should there be a parish lending library at Dinnet, they should make a gift to it of such works as they should think suitable, and as there were some rare books of history, science, and reference, he desired that these should be parted among his executors.

The nomination of executors is in these terms:—"I appoint the following to be my executors, viz., my brothers William and Charles and my sister Jane, or their representatives, namely, the successors of each as representing their respective families."

In order to participate in the gift an executor must, I think, have been appointed by the testator himself and have accepted the office. John Lundie Michie and Robert M'Lean appear to me to be in different positions. Charles Michie, John Lundie Michie's father, predeceased the testator, and John, as his father's successor, is appointed by the testator himself.

Robert M'Lean's mother, Jane, is still alive, but has declined to act as executor. Her son is not "her successor" and therefore had no right to the office, but he has been assumed as an executor. That being so I think that John Lundie Michie is entitled to participate in the legacy, but that Robert M'Lean is not.

LORD M'LAREN and LORD KINNEAR concurred.

The Court found in answer to the first and second questions that the second parties were each entitled to demand immediate payment from the first parties of one-fifth share of the residue of the testator's estate exclusive of the books, manuscripts, pictures, specimens, works of art and relics mentioned in the will, but that the third parties, the children of William Michie and the children of Jane Michie or M'Lean, being all of full age, were respectively entitled to immediate payment from the said second parties of one-fifth share of said residue exclusive as aforesaid, each of said one-fifth shares being divisible among the respective children equally; and found in answer to the fourth question that the whole expenses of administering the will were properly chargeable against the one and one-fourth share of residue destined to the sixth parties, and that such expenses did not include estate duty, which fell to be paid by the trustees before division, nor legacy duty; and found in answer to the seventh question that John Lundie Michie as the successor and representative of his father in the office of executor was entitled to share in the bequest of books, manuscripts, and collections of printed matter directed by the testator to be parted among his executors, but that Robert M'Lean was not so entitled.

Counsel for the First and Third Parties—Clyde, K.C.—A. R. Brown. Agents—Smith & Watt, W.S.

Counsel for the Second and Fourth Parties—C. K. Mackenzie, K.C.—Constable. Agents—Constable & Sym, W.S.

Counsel for the Fifth Parties—D. Anderson. Agents—Davidson & Macnaughton, S.S.C.

Counsel for the Sixth Parties—C. N. Johnston, K.C.—R. S. Horne. Agents—Menzies, Black, & Menzies, W.S.

Tuesday, February 21.

SECOND DIVISION.

GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND *v.* JOHNSTON AND OTHERS.

Process — Interim Interdict — Possession — Church — Commission Appointed by Crown — Probable Legislative Intervention.

Where the complainers in a note of suspension and interdict had a *prima facie* title of property in a church, and had otherwise made out a case for interim interdict, *held* that neither the fact that a commission of inquiry had been appointed by the Crown nor the fact that there was a probability of intervention by the Legislature was a ground for refusing interim interdict regulating possession of the church.

This was a note of suspension and interdict at the instance of (1) the General Assembly of the Free Church of Scotland, (2) Colin Fraser and others, the whole existing and acting trustees for the congregation in Strathpeffer adhering to the Free Church of Scotland, and (3) the Moderator and Kirk-Session of said congregation, against (1) the Rev. James Johnston and others, the minister and elders forming the Kirk-Session of the Association of Christians forming the United Free Church Congregation in Strathpeffer, (2) the Deacon's Court of said congregation, and (3) the said James Johnston and others as representing the said congregation, craving the Court to interdict the respondents from officiating as minister, elders, or deacons within the church property formerly known as the Free Church in Strathpeffer, and from interfering with the complainers in the peaceable possession of said subjects.

The church in question was held on a title similar, *mutatis mutandis*, to that on which the church in the case of *Young and Others* v. *Macalister and Others*, August 1, 1904, 41 S.L.R. 742, was held.

On 6th December 1904 the Lord Ordinary on the Bills (PEARSON) passed the note and granted interim interdict without caution and pronounced the following opinion:—"The case of Strathpeffer which I have now before me is the first of a group of cases which raise the question of the right to the congregational property of the Free Church as it stood at the time of the Union in 1900. It is conceded that the note must be passed, and the only question I have to decide at present is the question of interim interdict.

