two charges in a single parish to effect the unification of the two separate benefices which have become established by law as such. It might well, I think, be held that the larger and more far-reaching powers of this Court in the matter of union of kirks or parishes under the statutes referred to in the petition include the lesser power which we are now asked to use. But apart altogether from these, the considerations which are discussed above (particularly in connection with the *Cupar* case), arising out of the character and origin of these so-called collegiate charges, seem to me to afford ample ground for regarding this power as having been inherent in the Commission, and therefore inherent in this Court as its successor. The prayer of the petition will, in accordance with the suggestion made in the Teind-Clerk's report, require amendment so as to include a decerniture for payment of the stipend with the communion element money to the (henceforth) single minister of the parish and his successors, in like manner as the same are at present payable to the holders of the first and second charges, and attaching the emoluments of both benefices to the said minister and his foresaids. On these amendments being made the petition will be granted.

LORDS MACKENZIE, SKERRINGTON, CULLEN, and BLACKBURN concurred.

The Court granted the prayer of the petition, subject to the prayer being amended as suggested by the Clerk of Teinds.

Counsel for the Petitioners —Hon. W. Watson, K.C.—Wilson. Agents—Menzies & Thomson, W.S.

COURT OF SESSION.

Friday, February 25.

FIRST DIVISION.

LAW'S TRUSTEES *v.* GRAY.

Succession — Will — Legacy — Erroneous Recital—Implied Bequest or Misdescription.

A testatrix had a brother, a nephew (the brother's son), and a grandnephew (the nephew's son), all of the same name. Her brother and nephew having died, she appointed the grandnephew to be one of her trustees and bequeathed to him the sum of £500, which was expressed to be "in addition to and over and above his share of the legacy of £1000 hereinafter bequeathed to the children of his deceased father A equally." This reference was erroneous. The will contained no such legacy to the children of his deceased father, but it did contain, *inter alia*, a bequest of a like sum to the children of his deceased grandfather, viz.—"to the whole children of my deceased brother A, who shall survive me, the sum of £1000 sterling equally among them, share and share alike." *Held* that the erroneous reference to a legacy in favour of the children of the grandnephew's father did not constitute an implied bequest to them, such bequest being inconsistent with the general scheme of the will, and the erroneous reference being reasonably attributable to confusion arising out of the identity of names.

A Special Case was presented to the Court by Archibald Gray and others, the trustees acting under the trust-disposition and settlement, dated 31st August 1918, of the late Mrs Jane Gray or Law, Bowfield Road, West Kilbride, *first parties;* and the said Archibald Gray as an individual, Robert Speir Gray, and James Gray, all grandnephews of the said Mrs Jane Gray or Law, *second parties.*

After narrating that the truster (the said Mrs Jane Gray or Law) died on 26th April 1919, the Case set forth as follows:—"2. By her said trust-disposition and settlement the truster conveyed her whole means and estate to the first parties as trustees foresaid, for the purposes therein set forth. . . . 3. The second purpose is in the following terms, viz.—'In the second place I bequeath to the said Archibald Gray' (hereinafter referred to as 'Archibald Gray *tertius*') 'the sum of £500 sterling, and that in addition to and over and above his share of the legacy of £1000 sterling hereinafter bequeathed to the children of his deceased father Archibald Gray equally.' The said last-mentioned Archibald Gray was a nephew of the truster, and is hereinafter referred to as 'Archibald Gray *secundus*.' 4. By the fourth purpose the truster bequeathed 'to the whole children of my deceased brother Archibald Gray who shall survive me the sum of £1000 sterling equally among them, share and share alike.' The said last-mentioned Archibald Gray is hereinafter referred to as 'Archibald Gray *primus*.' 5. By the eleventh purpose the truster bequeathed 'to Mary Gray or Campbell the sum of £500 sterling, and that in addition to and over and above her share of the legacy of £1000 sterling hereinbefore bequeathed to the children of her deceased father Archibald Gray equally.' The said Archibald Gray is 'Archibald Gray *primus*' mentioned in the preceding article. 6. By the twelfth purpose the truster directed her trustees to pay and divide the whole residue of her means and estate heritable and moveable among such charitable and benevolent institutions in the county of Ayr as her trustees might select. . . . 8. The said Archibald Gray *primus* was a brother of the truster, and died on 13th February 1884. He was survived by four children, viz.—two sons—the said Archibald Gray *secundus*, who died on 17th September 1908, and James Logan Gray, who is now abroad, and two daughters the said Mary Gray or Campbell and Margaret Gray or Ferguson. 9. The said Archibald Gray *secundus* left three sons, viz.—the said Archibald Gray *tertius*, who is one of the trustees; the said Robert Speir Gray, and the said James Gray. Said children of the said Archibald Gray *secundus* are the second parties hereto. 10. The

