

The Court sustained the note of objections to the extent of the amount objected to under Head I of the note, and decreed against the defenders for payment to the pursuers of the taxed amount of their account less the amount successfully objected to by the defenders.

Counsel for Pursuers—D. P. Fleming.
Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Counsel for Defenders—J. R. Christie.
Agents—Davidson & Syme, W.S.

Saturday, October 26.

FIRST DIVISION.

[Lord Dewar, Ordinary.]

FREE CHURCH OF SCOTLAND AND OTHERS *v.* MACKNIGHT'S TRUSTEES.

Trust—Statute—Churches (Scotland) Act 1905 (5 Edw. VII, cap. 12), secs. 1 (1) and (3), 4 (1), and First Schedule—Churches (Scotland) Act Commission—Allocation by the Commissioners to the Free Church of Rights of the Free Church in a Trust Estate—Bequest for Promotion of Home Missions with Power to Trustees to Employ the Bequest Independently of the Church—Effect of Allocation on Trustees' Power of Independent Action.

The Churches (Scotland) Act 1905, sec. 1 (1), enacts that the Commission established by the Act shall allocate between the Free Church and the United Free Church "the property in question as defined by this Act. . . ."

Section 4 (1) enacts that all property which on 30th October 1900 "was held for the purposes of any . . . mission" shall be "deemed to be property in question within the meaning of this Act."

Section 1 (3) enacts that the Commission in making their allocation shall make adequate provision for the support of ministers, for itinerant preachers, and for the general purposes of administration and management of the Free Church, and that the funds out of which provision may be made for each of these objects shall be those set out in the second column of the First Schedule to the Act, opposite the description of the object in the first column. In the second column of the First Schedule the words "Sustentation Fund, Home Mission Fund, Highlands and Islands Fund, any moneys which the Commission regard as applicable for these or similar purposes," appear opposite the following words set forth in the first column, viz.—"(a) Support of ministers of Free Church congregations . . . and of itinerant preachers. (b) General purposes of administration and management of the Free Church."

A testator by a codicil to his will directed his trustees to expend the free

annual income of the residue of his estate for the promotion of the Home Mission in connection with the Free Church. The will contained a declaration "that it shall be in the power of my trustees to engage Free Church missionaries, or in their discretion other workers, including laymen and lady missionaries or workers, being members of the Free Church, in the promotion of" the said mission, "in such a way as they may think proper, either through the Church or independently of it, . . . or my trustees may, should it be deemed by them more expedient, pay over the free annual income of my estate to" the treasurer of the said mission. The Church Commissioners allocated to the Free Church for support of ministers and itinerant preachers, and for administration and management of the Free Church, "the whole rights and interests" which the Free Church had in the said estate.

In an action brought by the Free Church to have it declared that the trustees were bound to pay the income to the treasurer of the Church, held that, the allocation having substituted for the original object of the testator's bounty objects that could only be carried out by the Church itself, the trustees' discretionary power of independent action was inapplicable to the present circumstances, and that the declarator must therefore be granted.

The Free Church of Scotland, *pursuers*, raised an action against the trustees of the late Alexander Edward MacKnight, advocate, Edinburgh, *defenders*, in which, *inter alia*, they concluded for declarator that "the defenders, as trustees foresaid, are bound to pay over to the pursuers or their treasurer for the time being, or to such other person as may be authorised by them to receive the same, the whole free annual income of that portion of the means and estate of the said Alexander Edward MacKnight which, under the directions contained in the codicil dated 13th May 1898 to his said trust-disposition and settlement, was appointed to be administered and applied for the promotion of ' . . . the Home Mission in connection with the Free Presbyterian Church of Scotland,' for which missions it is declared in the said codicil that the residue is to form 'the capital fund for the same,' being the fund or moneys dealt with by the order of the Commissioners appointed for the purposes of and acting under the Churches (Scotland) Act 1905 (5 Edw. VII, ch. 12), No. 1252, entitled 'Alexander Edward MacKnight's Trust,' and dated 10th day of November 1909, and also referred to in a further order of the said Commissioners of the same date, numbered 1253, entitled 'Provision for support of ministers and itinerant preachers, and for administration and management of the Free Church,' in order that the said income may be by the pursuers or their said treasurer or other duly authorised representatives applied for such one or other or more of

the purposes specified in the said order of said Commissioners, numbered 1253, (being those enumerated under heads 4 (a) and 4 (b) in the first column of the First Schedule to the Churches (Scotland) Act 1905) as the pursuers shall from time to time direct."