"In considering this question I must, of course, take special note of the distinction between this case and the similar application which was made in the New College case. There the property in question ad-

mittedly fell within the very terms of the judgment of the House of Lords, and my duty was little more than ministerial. Here there is no judgment applying to the property in dispute; and the respondents urge that those who are now seeking to turn them out have themselves no title to the property by declarator or otherwise. Now, it is true that there has been no litigation between these particular parties, and because of that either party is free to make new averments, to state new pleas-in-law, and to put forward new grounds of judgment. But it is impossible, in deciding the question now in hand, to ignore all that has happened. Of course on this question of interim interdict I can only deal with the matter provisionally, but it is certainly according to the practice of the Court in such cases to consider how the rights of parties appear on a *prima facie* aspect.

"First, on the question of title, the respondents contend that the subjects are vested in a body of trustees, and that that body is divided, and, so far as regards those whose names appear in the infeftment, equally divided. I think that is quite immaterial to the present question. The trustees are all here, and obviously they are divided because some have remained in the Free Church while others have joined in the Union. If it were necessary it might be pointed out that under clause 7 of the Model Trust Deed, which is incorporated in their title, it is provided that in the event of any trustee 'ceasing to be a member of the said body or united body of Christians,' he shall *ipso facto* cease to have any right under these presents, and the trust shall thenceforward be conducted by the other trustees as if the trustee so ceasing was actually dead. True, the respondents say that the local trustees, who are among their number, have not ceased to be members of the united body of Christians there referred to, and that it is the trustees who are complainers that have done so. *Prima facie* I think it is just the other way, for I have been referred to the opinions pronounced by a majority of the Lords on appeal in the cases of *Lord Overtoun and Others* and of *Young* v. *Macalister*, which appear to lay down distinctly, as matter of construction of this very trust-deed (the Model Trust), that the union there contemplated must be such as might properly be made without detriment to the distinctive tenets of the Free Church, and that the union founded on by the respondent does not answer that description. Without being *res judicata* against the present respondents, that is a judgment of the highest authority upon the construction of the same Model Trust-Deed, and it is, I take it, binding on all the courts, except in a case where some workable distinction can be suggested.

"But after all when once it is settled, as I hold it to be settled, that the law which is applicable is the law of trusts, it becomes apparent that the practical question is not so much as to the personnel or the title of the trustees, but as to the identification of the beneficiaries. And on this point I take it that the judgments pronounced on both appeals are *prima facie* conclusive against the respondents. This is very clearly brought out by the circumstance that in the action of declarator it was declared among other things that even the United Free Church trustees hold the general property in the meantime for the Free Church beneficiaries.

"But it is urged for the respondents that however this may be their case as here stated on the pleadings presents certain important considerations which were not put forward in those previous litigations, and upon which they undertake to show after a proof that they are in the right. These are (1) that the opinions of the original leaders of the Free Church, when properly collected and weighed, negative the conclusion arrived at by the House of Lords as to the importance of the Establishment principle; and (2) that the title here, being dated in 1886, is not open to the same observations as was the case with the much earlier title founded on in the case of *Young*, and further that many of the original subscribers are still alive, and that their views and the views of the deceased subscribers are known to have been 'in favour not only of the competency but of the expediency of the Union.'

"I assume for the present purpose the relevancy of the respondents' averments on both these topics. But the question is whether they make any such difference in the *prima facie* aspect of the parties' rights as to entitle the respondents to prevail on this question of interim interdict. In my opinion they do not. The first of them involves the proposition that the case on this head was inadequately presented in the previous litigations, and that the present respondents could have done better—so much better as to compel a different decision. Now that is quite within the bounds of possibility, but there is no such marked probability about it as to impair seriously the strength of the complainers' position at this stage. The other topic, namely the inquiry into the intentions of the donors, comes more nearly up to what the respondents are in search of, and this is really the only point made which has caused me to hesitate in holding that the complainers' case for interim interdict is unanswerable. I have given every consideration in my power, within the time allowed, to the argument for the respondents on this matter of the wishes of the contributors, and to the full references which were made to the opinions delivered in the House of Lords; and I have been unable to come to the conclusion that the statement of the donors' wishes and intentions is sufficient ground at the present stage for deciding against the complainers in the matter of interim regulation.

