form of religious worship should unite, is it to be the result that one or all become disqualified to carry out the objects of the testator? So far from becoming disqualified, the union provides a stronger reason for making them agents for the distribution of the fund. There is nothing fundamentally altered in the views that are held in common by all the bodies. But is there to be any difference because the union is not between two of them but between a large section of one body and another of them? I can see no reason why the churches, libraries, &c., of that majority should be held to have lost their right to a share.

Then why should the minority not have a share? They have adhered to the principles and form of worship of their Church, and they remain as capable of being an agency or means within the meaning of the settlement for carrying out the charitable and pious intentions of the testator as there expressed.

I am therefore of opinion as regards both parties that nothing has occurred since 1863 to prevent their claims as objects of the testator's bounty being considered and dealt with by the trustees. I observe from the petition that the trustees have been in use to divide the funds in the proportion of 1-13th to the Reformed Presbyterian Church and 4-13th to the Free Church. Whether the trustees may or may not find it necessary to go back on that scheme I cannot say. They have ample power to do so. I have no doubt at all that the fund will be conscientiously administered in terms of the view taken by the Court, and doing equal justice to the claims of the majority and minority both represented in this case.

On the question of expenses—the trustees resisting and the pursuers demanding that they should be paid out of the trust-funds—the LORD PRESIDENT said—The direction of the statute is that "in the event of any question or difficulty arising as to the construction of the trust-deeds or this Act, or as to the proper operation and administration of the trust, or in consequence of any other special fact or occurrence," the trustees may apply to the Court by petition, and the Court shall direct the cost of the proceedings to be paid out of the funds. It is imperative that in such a case they should be, and the only question is, whether this action of declarator falls under the scope of this action? I must say, in the view that the pursuers proceeded to raise this action because of the delay on the part of the trustees in presenting a petition, it does fall under the section, and I am therefore for allowing both parties their expenses out of the trust-estate.

The Court therefore dismissed the action of declarator, and in the petition pronounced the following interlocutor:—

> "The Lords having resumed consideration of this petition, and having special regard to the interlocutor pronounced in the relative action of declarator at the instance of the Rev. Robert Wallace and others against the petitioners and against the Rev. William Symington and others, Find that the pursuers of the said action of declarator did not by reason of anything that occurred in 1863, or since then, as alleged in the petition, cease to be objects of the testator's favour; and that the petitioners are entitled and bound, in the fair exercise of their discretion, to consider and dispose of the claim of the said pursuers to participate in the benefits of the fund in the form of grants of money for religious and educational purposes connected with the congregation, schools, and missions of the pursuers: Direct the petitioners to administer the fund for the future in conformity with the above finding, and decern: Appoint the expenses of all parties in the proceedings under this petition and in the relative action of declarator, as the same shall be taxed, to be paid out of the trust-funds in the hands of the petitioners, and remit to the Auditor to tax the accounts of the said expenses and report."

Counsel for Minority (Pursuers and Reclaimers)—Asher—Pearson. Agent—A. Kirk Mackie, S.S.C.

Counsel for Ferguson Bequest Trustees (Defenders)—Lord-Advocate (Watson)—Jameson. Agent—John Carment, S.S.C.

Counsel for the Majority (Defenders and Respondents)—Balfour—Innes. Agent—John Galletly, S.S.C.

HOUSE OF LORDS.

Saturday, November 16, 1878.

SPECIAL CASE — SHARPE'S TRUSTEES *v.* KIRKPATRICK AND OTHERS.

(Before the Lord Chancellor (Cairns), Lord O'Hagan, and Lord Selborne.)

(*Ante* Dec. 20, 1877, vol. xv. 252; 5 Rettie 380.)

Succession—Legacy—Residue—Cumulative Bequest.

Terms of a deed *held* (*rev.* judgment of Court of Session) insufficient to take a case out of the general rule that a legacy and bequest of residue are cumulative.

Interest—Payable from Death of Testator.

Terms of a deed *held* (*rev.* judgment of Court of Session) not to imply any postponement of payment so as to defeat the right of legatees to claim interest from the date of the testator's death.

Succession—Legacy—Legacy-Duty.

A testator having written on the margin of a holograph letter of instructions the words "all free of legacy-duty," *held* (*rev.* judgment of Court of Session) that the application of these words could not be limited to the legacies opposite to which they were written, but must extend to all the legacies.

This was an appeal from the judgment of the Court of Session pronounced on December 20, 1877, and reported *ante*, vol. xv. 252, and 5 R.