The facts of the case which were not in dispute were as follows—Mr MacKnight died on 8th June 1899, leaving a trust disposition and settlement and relative codicils. By the codicil dated 13th May 1898 he directed his trustees to expend the free annual income of the residue of his estate (which amounted to £9340, 11s. 5d.) for the promotion of one or both of two missions in connection with the Free Church of Scotland, viz., (1) The Mission to the Miners of Scotland, and (2) The Free Church Home Mission, and he declared that if the said Church should depart from the Confession of Faith and standards, or adopt the false principle of abstinence and tamper with the administration of the Lord's Supper, the grant from his estate should cease and determine, and be applied by his trustees to such charitable purposes as they might think proper. There was a further declaration "that it shall be in the power of my trustees to engage Free Church missionaries, or in their discretion other workers, including laymen and lady missionaries or workers, being members of the Free Church, in the promotion of the above missions or either of them in such way as they may think proper, either through the Church or independently of it, such missionaries or other workers receiving suitable remuneration, or my trustees may, should it be deemed by them more expedient, pay over the free annual income of my estate to the respective treasurers of said missions, or one or other of them, to be applied to the purposes foresaid." There was also a provision that if the mission to the miners should become non-existent—an event which happened—the whole of the said income should be applied for the promotion of the Home Mission. The Trustees decided to act independently of the Church in the administration of the trust fund, and they appointed a missionary—the Rev. J. Hood Wilson MacLeod—who is an ordained preacher of the Free Church, to carry on mission work among the miners at Bathgate.

The Church Commission, acting under the powers conferred upon them by the Churches (Scotland) Act 1905 (5 Edw. VII, cap 12), issued two allocation orders affecting Mr MacKnight's bequest, both dated 10th November 1909 and numbered 1252 and 1253 respectively. By the first of these orders the Commissioners allocated to the Free Church "the whole rights and interests" which the Free Church had in Mr MacKnight's trust estate under the said codicil, and the allocation order further declared—"The allocation . . . shall to the extent of £9340, 11s. 5d. (being the amount of the capital value placed upon it for the purpose) be held as to account *pro tanto* of a provision of £250,000 made by the Commissioners for the support of ministers of the

Free Church congregations . . . for itinerant preachers and for the general purposes of administration and management of that Church, and which provision will be dealt with by a separate order entitled 'Order No. 1253.'" And by Order No. 1253 the Commissioners allocated certain funds, and among others certain sums specified in a schedule annexed to said order, to make up the said sum of £250,000, being the amount of the capital fixed by the Commissioners as a provision for the support of ministers of Free Church congregations, for itinerant preachers, and for general Church purposes. In the schedule referred to in said order the sum of £9340, 11s. 5d. from Mr. MacKnight's trust was entered as being wholly allocated for the purposes specified in the order.

Notwithstanding these allocation orders, the trustees continued to act independently of the Church in the administration of the trust fund. The pursuers averred that the Bathgate mission was not in any sense a Free Church mission, and had never been sanctioned by them, and that the payment of the Rev. Mr MacLeod's salary was not a proper application of the trust funds.

The pursuers pleaded, *inter alia*—"(1) The fund in question having been by virtue of the Churches (Scotland) Act 1905 and the Allocation Orders of the Commissioners under said Act founded upon, affected with a statutory trust for the purposes enumerated under the fourth head in the first column of the First Schedule to said Act, and being now applicable thereto, the pursuers are entitled to decree in terms of one or other of the first two declaratory conclusions."

The defenders pleaded, *inter alia*—"(3) On a sound construction of Mr MacKnight's will, and of the statute and orders founded on by the pursuers, the defenders are entitled to apply the trust revenue at their own hand and in their own discretion for the purposes specified by the testator. (4) The defenders having administered said bequest in accordance with the said trust purposes, and in terms of law, they should be assoilized from the whole conclusions of the action."

On 6th December 1911 the Lord Ordinary (DEWAR) sustained the fourth plea-in-law for the defenders and assoilized them from the conclusions of the summons.

