dead, and to that consequently there can be no succession. No doubt through his death the fee is disburdened and those portions to which, failing children of the liferenter, the legatees would be entitled are as a consequence left free for distribution. But neither the fee nor any part of it belonged to him, and those taking the fee do not and cannot take it as his successors in that estate. This result becomes the more obvious when section 3 of the statute is taken into account. Those who may pray for the authority which may be conferred under the first section are the same as those who may pray for that which under the third section may be conferred. The subject of the one application is the income; that of the other is the capital; and both or to both the person who has disappeared must have possessed or been entitled. Tried by this test the failure of the petitioners' argument becomes clear to demonstration. The petitioners say that the principle on which the statute is based is wide enough to comprehend them, but the words are not. Nay more, these not only do not support, but they are inconsistent with, the interpretation to which the petitioners seek the sanction of the Court. I would only add, that if the result contended for by them were to be recognised, this trust and many trusts would be frustrated. Interests intended to be protected would be left without protection, and contingent interests which were intended to be operative only when the conditions were purified would often be rendered effectual even from the opening of the trust. This is a consideration which, even had the words of the statute been ambiguous, which they are not, would have materially influenced my opinion on the question before us.

Lord Rutherfurd Clark—I am of the same opinion. The statute enables us in certain events to dispose of the estate of an absent person, and at two several times. First, when he is absent and has not been heard of for seven years, we are entitled, on the application of the person entitled to succeed, to give the petitioner the income of the heritable and moveable estate of the absent person, or we may sequestrate the estate of the absentee and appoint a judicial factor thereon. If the person continues to be absent for another period of seven years, then the same petitioner may renew his application to the Court, and the Court may then, if it thinks proper, direct the fee of the estate to be paid to the petitioner or his representatives, who may take the estate in his place.

These are the statutory provisions, and they seem to include all the cases which can possibly occur under the statute—the first application dealing with the interest, and the second with the fee of the estate.

Now, the petitioner here asks us to deal with the estate of an absent person who is presumed to be dead under the statute, where that person was a mere liferenter and nothing else, perhaps not even that—we are therefore asked to deal with the estate of a person who by his death lost the estate claimed.

Now, I cannot see why we should be thought to be giving a judaical construction to the statute if we reject this application, because I think that there is no estate with which the Court should deal. There are other questions involved in the petition on which I do not touch. For instance, I am clear that we ought not to decide whether the petitioners have any right to the legacies.

Lord Young was absent.

The Court refused the petition.

Counsel for Petitioners—Mackintosh—Guthrie. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Respondents — Trayner — Hon. H. J. Moncreiff. Agent—Alex. Morison, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Lord M'Laren, Ordinary

REID AND OTHERS *v.* PRESBYTERY OF ARBROATH.

Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 96), *secs.* 3, 4, 14—*Designing of Glebe—Appeal to Sheriff—Suspension and Interdict—Jurisdiction.*

A presbytery having, on the petition of a minister of a parish within the bounds, found him entitled to have a glebe designed to him, certain of the heritors appealed to the Sheriff in manner provided by the Ecclesiastical Buildings and Glebe (Scotland) Act 1868. Other heritors presented a note of suspension and interdict against the presbytery and the minister for interdict against designing a glebe, or taking any further procedure on the minister's petition. The Court *refused* the suspension on the ground that the question was *sub judice* before the tribunal appointed by the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 for its determination.

Section 3 of the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 provides that "From and after the passing of this Act, if in the course of any proceedings before any presbytery of the Church of Scotland, relating to the building, rebuilding, repairing, adding to, or other alteration of churches or manses, or to the designing or excambing of sites therefor, or to the designing or excambing of glebes, or addition to glebes, or to the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof (including the building or repairing of churchyard walls), any heritor, or the minister of the parish, shall be dissatisfied with any order, finding, judgment, interlocutor, or decree pronounced by such presbytery, it shall be competent for such heritor or minister, within twenty days of the date of such order, finding, judgment, interlocutor, or decree, to stay such proceedings by appealing the whole cause as hereinafter provided; and such appeal, on being duly intimated to the clerk of the said presbytery, shall have the effect of staying the presbytery from taking any further steps in connection with said proceedings."