"Then it is said that there is about to be intervention by the Executive Government or by the Legislature, and it appears that a Royal Commission is about to be appointed. But all beyond that is quite vague, both as to time and as to the terms of reference. I would gladly have held my hand until this matter takes more definite shape. But neither party suggested that I should on

that account postpone deciding the question of interim regulation one way or the other. The only use I was asked to make of it was to accept it as a reason for refusing interim interdict. But it is as yet at too early a stage to furnish me with a reason for doing that.

"I thought that perhaps a knowledge of the local circumstances of the two congregations, and of the facilities for accommodating them, might have some bearing on this question. I have been furnished orally by the parties with their respective views as to numbers and accommodation, with the result that I feel I can draw no safe conclusion in favour of either. The matter is in my view so obviously one for arrangement and regulation, especially having regard to the subject-matter in dispute, that it is with great reluctance that I give either party a temporary and it may be a barren victory by deciding the question of interim possession. But my reluctance is tempered by the consideration that the complainers made what from their point of view appeared to me a reasonable offer of joint use of the subjects, and that this offer was refused without any counter proposal being made."

The respondents reclaimed against the allowance of interim interdict, and argued —It was admitted that the case was not *res judicata;* the respondents were not parties to the previous litigations, and had not agreed to accept them as test cases; they had new facts to set out—the intentions of donors of the Church funds, and the appointment of a Royal Commission to inquire into the facts; there was a probability of legislative interference; and meanwhile they should not be compelled to give up what had never been litigated; a commission had been granted to Sir John Cheyne to regulate the question of interim possession.

Argued for the complainers—The Lord Ordinary had carefully considered the question of interim interdict, and there was no reason for disturbing his judgment; the complainers had a good *prima facie* title to the property, and were therefore entitled to interim interdict; the appointment of the Commissions did not oust the jurisdiction of the Court.

At advising—

LORD JUSTICE-CLERK—At this stage the Lord Ordinary has taken the course of allowing interim interdict in this case. It is quite plain that he has done so upon a very careful consideration of the case presented to him, and certainly his note is a most excellent exposition of the grounds upon which he has proceeded. I must say that I see no ground for interfering with the judgment at which he has arrived on that preliminary question. It is suggested that there are certain things now before the Court that were not before the Lord Ordinary, but these things are not of the nature of certainties at all. It is now said that there has been a Commission issued by the Crown for the purpose of making certain investigations with the view possibly, or we may assume certainly, to the intervention of Parliament. But I do not think that that is a matter which a court of justice is bound to take into consideration, and I doubt very much whether a court of justice is even entitled to take it into consideration. I think the sole question before us is, have these reclaimers as the case stands any title so that they can resist meantime a motion for interdict? I think it is quite plain that following out the judgment of the House of Lords they have no title, and if they have no title in the ordinary case in a question of possession interdict would follow. There are many cases in which there might be no need for giving interdict, because the want of interdict would not lead to any damage or to anything contrary to the rights of the other parties in the meantime. Here it is quite plain that that is not so. It is quite plain here that without an interdict strife and confusion might go on in these places, and I think it is far better to follow the course the Lord Ordinary has taken to prevent that and to bring matters to a point in the meantime. What may happen in the future we do not know, but I entirely agree with the view the Lord Ordinary has taken, that the proper course to settle the matter in the meantime is to grant interim interdict. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD KYLLACHY—I agree with your Lordship. I am entirely satisfied with the judgment of the Lord Ordinary, and do not desire to add anything to what he has so well said. I am the less disposed to do so because some of the topics with which the Lord Ordinary deals in their *prima facie* aspect may come before us later and may have to be the subject of argument and decision. As to Sir John Cheyne's Commission, all I need say is that the existence of that Commission cannot in my opinion relieve this Court from the duty of dealing with these cases, which are cases competently before us, and of dealing with them just as we should deal with applications for interim interdict in any other cases which come before us.

LORD KINCAIRNEY—I concur with your Lordship and with the Lord Ordinary. The Lord Ordinary has very carefully considered the question of interim interdict, and I see no reason for disturbing the judgment which he has pronounced.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Complainers—Johnston, K.C.—Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Mackenzie, K.C.—Orr. Agents—Cowan & Dalmahoy, W.S.