Opinion.—" . . . The pursuers maintain that the effect of these orders is to sweep the bequest from Mr MacKnight's estate into the general Church funds, so that it is no longer exclusively available for the purpose for which Mr MacKnight intended it, but may now be used for any of the specified purposes, viz.—Either for the support of ministers or itinerant preachers or for general purposes of administration and management, and accordingly that the defenders have no longer the right to administer the trust fund independently of the Church, as they have hitherto done; that they have been deprived of their discretion, and that it is now for the Church to decide how the money should be applied; and they conclude for declarator

(1) that the defenders are bound to pay over to the pursuers or their treasurer the whole free annual income of the residue of Mr MacKnight's estate; or (2) that the defenders are bound to dispense the said income among the objects referred to in said Allocation Order in such manner as the pursuers may direct; and (3), and in any event, that the defenders are not entitled to pay missionaries who are not duly appointed and recognised by the Church or its agents for the purposes of home mission work.

"It may be true, as the pursuers say, that the Church can administer the funds quite as efficiently and perhaps more economically without the assistance or interference of the defenders, but that is not the point. The question, and I think the only question, is whether the Allocation Orders have deprived the defenders of the discretion which Mr MacKnight reposed in them. I am of opinion that they have not.

"By Order No. 1252 the Commissioners allocate the 'whole rights and interests' which the Free Church had in Mr MacKnight's estate at 30th October 1900. And the codicil sets forth what these rights and interests were. The trustees are directed to 'expend the free annual income' of the residue of the estate in manner after mentioned for the promotion of the said missions; and the manner in which it is to be expended is left absolutely to the discretion of his trustees:—'. . . It shall be in the power of my trustees to engage Free Church missionaries, or in their discretion other workers, including laymen, and lady missionaries or workers . . . in such a way as they may think proper either through the Church or independently of it, such missionaries or other workers receiving suitable remuneration, or my trustees may, should it be deemed by them more expedient, pay over the free annual income of my estate to the respective treasurers.' Mr MacKnight desired to benefit Free Church missions, but he did not give the Free Church control of the fund; he does not even think it prudent to permit the Church to have control of the income. He seems to have had more confidence in his trustees than in those who managed the affairs of the Church. This may have been because he thought it possible that the Church might 'depart from the Confession of Faith or adopt the false principles of abstinence.' But in any case he made it abundantly clear that he wished his trustees to administer his bounty, and he accordingly circumscribed and limited his bequest to the Church. All he gave was the right to have the annual income from his estate applied in the promotion of Church work at the discretion of the defenders, and it is this limited 'right and interest' which is allocated by Order No. 1252, and it is this limited 'right and interest' also which is declared by Order 1253 to form part of the fund of £250,000 which may be used for support of ministers, itinerant preachers, or general Church purposes. If the Commissioners had in-

tended to extinguish the defenders' right to exercise their discretion in the manner in which the bequest should be applied, I think they would have said so in express words, or at all events it would have been clear by necessary implication that such was their intention. But I can find nothing to suggest this in either order. On the contrary, it is specially provided that 'nothing in this order shall prejudice or affect any rights, duties, and liabilities as regards the property hereby allocated other than those of the Free Church and the United Free Church.' Now it is both the right and the duty of the defenders under the codicil to use their discretion as to the manner in which they shall apply the income from the trust fund, and to act independently of the Church if they think proper. They have decided to act independently, and I do not think that the pursuers can interfere with them, and I accordingly sustain their fourth plea-in-law and assolvie them from the conclusions of the summons."

The pursuers reclaimed, and argued—The Churches (Scotland) Act 1905 (5 Edw. VII, cap. 12), section 1 (1) authorised the Commissioners to allocate "the property in question" between the Free Church and the United Free Church. "The property in question" was defined by section 4 (1) of the Act, and Mr MacKnight's bequest fell within the definition. The Commissioners were therefore entitled to allocate the bequest. The bequest formed part of the Home Mission Fund of the Free Church. In any event it was money which the Commissioners regarded as applicable for that or similar purposes. They were therefore entitled under section 1 (3) of the Act, taken along with the First Schedule, to devote the bequest as they had done to the support of ministers, for itinerant preachers, and for the general purposes of administration and management of the Church. The objects of the trust had thus been altered by the Act and the orders of the Commissioners. The question therefore was, whether, looking to the alterations as to the beneficiary, the old machinery of the trust was not inapplicable to the present circumstances. The only practical way to carry out the new trust purposes was for the trustees to hand over the income of the trust funds to the Free Church. The duty of trustees was to exercise the machinery of a trust so long only as it was useful for carrying out the trust purposes—*Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236. If the Act and orders had not interfered with the trustees' power of independent action, and they proceeded to spend this money independently of the Church, then the pursuers would not get £250,000 for the foresaid purposes, as the Commissioners intended, but *quoad* upwards of £9000 thereof would have to be satisfied with a benefit which would be wholly illusory. Section 2 (5) had no bearing on the question. It was primarily intended to save outside rights in an allocated fund, *e.g.*, a