By section 4 it is provided that the appeal under the said Act "shall be taken by the appellant or his agent presenting a summary petition to the Sheriff of the county in which the parish

concerned is situated, praying him to stay the proceedings before the presbytery, and to dispose of the same himself."

The burgh of Arbroath was by charter of novodamus granted by James VI. in 1599 of new constituted, as it had been of old, a free burgh. By the same charter it was erected into a royal burgh. On the 5th December 1882 a petition was presented to the Presbytery of Arbroath by the Rev. James Thomson, minister of that parish, setting forth that no glebe of arable land, or pasture land in lieu thereof, had ever been designed to the minister of the said parish, and praying the said Presbytery to set apart as a glebe to him as minister of the parish, and his successors in office, a piece of ground of proper quality, extending to at least four acres of arable land, near to the church or manse. This petition was duly intimated and advertised, and thereafter the Presbytery met and considered objections taken by certain heritors to the proceedings, on the ground that the parish of Arbroath being a burghal parish without any landward district the minister was not entitled to a glebe. The deliverance pronounced by the Presbytery was in the following terms:—"The Presbytery, in respect that the minister of Arbroath is minister of a royal burgh having a landward district annexed —Find (1) That he is by law entitled to have a glebe designed to him; (2) That the heritors of the parish are bound to provide the same, and decern accordingly." An appeal was presented to the Sheriff of the county by a committee of the heritors of the parish against this deliverance, and this note of suspension and interdict was presented. Before parties had been heard thereon in the Bill Chamber at the instance of the Provost and Town Council of Arbroath, as representing the said burgh and community, against the Presbytery of Arbroath and the minister of the parish as an individual, praying the Court to suspend the proceedings complained of, and to interdict the Presbytery from designing and setting apart a glebe, and from taking any further procedure upon the petition presented by the minister, or upon their deliverance thereon.

The complainers averred that the parish of Arbroath was a burghal parish, and there was not, and never had been, any landward parish or district attached to it, and that no glebe ever had been designed or possessed by the minister of the parish, and that the lands and territory of the burgh as contained in its charter consisted of and comprehended the whole parish with the exception of a small piece of ground known as the Abbey precinct, formerly the residence and garden of the Abbot of Aberbrothock, which lay in the centre of the town, and had long been built over. They further averred that the finding of and decerniture by the Presbytery was *ultra vires*.

The respondents averred that the parish while partly burghal was also to a considerable extent landward, and consisted of farms, pendicles, and gentlemen's residences, that the proprietors and tenants in this landward district paid county assessments and not burgh taxes, that they had no votes in the municipal elections of the burgh of Arbroath, and that the roads were under the charge of the county boards and not of the police commissioners of the town. They further averred that the stipend of the minister of the parish of Arbroath was provided by the heritors out of the teinds of the parish, and that he was also in possession of a manse and offices provided by the heritors.

The respondents pleaded—"(1) The present suspension is incompetent, in respect (1st) that the Presbytery having jurisdiction in the determination of all questions relating to the subject of glebes, the deliverance pronounced by them finding the respondent entitled to a glebe was validly and competently pronounced, and can only be reviewed in the manner prescribed by the statute; and (2d) that the questions raised by the present suspension are already *sub judice* in a court of competent jurisdiction."

On the 15th February 1883 the Lord Ordinary refused the note and found the complainers liable in expenses.

