Tuesday, February 21.

FIRST DIVISION.

MICHIE'S EXECUTORS *v.* MICHIE AND OTHERS.

Succession—Testament—Construction—Bequest to Parent "for Behoof of His Family."

Held that a bequest in a holograph will to A "for behoof of his family" constituted, although the parent was described in a subsequent portion of the will as a "beneficiary," a trust in him for his children, who, being all of full age, were entitled to immediate payment.

Succession — Testament — Construction — "Necessary Expenses Connected with this Trust"—Incidence of the Expenses—Estate and Legacy Duty.

A testator by holograph will, after bequeathing certain shares of his estate to beneficiaries, provided in the *sixth* clause that the remaining share of his estate should be devoted to certain purposes, and that the residue of this remaining share should, "after discharging the necessary expenses connected with this trust," be apportioned to certain beneficiaries. *Held* (1) that the residue must bear the expenses of administering the whole trust estate, and not merely the expense of carrying out the directions contained in the *sixth* clause; and (2) that "necessary expenses" included only the legal and ordinary expenses of administering the will, and did not include the estate duty exigible from the testator's estate or legacy duty.

Succession—Executors—Bequest to Executors — Right of Assumed Executor to Share in Bequest to Executors.

A testator appointed as his executors A, B, and C, "or their representatives, namely, the successors of each, as representing their respective families," and directed that they should divide certain books, &c., amongst them. A predeceased the testator, and B survived the testator but declined to act as an executor. *Held* that A's eldest son, who acted as an executor, was entitled to share in the bequest, but that B's son, who had been assumed an executor, was not so entitled.

The Reverend John Grant Michie, minister of the *quoad sacra* parish of Dinnet in Aberdeenshire, died on the 21st January 1904, leaving a holograph last will and testament dated 11th April 1901, and holograph codicil thereto dated 14th March 1903, both of which were registered in the Sheriff Court books of the County of Aberdeen on 30th January 1904. His personal estate amounted to £7730, 15s. 1d., and his heritable estate, after deducting burdens, was valued at £350.

The will directed as follows:—"After the settlement of my pecuniary affairs—debts due to and by me—the residue of my property, personal and heritable, I leave to be divided into five equal shares (exclusive, however, of my books, pictures, works of art, and specimens of all sorts which I propose otherwise to dispose of).

"1st, I leave to my brother William for behoof of his family one share.

"2nd, I leave to my brother Charles for behoof of his family one share.

"3rd, I leave to my sister Jane for behoof of her family one share.

"4th, I leave to my sister Margaret one-half share (½ share). The reason why I bequeath her only half a share is that she has no dependants. . . . Should she predecease me I wish her portion to be equally divided among the three first-mentioned beneficiaries.

"5th, I leave to the surviving children of my late sister Anne Michie or Smith one-fourth of a share. . . . The reason why I thus dispose of this fourth of a share is that I believe these children are already better provided for than my other nephews and nieces. My brother James, whom I have maintained since his return from Australia, having means of his own and no dependants, I have not included as a beneficiary.

"6th, The remaining one and one-fourth share I wish to be devoted to the following purposes:"—(1st) the payment of a small legacy; (2nd) the purchase of a tombstone; "(3rd) my books, manuscripts . . . I leave to be disposed of by my executors as shall seem to them best, with this request, . . . and as there are several rare books of history, science, and reference, I desire that these be parted among my executors, as they shall agree among themselves. Any manuscripts of historical interest or collections of printed matter I wish to be disposed of in the same manner. The letters I have preserved I wish to be locked up in a box and kept for ten years where my executors may think most suitable, and thereafter to be inspected, and such as are of any value as illustrating local or general history to be selected and preserved for that or any similar purpose. The selection to be made by my executors with the assistance of any person or persons they may think well qualified to judge of their value. The residue of the above-mentioned one and one-fourth share I desire to be apportioned to the following objects:—(First) After discharging the necessary expenses connected with this trust, *to the University of Aberdeen in aid of the endowment of a chair of geology*, and (Second) to defray the expense in connection with the publication of any manuscripts I may leave, should such be deemed by my executors worthy of publication. The apportionment of the above-mentioned residue of one and one-fourth share to be entirely at the discretion of my executors for said purposes. I appoint the following to be my executors, viz., my brothers William and Charles and my sister Jane, or their representatives, namely, the successor of each as representing their respective families. Also I appoint as executors to be conjoined with them" two persons named, and "both of whom I wish

to be consulted on the whole administration of this trust, and in especial in regard to the above-mentioned one and one-fourth share, and whom I therefore constitute my literary executors."