right of life or a reversionary right. It was of course not meant to cover a trust purpose which the Act by its own terms had altered. Between these two classes of rights, administrative rights such as that claimed by the defenders occupied an intermediate position. Whether such rights would be affected by the Act and orders following thereon depended on the circumstances of each particular case. They would be saved unless, as in this case, the alteration of the trust purposes had rendered them merely cumbersome. In any event the Lord Ordinary was wrong in sustaining the fourth plea-in-law for the defenders. The trustees had not expended any of the trust funds on the Home Mission of the Free Church, it being impossible to regard the mission in Bathgate as coming within that description.

Argued for the defenders—The right conferred upon the Free Church by Mr MacKnight's will was a somewhat limited right. Not only was there a provision that the bequest should be forfeited in the event of the Church adopting certain courses, but it was in the discretion of the trustees to pay over the income of the trust funds to the Church or to promote home missions by taking action independently of the Church. The only thing that was impressed with what might be called the statutory trust was such right as the Free Church had in Mr MacKnight's property, and such right subject to every limitation that existed affecting it, of which this discretionary power of the trustees was one. All that the Act was intended to do was to discriminate between the property which was to go to the Free Church and the United Free Church respectively. It was not intended to make any other alteration on the trusts under which the property was held. The Act accordingly provided for the alteration of the person of the beneficiary without in any way altering the rights of the beneficiary. All that the Commissioners could therefore deal with, and all that they did deal with, was the limited right which the Free Church got through the administration and subject to the administration of the trustees. In order to extinguish such rights as the right of independent action conferred upon the trustees a very direct provision in the statute would have been required. Not only was there no such provision, but it was expressly provided by section 2 (5) that the orders of the Commissioners were to be without prejudice to any rights, duties, and liabilities of third parties. *Esto* that the trust funds must be devoted to the support of ministers, itinerant preachers, and the general purposes of administration and management of the Free Church, home missions fell under general purposes, and the defenders were perfectly able and willing, acting independently of the Church, to promote home missions. The defenders did not insist on carrying out the Bathgate scheme, and that alone. They were willing to consider any other

district. On the other hand, if the pursuers got the declarator they sought they could spend every penny of the bequest on placed ministers, which would be quite contrary to Mr MacKnight's will.

At advising—

LORD PRESIDENT—The late Mr MacKnight, advocate, left a trust-disposition and settlement in which, with regard to the residue of his estate, he directed his trustees to expend the free annual income thereof for the promotion "of one or other or both of the following missions." I leave out the first mission, because it has disappeared. The second mission was the Home Mission in connection with the Free Presbyterian Church of Scotland. There was a multiplepointing at the instance of Mr MacKnight's trustees, in which it was held that the Free Presbyterian Church was the body more correctly known as the Free Church of Scotland. This was at a time when the question which all of us know so much about was only just mooted. The question between the Free Church as it is now known, and the United Free Church as it is now known, took, as all of us are well aware, some years to decide. After being decided in the House of Lords it was followed by the Churches (Scotland) Act of 1905.

The Churches (Scotland) Act of 1905 established a Commission, and by section 1 the Commission is directed to allocate between the Free Church and the United Free Church the property in question as defined by the Act. The definition of property in question is given in section 4 (1), and is "all property which" on a certain date "was vested in or held by or on trust for, or was payable to or for behoof of, the Free Church, or was held for the purposes of any school, scheme, mission, or other special object of said Church." Indubitably the Home Mission was a mission of the Free Church, and therefore it was held by the Commission—and I think rightly held—that Mr MacKnight's trust funds fell within the definition of "property in question," and that therefore it became the duty of the Commissioners in terms of section 1 to allocate these funds between the Free Church and the United Free Church.