"*Opinion.*—As probably the parties may desire to bring my opinion under the review of the Inner House, it is convenient that I should give it as speedily as possible. I think it must be admitted that if the subject of the deliverance of the Presbytery appealed from is within their competence, and if they have committed no irregularity and no excess of jurisdiction, then the proper mode of correcting any error in law that may vitiate their deliverance would be by an appeal from the Presbytery to the Sheriff, and if necessary from the Sheriff to the Lord Ordinary on Teinds, as provided by the Ecclesiastical Buildings Act 1868. The statute provides that if no such appeal is taken, "every such order, finding, judgment, interlocutor, or decree, not appealed from as aforesaid, shall be final, and not subject to review." It might, on a very critical reading of this statute, be supposed that as there has been an appeal to the Sheriff the interlocutor may also be subject to review in another way. But the meaning is clear, that there may be a review by appeal, and if that mode of review is not taken advantage of there shall be no other review. There may, however, be an appeal to the Court of Session in respect either of defect of jurisdiction on the part of the Presbytery to deal competently with the matter, or in respect of an excess of jurisdiction committed by them, that is, an assumption of jurisdiction to which they have no right. It has been laid down by the highest authorities on this subject that the Court of Session has an inherent power to restrain or correct the illegal assumption of jurisdiction by any other tribunal, civil, criminal, or ecclesiastical; and therefore if the Presbytery had proceeded to try some question of civil right which was not within their province there can be no doubt that under a note of suspension their proceedings would have been at once restrained, or if necessary quashed. If the Presbytery had exhausted their powers, as was alleged in the *Chanonry* case (26th Nov. 1880), to which reference has been made in the argument; if they had, for example, laid an assessment upon a parish, and then a question had arisen who were the heritors liable for the assessment, in such a case, beyond all question, the Court of Session might be appealed to. The Presbytery having decided on the matters that were competent, and the difference having arisen as to the execution of their decree, that difference must be solved by the Civil Courts, just as in the case of resort to

suspension to determine whether a person is liable for poor's assessment or any other tax or charge laid on by competent authority. Now, clearly the present case does not fall within the latter category, because all that the Presbytery have done is to find that the minister is entitled to a glebe. The question is, whether in so doing they have exceeded their jurisdiction? It has not been shown to me that there was any irregularity in the mode of bringing this question before the Presbytery. They are the parties to designate a glebe, and until appearance was made and cause shown to the contrary there was *ex facie* a proper reference to them of the question whether the minister was entitled to a glebe. There might have been other defences to the application. It might have been shown that the minister already had a glebe, or that this was a burghal parish—which is the defence actually taken—and that he was not entitled to a glebe. Suppose there had been no appeal taken to the Sheriff in the manner contemplated by the Ecclesiastical Buildings Act, could it be said that when the Presbytery were asked to design a glebe, and defences were put in to the effect that the minister was not entitled to a glebe, they were doing wrong in deciding the question thus raised? I think, on the contrary, that where heritors appear and dispute the minister's right to a glebe the Presbytery would be violating the rules of justice, and committing what is known as an excess of jurisdiction, if they went on to act without determining the true question raised by the parties—whether this is a case in which the minister is entitled to a glebe? They could not move one step until that point had been determined. And how is it to be determined? Either by the Presbytery going on to decide with such light as they have, or, if the parties choose, by one or other of them availing themselves of the power given under the Ecclesiastical Buildings Act to remove the case to the Sheriff, who has power to stay proceedings and take the case into his own hand. No doubt, under the procedure which existed before the passing of the Ecclesiastical Buildings Act the Court of Session would interfere either by way of advocation in the course of the proceedings before the presbytery, or by suspension of their deliverance after the proceedings terminated, there being then no other mode of obtaining a legal decision. But it does not follow that the ground of action of the Court in such cases was excess of jurisdiction on the part of the ecclesiastical authority. I think that the Court at common law had a general power of reviewing the decisions of the presbytery on matter of law, as being the Supreme Court of Appeal from all other Courts, except those which are subject to the appellate jurisdiction of the Court of Justiciary. But now, the Ecclesiastical Buildings Act having provided a different mode of appeal, and having declared that except in this manner the orders of the presbytery shall be final and not subject to review, I think it follows that there is an implied restriction of the jurisdiction of the Court of Session to those questions which lie within their inherent right of restraining all unauthorised proceedings of inferior tribunals or authorities. I cannot say that this deliverance of the Presbytery is one that could be suspended on such grounds. The Presbytery may be wrong in law, but the mode of correcting their error in law is by an appeal to the Sheriff. The only case that might lead to any doubt in my mind is the case of *Walker* v. *The Presbytery of Arbroath*, where, although there is in the opinion of the Lord President a statement of the conditions under which the Court in its ordinary jurisdiction will review such deliverances, yet in fact the Court did proceed, as I think, to consider the appeal on its merits, and were followed in that course by the House of Lords. But it must be observed that in *Walker's* case it was shown, or at least alleged, that owing to the want of proper intimation the time for appealing in the statutory form had expired, and the Supreme Courts of this country have always been indulgent to appellants who came to them alleging substantial injustice, where it is shown that without fault on their part the opportunity of appealing in the ordinary way had been lost. In that case it was difficult for the Court to say, until they had heard the case on the merits, whether after all there might not be some point established involving or implying illegal assumption of jurisdiction by the ecclesiastical authority. In the present case no such difficulty presents itself to my mind. It is unnecessary that I should make an order for the hearing of this case on the merits to discover whether there has been excess of jurisdiction in the proceedings before the Presbytery, because the case has been already appealed to the Sheriff; and any excess of jurisdiction which is involved in the merits of the controversy will, I think, fall within the appeal to the Sheriff. If the alleged excess of jurisdiction only means this—as it appears to me to mean—that the Presbytery, having taken an erroneous view of the law, have pronounced an interlocutor that ought not to be enforced, that really is an objection to their finding on the merits—not upon form nor upon the assumption to deal with a matter incompetently brought before them. Therefore, though I am unwilling to deprive the appellants of any advanwhich they may be supposed to have in obtaining through this form of appeal an authoritative determination by the Inner House, I feel constrained to hold that the matter of this appeal falls within the scope of the statute, and consequently that appeal by suspension is excluded. Of course, my judgment on this point is reviewable, and if it is erroneous then the case will go on."