truster in her trust-disposition and settlement made no express provision in favour of the children of the said Archibald Gray *secundus* other than what is contained in the second purpose of the said settlement and above narrated. Questions have thereby arisen as to the extent of the rights of the second parties in the estate of the truster."

The first parties maintained that on a sound construction of the trust-disposition and settlement there was no bequest to the children of Archibald Gray *secundus*, other than the bequest of £500 to Archibald Gray *tertius* contained in the second purpose of the settlement.

The second parties maintained that the truster bequeathed a legacy of £1000 to the children of Archibald Gray *secundus* over and above the bequest of £500 to Archibald Gray *tertius*.

The *question of law* was—"Does the said trust-disposition and settlement validly bequeath a sum of £1000 to the children of the said Archibald Gray *secundus*?"

Argued for the first parties—This was merely a case of mistaken reference by the testatrix to the bequest made to the children of her deceased brother Archibald Gray *primus*. The mistake was intelligible. She had three relatives named Archibald Gray, and it had escaped her memory that Archibald Gray *tertius* was not the son but the grandson of Archibald Gray *primus*. In order to apply the doctrine of implied bequest as against a residuary gift the inference must be irresistible—*Adams* v. *Adams*, 1842, 1 Hare, 537; *Mackenzie* v. *Bradbury*, 35 Beav. 617; *Pike* v. *Hamlyn*, [1898], 1 Ch. 153; *In re Bagot*, [1893], 3 Ch. 348; *Hunter* v. *Attorney-General*, [1899] A.C. 309, Earl of Halsbury, L.C., at 314; *Bate's Trustees* v. *Bate*, 1906, 8 F. 861, 43 S.L.R. 660; *Crawford's Trustees* v. *Fleck*, 1910 S.C. 998, 47 S.L.R. 755. Further, the implication was inconsistent with the general scheme of the will.

Argued for the second parties—The recital of a bequest as an accomplished fact was a sufficient indication of testamentary intention in the absence of other indications within the will to the contrary. The scheme of the will which the first parties relied on had not in fact been rigidly adhered to. Moreover, there was a motive for the bequest from the fact that owing to their father's predecease of the testatrix the third parties had no share in the legacy to the children of Archibald Gray *primus*. It was not probable that the person who had selected Archibald Gray *tertius* to be her trustee would make a mistake in describing him. The following authorities were referred to:—Jarman on Wills, 6th ed., p. 623; M'Laren on Wills, 3rd ed., vol. i, p. 317, secs. 586, 589, 590; *Grant* v. *Grant*, 1851, 13 D. 805; *Forbes' Trustees* v. *Forbes*, 1893, 20 R. 248, Lord President Robertson at 251, 30 S.L.R. 250; *Mearns* v. *Mearns*, 1775, M. 13,050; *Yates* v. *Thomson*, 3 Ch. & Fin. 544, *per* Lord Brougham at 572; *Jordan* v. *Fortescue*, 1847, 10 Beav. 259; *Smith* v. *Fitzgerald*, 1814, 3 Ves. & B. 2; *In re Redfern*, 1877, L.R., 6 Ch. D. 133, Bacon, V.C., at 136; *Bibin* v. *Walker*, Amb. 661; *Towns* v. *Wentworth*, 11 Moore's Privy Council Cases 526, at 543.