Now by sub-section (3) of section 1 the Commission in making their allocation are directed to make an adequate provision for the Free Church—I am reading the section shortly. The scheme of the statute was that inasmuch as the Free Church was held by the decision of the House of Lords to be the Church which had what I may call the legal right to continuity with the old Church, and also as it was very much the smaller body, provision should be made to them out of the funds before the balance was given to the United Free Church. Then the section goes on to say the funds or property out of which provision may be made for objects mentioned shall be those set out in the second column of the first schedule of the Act opposite the description of the object in the first

column of that schedule. Turning now to the first schedule, one finds in the second column, heading 4, "Sustentation Fund, Home Missions Fund, Highlands and Islands Fund, any moneys which the Commission regard as applicable for these or similar purposes." That is a category of the different classes of funds out of which the Commission were to make provision.

The next question is, therefore, did Mr MacKnight's trust, being part of the property in question, fall within this heading 4? Clearly, again, I think it did, because, although it is not in terms a Home Mission fund, it is money which the Commission regarded as applicable to that purpose. The Commission are made judges of that, and therefore I have no doubt that they quite rightly dealt with Mr MacKnight's fund under this head. The provision, as the Act of Parliament says, is to be to the objects in the first column opposite this heading. Now the heading 4 in the first column (that is, opposite heading 4 in the second) is "(a) Support of ministers of Free Church congregations to which congregational property has been allocated under this Act and of itinerant preachers. (b) General purposes of administration and management of the Free Church."

Accordingly the Commission upon 10th November 1909 made an order in connection with Mr MacKnight's trust, wherein they set forth, after reciting their powers, the following allocation:—"They 'hereby allocate, as from and after' a certain date, 'to the Free Church of Scotland and the Home Mission Committee of that Church the whole rights and interests which the Free Church of Scotland . . . or the Home Mission Committee of that Church had at that date in the trust estate of the said Alexander Edward MacKnight.'" They estimate that interest as of the capital value of £9000 odds, and it is to form an aliquot part of a sum of £250,000 which they are allocating under this head by a further order. A further order was pronounced which set out categorically the whole sum which they dealt with under this provision of Schedule 1, heading 4. I need not call attention to it, because various sums are dealt with. It is enough to say that in the £250,000 Mr MacKnight's trust enters *in computo* for the £9000 odds.

Now there was also in Mr MacKnight's settlement a sentence which I have not read, which provided that if the Church in the future deviated from what he considered correct doctrine and practice in the matter of the Holy Communion, they should forfeit the legacy. And inasmuch as there is a saving clause in very ample terms in the Act in section 2 (5), which provides that the orders or proceedings of the Commission "shall not prejudice or affect any rights, duties, and liabilities as regards any property in question as defined by this Act other than those of the Free Church and the United Free Church," the Commission did not attempt to transfer the capital sum away from the trustees. The trustees are still bound to hold the

capital sum in order to make good this forfeiture if the occasion for it should ever arise.

What has happened is this. The trustees have not handed over the income to the present Free Church in order to allow them to spend it on the purposes mentioned in the Act of Parliament, but they have at their own hands instituted and continued a mission of the character of a home mission in the town of Bathgate, using for their missionary a Free Church preacher. The Free Church are anxious that the money should be transferred to them, and they allege two reasons for that. They say, in the first place, it is much more economical that there should not be separate administration of money; and they say, secondly, that it does not fit in with their schemes that there should be a mission in Bathgate. They say there are not many adherents of the Free Church in Bathgate, and that the mission which is held in Bathgate can in no sense be said to be a mission in connection with their Church.

The reason that the trustees have been in any way able to do this at all is that, after the provision of the trust deed dealing with the application of the residue, which I have already read, there is added a declaration to this effect—"Declaring that it shall be in the power of my trustees to engage Free Church missionaries, or in their discretion other workers, including laymen and lady missionaries or workers, being members of the Free Church, in the promotion of the above missions or either of them in such way as they may think proper either through the Church or independently of it." So that as the trust stood originally there is no question that the action of the trustees would have been well within their powers. I feel quite sure that the action of the trustees is not based upon any antagonism to the Free Church, but is in the exercise, according to the best of their abilities, of the discretion which was conferred upon them by the truster, and the exercise of which, for reasons which commend themselves to their mind, and with which I have nothing to do, has led them to take the step that they have taken.