The complainers reclaimed, and argued—That as this was a purely burghal parish the minister was not entitled to a glebe. The Ecclesiastical Buildings Act did not deprive the Court of Session of all jurisdiction in such cases, for while its appellate jurisdiction was no doubt taken away, a restraining or quashing jurisdiction remained. If the parish was proved to be purely burghal, as averred by the complainers, then the proceedings were outwith the statute. The present application for interdict could not in any sense be called premature.

Authorities—*Telford* v. *Kirk Session of Ancrum*, March 10, 1826, 4 Sh. 545; *Panmure* v. *Presbytery of Brechin*, December 12, 1855, 18 D. 197; *Panmure* v. *Hacket*, July 3, 1860, 22 D. 1351; *Walker* v. *Presbytery of Arbroath*, March 1, 1876, 3 R. 498, and 4 R. (H of L.) 1; *Stewart* v. *Presbytery of Paisley*, November 15, 1878, 6 R. 178; *Magistrates of Fortrose* v. *Maclennan*, November 26, 1880, 8 R. 124; Connal on Parishes, p. 357.

Argued for respondents—The whole question depended upon the fact whether there was a landward district attached to this burghal one, and the tribunal appointed by statute to determine such a question was the Sheriff Court, with an appeal to the Lord Ordinary on Teind Causes. The Presbytery was quite within its powers in what it had done; there was here a competent jurisdiction, and no informality had been averred. The remedy here sought was not a suitable one, and no proper case had been made out for a suspension—Mackay's Court of Session Practice, i. 220. The Act (sec. 14) provides that "All orders, findings, judgments, interlocutors, or decrees pronounced by any Sheriff under the authority of this Act shall be final and conclusive, and not subject to review by any Court whatsoever, unless an appeal shall be taken to the Lord Ordinary against the same, in manner hereinafter mentioned."