By the codicil the testator cancelled the words printed in italics and substituted for these words the following words:—"To the Church of Scotland's Committees of the Aged and Infirm Ministers' Fund and of the Small Livings Fund, equally between them, share and share alike."

The testator was survived by his brother William, who accepted office as executor. His brother Charles predeceased, but Charles' son John Lundie Michie acted as executor as the representative and successor of his father. His sister Jane (Mrs M'Lean) survived, but declined office, and her eldest son Robert M'Lean was assumed by the other executors to act along with them.

Questions arose as to the rights of parties, and a special case was submitted to the Court.

The parties to the special case were (1) the acting executors; (2) the testator's brother William Michie and his sister Mrs Jane Michie or M'Lean; (3) the children of the said William Michie and Mrs Jane Michie or M'Lean, these children being all of full age at the date of the will; (4) the children of the testator's brother Charles, who had all attained majority before the testator's death; (5) a sister of the testator, Margaret Michie, and the children of a predeceasing sister, Mrs Anne Michie or Smith; (6) the Church of Scotland's Committees for the Aged and Infirm Ministers' Fund and the Smaller Livings Fund.

The second parties maintained that they were each entitled to immediate payment from the first parties of one-fifth share of the revenue of the testator's estate, in respect that upon a sound construction of the said will they were each entitled either (1) to a fee of such share, no effective condition limiting their right thereto having been attached by the testator; or alternatively (2) to hold and administer such respective shares in trust for themselves in liferent and their respective children in equal proportions in fee.

The third parties maintained that they were respectively entitled to immediate payment equally among them from the first parties of one-fifth share of said residue in respect that the right to said respective shares vested in them in equal proportions on the testator's death; or alternatively, if it should be found that the first parties were bound in the first instance to make payment of said shares to the second parties, then the third parties maintained that they, as the true objects of the testator's bounty, and being all *sui juris*, were entitled to obtain immediate payment of such shares from their respective parents (the second parties), there being no ulterior interests to protect.

On the sixth clause of the will a question arose as to what were included among "the necessary expenses connected with this trust." It was maintained by the second, third, fourth, and fifth parties that the debts due by the testator formed the only deduction falling to be made before ascertaining the amount of the shares of the testator's estate, and that, *inter alia*, all estate and other Government duties, payable in respect of said estate, fell to be paid out of the residue of said one and one-fourth share as part of the necessary expenses connected with the trust in the sense in which these words were used by the testator. The sixth parties contended on the other hand that the said "necessary expenses connected with this trust" applied only to expenses connected with the trust purposes created under the sixth clause of the will, and that the expenses of giving effect to the will generally, as well as Government duties (other than legacy duty) and debts payable to the executors, must be charged to the general estate before it was divided into fifths, and as regarded legacy duty, that it formed a charge against the respective beneficiaries to the extent to which they were interested in the estate.

The question was also raised whether John Lundie Michie, who acted as executor as the representative and successor of his father, and Robert M'Lean, who had been assumed as an executor, were entitled to share in the bequest to the executors.

The opinion and judgment of the Court was requested upon, *inter alia*, the following questions—"(1) Are the second parties 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? or, Are the third parties, the children of William Michie and the children of Jane Michie or M'Lean, respectively entitled to immediate payment equally among them, from the first parties, of one-fifth share of said residue, exclusive as aforesaid? (4) Are the whole expenses of administering the will, the estate and other Government duties exigible from the testator's estate, and legacy duty, a proper charge against the whole residue of the trust estate before it is divided into fifths? or, Are they, or any of them, properly chargeable against the one and one-fourth share of residue destined to the sixth parties? (7) Are John Lundie Michie, as the successor and representative of his father in the office of executor, and Robert M'Lean, as the eldest son of his mother and an assumed trustee, entitled to share in the bequest of books, manuscripts, and collections of printed matter directed by the testator to be parted among his executors?"

Argued for the third parties — *On the First Question.* A bequest to A for behoof of B constituted a trust for B, for the words "for behoof of" were merely equivalent to "for the advantage and benefit of." The "family" here was therefore the favoured persons — *Gillespie & Paterson* v. *City of Glasgow Bank*, February 27, 1879, 6 R. 714, 16 S.L.R. 473, July 1, 1879, 6 R. (H.L.) 104, 16 S.L.R. 815; *Macpherson* v. *Macpherson's Curator Bonis*, January 15, 1894, 21 R. 386, 31 S.L.R. 271. The words "his family"

must mean the children excluding the father, and as there were no purposes expressed, the bequest became a simple trust for the children, the result of which was that they were entitled to immediate payment—Lewin on Trusts, 11th ed. p. 16; *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236. It could not be said that the trust should be kept up in case there should be any more children, for it was settled that unless it was otherwise specially provided a favoured class was to be taken as it existed at the testator's death—*Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; *Massey* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173, 10 S.L.R. 111.