The question that is raised in this case, however, is whether their position is really now in accordance with what may be called the law of the case, and accordingly this action has been brought to try that question. It is an action of declarator at the instance of the Free Church asking that, as the first conclusion, the yearly proceeds of the trust funds should be handed to them in order that they may be enabled to apply these proceeds for the purposes for which the sums were allocated to them under the order—in terms, in other words, of the fourth head of the first column of the first schedule.

I am of opinion that they are entitled to have their demand granted. The steps by which I reach that conclusion are really very simple. First of all, I think that one has to consider whether the fund in

question fell within the powers of the Commission at all. If it did not, the whole matter would be *ultra vires*; and I take it that this Court, although under the Act and the section which I have already partly read we cannot interfere with the orders of the Commission, would naturally be able to check any *ultra vires* action. But my judgment upon that point is that it was not *ultra vires*, and I have already, by way of recital, said why. I think there is no question that this fund falls within the definition of "property in question."

The next step is—Does it fall within the enumeration in column two of the first schedule as to which what may be called special statutory directions are given? There again I have given my reason in my recital. I think it does, because, although it is not actually a home mission fund, it is money which the Commission have regarded as applicable to that purpose. I do not think that we can interfere with the Commission there. I think the Commission are the judges of that. But if I may be allowed respectfully to say so, I think the Commission were clearly right, because, although not actually part of a home mission fund, it is certainly for the purposes of a home mission, and therefore under the terms of the Act of Parliament it was applicable for that or a similar purpose.

If that is so, the next step is one in which the Commission cannot help themselves. They have got to do what the Act of Parliament tells them—that is to say, if out of this class of funds they take this particular item which was entirely in their hands—and they have taken it—then the use to which that item is put really does not depend upon them or their order, but it depends upon the Act of Parliament; and the use to which it is to be put is the use which we find in the first column of the schedule under head 4 thereof. Of course they need not have touched Mr MacKnight's fund at all. If they had liked they could have made up the £250,000 out of other sums, because nobody supposes that the £250,000 exactly and precisely exhausts to a penny the funds of the category in the fourth heading of the second schedule; but as they did touch it, and they were entitled to touch it, then the way in which they operated upon it really did not lie in their hands but was determined by Act of Parliament.

Accordingly I hold that their proceedings being regular and *intra vires*, this fund of Mr MacKnight's is, by force of Act of Parliament, allocated to the Free Church for the support of ministers, of itinerant preachers, and for the general purposes of administration and management of the Free Church. Now, no doubt, that is to a certain extent an alteration of the trust purposes. That was inevitable. The trust purpose as it existed in all these trusts could not remain intact; for after all, these trusts are constituted in favour of a Free Church. I think it is only the French Republic that was one and indi-

visible. The Free Church has shown that it was not indivisible in one sense. Parliament had to deal with the new state of affairs where, although by law the continuity of the body was held to go on in what is now known as the Free Church, still there was the very large body known as the United Free Church, in which were the majority of the people who had been in the Free Church before the amalgamation with the United Presbyterian Church had been made. Parliament held that it was expedient in the interests of the kingdom that an allocation of property should be made between these two. So that although it is true, as was argued for the defenders, that this is an alteration of the trust purposes, it is just one of those things that cannot be helped, and the alteration is effected by an Act of Parliament and therefore binds us.

But what of the discretionary power conferred upon the trustees? My answer to that is that the discretionary power is not in one sense superseded; it would be more accurate to say that it is inapplicable to present circumstances, for although there could be independent action at the time when Mr MacKnight made his trust, there cannot be independent action now in the case of money which is allocated by Act of Parliament for a particular thing which must be done by the Church itself. Support of ministers of Free Church congregations of course must mean support of ministers through the Church. It does not mean that the Commissioners were to say that Mr A B was to have a stipend of £100 or £200, or whatever it may be; it is support through the Church. The itinerant preachers must be appointed through the Church, and the general purposes of administration and management must be the general purposes of administration and management by the Church, and therefore independent action in support of these things is impossible.

Accordingly I think that the saving clause in the Act has really no application. The saving clause saves people who are outside. But this question is not outside; it is inside. It is not a question of what rights these trustees have which may possibly be contrary and antagonistic to the rights of the Church. That class of right is evidenced, for instance, by the forfeiture clause, which survives and is still saved to them; but this right is an administrative right in connection with the old trust purposes. It is an administrative right which is not workable, in my judgment, in connection with the new trust purposes, which are the Parliamentary purposes, and supersede the old.