At advising—

Lord President—I think one or two points could fairly be conceded by the respondents here. In the first place, if this is a purely burghal parish without a landward district, then the minister is not entitled to a glebe, and it follows from that that the Presbytery would have no jurisdiction to design it. And it is equally clear that if the case is before the Sheriff on appeal, or Lord Ordinary on Teinds, and it turns out that this is a purely burghal parish, and the minister has no right to a glebe, then neither the Sheriff nor the Lord Ordinary has any jurisdiction. But that being so, the question still remains, whether this is a process that should be entertained under existing circumstances? If there is a landward district annexed to this parish, then it is equally clear that the minister is entitled to a glebe. That is not disputed. Now, the question whether the parish is purely burghal or partly burghal and partly landward is at present a question before the Sheriff, and it appears to me that it has come before the Sheriff in a regular form under the statute of 1868. The minister presented his petition to the Presbytery upon the footing that he was the minister of a parish partly landward and partly burghal, and the deliverance of the Presbytery on that issue is, "in respect that that is so, and that there is a landward district annexed to this burgh, we proceed to designate a glebe to the minister." If it turns out in point of fact in the inquiry which is pending before the Sheriff that the minister is right in his contention, then he will get his glebe; and if it turns out in point of fact that there is no landward district in the proper sense of the term annexed to this burgh, then certainly he will not get his glebe. But the question is at present, I think, before a competent tribunal for determination, and when the Sheriff has determined that question, and an appeal is taken to the Lord Ordinary, and he has decided it also, one of two results will follow. Either the question will be decided against the minister, in which case there will be no reason for the complainer's interference by way of supension or reduction, or it will be decided in favour of the minister. If it is decided in favour of the minister on grounds which are bad in law, I can quite easily see that the present complainer may raise upon the face of the proceedings before the Lord Ordinary the question whether he or the Presbytery had any jurisdiction to entertain the petition of the minister, and in that form they may obtain the judgment of the Courts in the end determining the question. But in the present state of matters I am not for sustaining this suspension and interdict, because I think the effect of it would be to remove to this Court a question which is *sub judice* before a competent tribunal created by statute for the purpose of determining it. On these grounds, without going into the more detailed views of the Lord Ordinary, or expressing any concurrence with these views, I am for adhering to the interlocutor reclaimed against.

Lord Deas—I am of the same opinion. I think that in this case nothing has been shown for us to interfere with, and that the case should be allowed to go on in the ordinary form. When the procedure has been followed which is laid down in the Ecclesiastical Buildings Act it will be seen whether the heritors can appeal to this Court or not. It may be there will then be a question whether the finality which apparently was contemplated has come in regard to these proceedings, but at present there is no reason for suspension and interdict while those regular and statutory proceedings are in progress.

Lord Mure—I am quite clear that there are no grounds for interfering with anything that has been done in this case. The question at issue, as I take it from the record, is a simple question of fact. Is the parish of Arbroath purely burghal or not? There are allegations on record that there are 600 acres of land outside the burgh, and that fact I think is competent to be inquired into by the Sheriff, to whom it is made competent by the statute to take an appeal if the Presbytery does anything that is thought to be wrong. The jurisdiction of the Sheriff having been so constituted under this statute, with power of appeal to the Lord Ordinary, until decision is given by the Sheriff I think that this Court ought not to interfere, and I entirely concur in the result at which your Lordships have arrived.

Lord Shand—I am not prepared to say that this process is absolutely incompetent. The complainers are here with a case in which they state that the Presbytery have no jurisdiction to deal with the matter that is before them, and they state relevant grounds, in my opinion, to exclude the jurisdiction of the Presbytery. At the same time, looking at the question as one of procedure, I concur with your Lordships in thinking that the note should be refused. There may be cases in which we would take a different course—as, for example, if the respondents to this reclaiming note, instead of denying, had admitted that this was a purely burghal parish. I suppose we should have had no difficulty, it being conceded that this was the state of the facts, in sustaining the note of suspension and interdicting further procedure before the Presbytery. But I think, as a matter of convenience, that it is desirable, now that the proceedings have begun, that they should be allowed to go on in their natural course, taking the form of an appeal to the Sheriff and the Lord Ordinary. At the close of these proceedings it will be for the consideration of these complainers whether they should adopt further proceedings in order to cut

down what has been done. Upon that I shall only say that I am not satisfied that the complainers will be limited in their objections to mere matters of law at that stage of the case. I think it is very questionable whether they will be so limited. For example, if it appeared that jurisdiction depended on a matter of fact, I am not prepared to say that the Court which finds the fact would not thereby acquire the jurisdiction which otherwise it would not have. It may be that ultimately it will be found in the litigation that this is a burghal parish, and there would be an end of the litigation. If not, it will be for the complainers to see whether under the Ecclesiastical Buildings Act they cannot present a case.