Argued for the second parties—*On the First Question.* The beneficial right in this bequest was directly vested in the parents, for they alone could discharge the executors, and unless it had been intended to benefit the parents there was no reason for mentioning them, there being no object in making a simple trust for children *sui juris.* The parents were further described in the will as "beneficiaries," and it was clear from the other bequests in the will that the testator's intention was to benefit his brothers and sisters. If, however, there was any doubt, the fee was to be presumed to be in the parents—*Frog's Creditors* v. *His Children*, 1735, M. 4262; *Gifford's Trustees* v. *Gifford*, March 30, 1903, 5 F. 723, 40 S.L.R. 476. The children were merely conditional institutes. But if the fee was not the parents', still, as the intention to benefit them was clear, they must have a liferent. Or at least, if there were a trust, it was, and must have been intended as a trust to be kept up during the parents' lives, till the class benefited was complete. *Gregory's Trustees* (*cit. sup.*) was not applicable here, for in it no trust was constituted, while here there was, and consequently the time to be looked at was not the testator's death, but the date of payment by the trustees appointed by him. *Massey* v. *Scott's Trustees* (*cit. sup.*) dealt only with the means of carrying out the testator's clearly expressed intention.

Argued for the second, third, fourth, and fifth parties—*On the Fourth Question.* (1) "This trust" must mean the trust of the whole estate, for there was no reason for treating the provisions of the sixth paragraph of the will as a separate trust, and they in no way answered to the description of a trust more than the provisions of the other paragraphs. Further, the literary executors were to be consulted in the execution of "this trust" as well as in the carrying out of the sixth paragraph, showing that these words must apply to something else than the provisions of that paragraph. (2) "Necessary expenses" of the trust included every expense of winding up the estate, and so covered estate-duty—*In re Clemow*, L.R. [1900], 2 Ch. 182; *In re Formeside*, L.R. [1903] 1 Ch. 250; *Sharp* v. *Lush*, June 13, 1879, L.R., 10 Ch.D. 468. It was impossible to administer the estate without paying estate-duty—The Finance Act 1894 (57 and 58 Vict. c. 30), sec. 6 (2), 8 (3). Legacy-duty was in the same position. The executors must pay it—Act 36 Geo. III, c. 52, sec. 6.

Argued for the sixth parties — *On the Fourth Question* — (1) "This trust" could only apply to the provisions of the sixth paragraph, for they alone could be described as a trust, the provisions of the other paragraphs being purely executorial. (2) "Necessary expenses" did not include estate or legacy duty. Estate duty was a debt payable to the Government, and had to be deducted before the trust estate was determined or a share of it could be calculated—*Clemow's* case (*cit. sup.*) was the only decision on the point, and it was the opinion of one Judge only. Legacy duty was a debt due by the legatee, and was retainable on payment to him. Were it otherwise every legacy would be free of legacy duty without that requiring to be stated by the testator.

Argued for the the first parties—*On the Seventh Question*—The executors who were entitled to share in the testator's bounty were the whole accepting and acting executors. It did not matter how they came to have office, whether by nomination or assumption. But if it were necessary that the executors should have been selected by the testator, then they had so been selected here, for they were all either the parents themselves who had been named, or the successors of the parents and representing their families as the testator had prescribed—*Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; *Hall* v. *Hall*, March 18, 1891, 18 R. 590, 28 S.L.R. 476; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226, were also cited during the debate.

At advising—

LORD ADAM (in the Chair)—The questions in this case arise upon the construction of a holograph will and codicil left by the late John Grant Michie, minister of Dinnet.

Mr Michie directed the residue of his estate to be divided into five equal shares (exclusive of his books, pictures, &c.), and he bequeathed three of these shares in these terms — "I leave to my brother William for behoof of his family one share," and to his brother Charles and to his sister Jane one share each in exactly the same terms.

William and Jane, who are the second parties to the case, claim to be entitled to the fee of their respective shares, in respect that no effective condition limiting their right has been imposed by the testator. On the other hand their children, who are the third parties to the case, claim immediate payment of the shares in respect that they are the sole objects of the testator's bounty, and are now all of full age.