Upon the whole matter I come to the conclusion that the Free Church here is entitled to the declarator which it seeks under the first head. As to expenses, I think the trustees here have acted in perfectly good faith. It was quite a fair question to try, and I think parties ought to get their expenses out of the income.

LORD JOHNSTON—I agree. The litigation which determined the rights of the Free Church and of the United Free Church of Scotland was concluded in 1904, and immediately thereafter a Royal Commission, which was appointed to inquire, reported that the Free Church could not adequately carry out all the trusts or administer all the property which the result of the judgment in the original action left in their hands. The Commission recommended that provision should be made for the allocation of that property, with this important rider, that provision should be made thereout for the equipment of the Free Church. I think it is essential and necessary to have regard to that word "equipment" in considering the meaning and effect of the Act which followed in the year 1905, and which provided for the allocation which the preamble of it indicates is desirable.

The property, roughly speaking, consisted of two different kinds. There were heritable subjects, consisting of churches, manse, schools, etc.; and there were income-producing funds—some of them in the hands of the Church itself, or, rather, of general trustees for the Church, and some of them in the hands of private trustees, but devoted notwithstanding to the purposes of the Church. I think that, dealing, as we are dealing here, with the second class of the second kind of assets, it must be perfectly apparent that Parliament approached this subject knowing that necessarily, if there was to be a practical allocation between the two Churches, it was impossible that the purposes of standing trusts should not require, to a certain extent, to be interfered with. The bare trust might remain, and yet to carry out the object of the statute it might be absolutely necessary to abrogate certain of the trust purposes or of the trust directions. I think it is also perfectly clear that in carrying out the object of the statute, to a certain extent the application of a broad axe was necessary. But Parliament did not apply the broad axe itself; they put it into commission for the purpose of doing that which the preamble set forth.

There are two provisions contained in the statute which I would refer to, one of which your Lordship has referred to, but the other is of equal importance. In section 2 (1) it is said that any such orders of the Commission—referring to the orders necessary for giving effect to allocation—"shall have effect as if enacted in this Act." Accordingly the orders of the Commission come by force of the statute to have themselves the force of statute. It is also said, section 2 (5), as your Lordship has pointed out, that no Court shall have power to review or interfere with the orders or other proceedings of the Commissioners.

Now, acting under this statute, the Commissioners have allocated, for certain of the purposes for which they were directed under the statute to provide, the funds under Mr MacKnight's trust. In doing so they have acted with the greatest

discrimination. They have observed that these funds were held under an irritancy, and that it might so happen that they became forfeit; and accordingly they have not taken the fund itself and transferred it to, or even left it to be held simply in trust for, the Free Church. But they have very carefully worded their order so as to deal only with the interest of the Free Church in the fund. They have therefore left standing what I referred to as a bare trust in the trustees, but they have left the real interest of the Free Church, to be held for the Free Church, but for the statutory purposes. And that real interest was in the income of the fund, subject as I have said to an irritancy.

I concur, therefore, in the judgment which your Lordship proposes.

LORD CULLEN—I agree. Mr MacKnight devoted the income of this fund to the promotion of the Home Mission of the Free Church of Scotland, and he gave to his trustees an administrative power to expend the money themselves in home mission work as an alternative to paying it into the Home Mission Fund. The trustees have so far exercised this power. But now that the income has been appropriated by the allocation orders to the purposes mentioned under heads 4 (a) and 4 (b) of the first column of the first schedule of the Act of 1905, it seems clear that this discretionary power given to the trustees of expending the money themselves on home mission work is inapplicable and is necessarily displaced, and that the pursuers are entitled to have the income applied in the manner formulated in the first conclusion of the summons as now amended.

The Court recalled the Lord Ordinary's interlocutor and granted the declarator concluded for.

Counsel for the Reclaimers—Constable, K.C.—Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Chree, K.C.—Valentine. Agents—Hugh Martin & Wright, S.S.C.

Friday, November 12.

FIRST DIVISION.

[Lord Ordinary on the Bills.

EDINBURGH MAGISTRATES, PETITIONERS.

Company—Winding-up—Process—Winding-up Order Pronounced in Vacation—Review—Competency—Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), secs. 135, 181 (2), and Sched. 4.

A winding-up order pronounced by the Lord Ordinary officiating on the Bills in vacation is reviewable.

The Companies (Consolidation) Act 1908 enacts—section 135—"The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of