The Court adhered.

Counsel for Complainers—J. P. B. Robertson—Gardner. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Guthrie Smith—Strachan. Agents — J. Duncan Smith & M'Laren, S.S.C.

Wednesday, March 14.

FIRST DIVISION.

FLYNN *v.* HOOD

Process—Jury Trial—Issue.

Form of issue adjusted for the trial of an action of damages by a miner against a coal-master for injuries alleged to have been caused through the defective condition of a railway in the defender's mine.

This was an action of damages at the instance of Michael Flynn, formerly a miner, for injuries received by him while in the employment of the defender Archibald Hood, coal-master, through the alleged fault of the defender.

The pursuer had been a "drawer" in the defender's pit at Rosewell, and on the occasion of the accident which led to this action had been walking down an inclined road or railway in the mine, taking with him a loaded hutch. He averred that, according to the practice of the mine, he had been walking in front of the hutch leaning his back against it to prevent it from moving too rapidly, and pressing his feet against the sleepers in the road; that when he was doing so one of the sleepers which was loose slid away from his foot, as a result of which he fell before the hutch and received injuries which necessitated the amputation of a leg. Further, he averred that the accident occurred through the defective condition of the road, arising from bad construction and repair, it being wanting in sufficient sleepers and in ballasting, as well as in regular attention to the condition of the sleepers, many of which were loose. He also averred that the defender had failed to supply materials sufficient for the proper construction and maintenance of the road, and that he and his foreman were aware of its bad condition.

The defence was a denial of fault on the part of the defender or anyone for whom he was responsible. The defender averred that he took no personal charge of the management of the pit, but delegated it to competent persons, and that he had supplied all necessary materials for the construction and repair of all the roads in the pit. He averred that if there was any fault other than that of the pursuer himself, it was that of a fellow-workman with him. In any view, he pleaded contributory negligence on the pursuer's part.

The Lord Ordinary (FRASER) adjusted this issue for the trial of the cause — "Whether, on or about the 1st day of August 1881, the pursuer, while in the employment of the defender as a miner in a pit at Whitehill belonging to him, was struck by a hutch which he was guiding along a railway in said pit, and injured, in consequence of the defective condition of said railway, through the fault of the defender, to his loss, injury and damage."

The defender moved the Court to vary the issue by adding after the words "the fault of the defender" the words "in not supplying sufficient sleepers and ballast therefor," so as to make the issue read:—"Whether, on or about the 1st day of August 1881, the pursuer, while in the employment of the defender as a miner in a pit at Whitehill belonging to him, was struck by a hutch which he was guiding along a railway in said pit, and injured, in consequence of the defective condition of said railway, through the fault of the defender in not supplying sufficient sleepers and ballast therefor, to his loss, injury and damage."

The Court approved of the issue as adjusted by the Lord Ordinary.

Counsel for Pursuer—D.-F. Macdonald, Q.C.—James Reid. Agent—R. H. Miller, S.S.C.

Counsel for Defender—Dickson. Agent—T. F. Weir, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, March 14.

(Before Lord Justice-Clerk, Lord Young, and Lord Craighill.)

[Sheriff of Perthshire.

MACLEISH *v.* CRIGHTONS.

Justiciary Cases—Turnpike—Steam-Engine—Locomotive Steam-Engine near Turnpike Road—General Turnpike Act (1 *and* 2 *Will. IV. c.* 43), *sec.* 107—*Roads and Bridges* (*Scotland*) *Act* 1878 (41 *and* 42 *Vict. c.* 51), *sec.* 123.

Held that to have a locomotive traction-engine for the purpose of driving a thrashing-mill at work in a farmyard within one hundred yards of a turnpike road without a screen to prevent it from frightening horses inferred a contravention of sec. 107 of the General Turnpike Act 1831, incorporated with the Roads and Bridges Act 1878 by sec. 123 thereof.

Section 107 of the General Turnpike Act of 1831 (1 and 2 Will. IV. c. 43) enacts as follows:—