I see no reason to doubt that the children are right in saying that they are the sole objects of the testator's bounty. It is true that in the fourth purpose of the will, when dealing with one-half share which he had bequeathed to his sister Margaret, he provides that should she predecease him her portion is to be divided among "the three first-mentioned beneficiaries," referring thereby no doubt to William, Charles, and Jane;

and again in the fifth purpose, when dealing with the one-fourth share which he had bequeathed to the children of a deceased sister, Ann, he explains why he had not included his brother James as a "beneficiary."

Were we construing a will prepared by a professional man, presumably well aware of the distinctive meanings of trustee and beneficiary, the fact that the testator had in his will described his brothers and sisters as beneficiaries would have had much weight in determining whether they took as trustees or solely for their own benefit. But I can quite understand that the testator should consider it a benefit to them to put money into their hands to be expended for the good of their families, and so style them beneficiaries. In any view, I do not think that such considerations can prevail against the words in which the shares are given, viz., not to them for their own behoof, but expressly for behoof of their families, which I think clearly raises a trust in them for behoof of their children.

By giving these shares of the succession to his brothers and sister for behoof of their children the testator apparently intended that the parents should have the control and administration of their respective provisions. If they had had any minor descendants this intention might have received a certain effect during their minorities. But as the testator's nephews and nieces are all of full age this intention cannot be carried into effect, because by the general law of this country if a gift is made of a capital sum the donor cannot limit the enjoyment of his gift except by giving an interest in it to some other person. As no persons other than the members of the respective families take any interest in the shares, and as no power of appointment is given to the parents, it follows that as to each family the bequest is subject to equal division, and that the legatees are entitled to immediate payment.

The testator's brother Charles, to whom he bequeathed one-fifth share for behoof of his family, predeceased him. The fourth parties are Charles' surviving children, and they claim his share as having vested in them at the death of the testator. This claim is opposed by the fifth parties, who maintain that the gift lapsed by Charles' predecease of the testator, and falls to be divided as intestate estate.

If I am right in thinking that the legacy to Charles, as in the case of his brother and sister, was as trustee merely in trust for his children, I see no reason for thinking that by reason of the predecease of the trustee the legacy to those who were truly beneficiaries should fail. These children are now all of full age, and I think they are entitled to payment of the share as claimed, and accordingly that the first alternative of the third question should be answered in the affirmative.

The remaining questions are of a different character, and arise upon the construction of the sixth purpose of the trust, by which the testator disposes of the one share and a quarter share of the residue of his estate, which he had not previously disposed of. He directs his executors (1) to pay a legacy of £20; (2) to pay the expense of a tombstone and of a memorial tablet, and in the third place he disposes of his books, manuscripts, pictures, and certain other things. Then he provides as follows:—"The residue of the above-mentioned one and one-fourth share I desire to be apportioned to the following objects:—(1) After discharging the necessary expenses connected with this trust, to" (as altered by codicil) "the Church of Scotland's Committees of the Aged and Infirm Ministers' Fund and of the Small Livings Fund, equally between them," and to certain other objects. The Church of Scotland's Committees in question are the sixth parties to the case.

The first question is what sums are to be deducted from the residue of the one and one-fourth share "as necessary expenses connected with this trust" before it is apportioned as directed by the will.

The sixth parties maintain that the words "this trust" mean the trust created by the directions contained in the sixth purpose of the will, and that only the expense of administering that trust should be charged against the residue. The second, third, fourth and fifth parties on the other hand maintain that the expenses of administering the whole trust estate fall to be so charged. I do not doubt that this latter view is right.

It will be observed that it is upon the settlement of the testator's pecuniary affairs, which he explains to mean the payment of debts due to and by him, that he desires the residue of his property to be divided into five shares. Nothing is said about the expenses of the trust being deducted or provided for before division. Had the testator said nothing about expenses they would no doubt have been a charge against the whole estate. But he has provided for them, as I think, by making them a charge on the residue of the one and one-fourth share.

The next question is what is included under "necessary expenses," and in particular whether estate and Government duties exigible from the testator's estate and legacy duty are included. In my opinion only the legal and ordinary expenses incurred in administering the will are included. As regards estate duty—that is a debt due by the estate which must be paid by the trustees before division, and I see no reason to suppose that the testator intended to include such a charge under the head "expenses." As regards legacy duty, that is recoverable from the legatees, so that I do not see that any question arises with regard to it. There is no direction that the legacies are to be paid by the trustees free of legacy duty.

I understand that the parties do not desire an answer to the fifth and sixth questions.

The seventh and last question is whether John Lundie Michie and Robert M'Lean are entitled to share in the books, manuscripts, &c., directed by the testator to be parted among his executors.

By the sixth purpose of the will the testator left his books, manuscripts, &c., to be disposed of by his executors as should seem to them to be best, with the request that

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-