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.

380, where the facts of the case are fully narrated.

The second party, Sir Thomas Kirkpatrick, appealed against the judgment of the Court of Session in so far as it negatived his right to a legacy of £1000 in addition to half the residue; and the fourth parties, the legatees, appealed against the judgment in so far as it negatived their right to interest from the date of the testator's death, and limited the application of the marginal note "all free of legacy-duty" to the servants' legacies, opposite to which it occurred.

The third party, Mr Bedford, who was one of the two residuary legatees, was respondent in the first appeal, and, with Sir Thomas Kirkpatrick, in the second also.

In moving the judgment of the House—

LORD CHANCELLOR—These appeals raise three separate questions, the first raising one question only. Sir Thomas Kirkpatrick claims a legacy of £1000 as having been given to him by the will. The words of the will are "to Roger Kirkpatrick . . . . the sum of £2000, and to each of his brothers the sum of £1000." If one stopped at those words, the matter would not admit of argument, for Sir Thomas was one of seven brothers of Roger. There is nothing ambiguous or equivocal in the words. Unless, therefore, some other part of the will takes away this legacy, it must stand good as a legacy to Sir Thomas. The only reason given for taking it away is that the appellant has also a gift of half of the residue, and it was argued at the bar that this was a case of double gifts, and that one only could be allowed. In my opinion it is not at all a case of double gifts, nor anything like it. Why should they not both stand? The case of double gifts has not the remotest bearing on the matter. To construe this will as has been done in the Court below is nothing less than to make a new will for the testator, which no Court has any right to do. A Court has no business to interpolate and introduce words in order to alter what is clear and precise. The conclusion of the Court below could not be sustained without doing violence to the will, and the decision must be reversed, and the respondent must pay the costs of the first appeal.

As to the second point, namely, whether the legacies bear interest from the date of death—it is admitted that that is the general rule in Scotland. But it was argued that the legacies were payable only out of the heritable estate, and when that estate was sold. This is an entire mistake. The legacies are payable out of the saleable estate, which includes both heritable and moveable. There is nothing to restrict the legacy to the proceeds of the real estate. The general rule therefore applies, that interest is due on the legacies from the testator's death at five per cent., and the decision of the Court below must be reversed.

As to the third point, namely, whether the words on the margin, "All free of legacy-duty," apply to all the legacies, it might have been doubted whether those words were altogether free from uncertainty, and whether they ought not to be disregarded. But certainly if they are to have effect, then there is no reason for confining them to the servants' legacies. The construction that the words apply only to servants' legacies adopted by the Court below is a most arbitrary construction. It is impossible so to limit the words. And in this third point also the Court below has come to a wrong conclusion. The second appeal must therefore be sustained, and the interlocutor reversed, but in the second appeal the costs will come out of the estate.

LORD O'HAGAN and LORD SELBORNE concurred.

Appeals sustained.

Counsel for Second Party—Hastings, Q.C.—Dauney—Low. Agent—J. C. Stogdon.

Counsel for Third Party—Kay, Q.C.—G. R. Gillespie. Agents—Grahames & Wardlaw.

Counsel for Fourth Parties—Southgate, Q.C.—Readman. Agents—J. & J. Graham.

COURT OF SESSION.

Tuesday, January 28.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

FLEMINGS (MALCOLMS' ASSIGNEES), AND OTHERS *v.* M'LAGAN AND OTHERS (FRASER'S TRUSTEES).

Title to Sue—Trust—Decree of Declarator of Right Subject to Contingency.

A testator made bequests in favour of his four children (two sons and two daughters) and their issue, of annuities of £100 each, the share of such of them as might die without legitimate issue to revert to the survivors, and to be equally divided amongst them in addition to the above. He appointed his brother universal residuary legatee. To meet the provisions a sum of £12,000 was invested under a deed of arrangement entered into between the beneficiaries, the residuary legatee, and certain trustees who were appointed for the purposes of the administration of the fund. The fund was divisible in terms of the will into four portions of £3000 each, which were appropriated to payment of the annuities. The two sons died unmarried and intestate. One of the daughters was unmarried, and aged sixty-one; the other was a widow, aged fifty-nine, with an only son of twenty-six, who was unmarried.

In these circumstances, an action was brought by certain parties who were in right of the residuary legatees' interest in the £12,000 for declarator of absolute right in them to certain portions of the fund. They called the residuary legatee, the two surviving daughters, the son of the married daughter, and the trustees themselves. The latter alone entered appearance, and contended that as the sums referred to were not then distributable, and the vesting of them was contingent, the action was premature.

Held (diss. Lord Young) that decree might be granted as craved with regard to the two shares of £3000 which had been destined to the sons, but that as such a decree would