At advising—

LORD PRESIDENT—The testatrix had a brother Archibald Gray *primus*. He predeceased her, leaving a son Archibald Gray *secundus*. This son also predeceased the testatrix, leaving three children, of whom the eldest was Archibald Gray *tertius*. The testatrix appointed Archibald Gray *tertius* one of the trustees under her will, and by the second purpose she bequeathed to him "the sum of £500, and that in addition to and over and above his share of the legacy of £1000 hereinafter bequeathed to the children of his deceased father Archibald Gray," namely, Archibald Gray *secundus*, which legacies it was thereby provided should not deprive the said Archibald Gray *tertius* of the privileges of a gratuitous trustee. There is no legacy anywhere in the will of £1000 or of any other sum in favour of the children of the deceased father of Archibald Gray *tertius*. But there is in the fourth purpose a legacy of £1000 in favour of the children of the testatrix's deceased brother Archibald Gray *primus*. The question is whether there arises by implication to Archibald Gray *tertius* and his brothers, as the children of Archibald Gray *secundus*, a bequest of £1000.

It is clear that the testatrix was under a misapprehension when she executed her will. But there are two sources to either of which this misapprehension may be traced. Either she thought that her will did contain a bequest in favour of the children of the deceased father of Archibald Gray *tertius*, or she was under the impression that "the children of his deceased father" (namely, Archibald Gray *secundus*) in the second purpose were *eædem personæ* with "the children of my deceased brother" (namely, Archibald Gray *primus*) in the fourth purpose. In the former case there might be room for the implication contended for, in the latter case there would be none. I think that where the recital of a bequest—as being contained in the will, although it is not in fact expressed anywhere in it—can with reasonable probability be attributed to the mistaken identity of the legatees of the recited bequest with the legatees of another bequest which is actually expressed in the will, resort to the principle of gift by implication in order to set up the recited bequest is inadmissible.

In the present case there is nothing in the will which affords evidence of intention in favour of the recited bequest except the recital itself. In most, if not in all, the classes of case in which, in this country at any rate, gifts by implication have been established, there has been something of the kind. Thus in *Mearns* v. *Mearns*, 1775, M. 13,050, the whole purpose of the deed was, as appeared from its character and from the express declaration in the narrative, to make a provision for wife and children; and this purpose would have been frustrated if the unexpressed gift of the fee to the children had not been implied. In *Grant's*

Trustees v. *Grant*, 1862, 24 D. 1211, the codicil—by which, in order to achieve an equal distribution between two nephews, the testator directed his residue to be divided equally between them—proceeded inductively on the recital that by the will the testator's heritage had been already bequeathed to one nephew, and a moveable legacy of equal value had been already bequeathed to the other. The former bequest was, the latter bequest was not, in fact, contained in the will; but if the latter bequest had not been held to be established by implication the result would have been not only to stultify the will and codicil together but to defeat the expressed purpose for which the codicil was made. Again in *Aberdein's Trustees* v. *Aberdein*, 1870, 8 Macph. 750, the residuary gift to charities failing issue of both the testator's sons was held, notwithstanding some peculiarities in the will, to imply a gift to the issue, and the decision was supported by the evidence afforded by the will as a whole of the testator's desire to benefit his sons and their families in the first instance, and by the powerful consideration that if implication was not resorted to intestacy would result. The latter consideration also entered into the decision of the case of *Douglas* v. *Douglas*, 1843, 6 D. 318, which exemplifies the simplest and most familiar instance of testamentary implication, that, namely, arising from a gift on the death of the primary legatee without issue.

If the other provisions of the will in the present case had presented evidence in support of the implication contended for it might have been possible to make it notwithstanding the ambiguity already pointed out. But the recital stands by itself, and the general scheme of the will cannot be said to be favourable to it. Each of the *stirpes* of the testatrix's brothers and sisters gets £1000, one niece and one nephew being specially excluded from participation, and two nieces being specially favoured by an additional personal gift of £500 apiece. The recited bequest would be an excrescence upon this simple scheme, which could not be accounted for by the fact that Archibald Gray *tertius* was appointed a trustee, for the recited bequest is not to him personally but to the children of his deceased father, of whom there were three.

No reported case in our own Courts—or in the English Courts so far as I am aware—supports the application of the principle of gift by implication when some competing explanation of the absence of an express bequest is reasonably open besides that of unintentional omission or *casus improvisus*. I do not think it is going beyond the limits of reasonable probability to attribute the recited bequest in this case to a confusion in the mind of the testatrix among the plurality of persons in the *stirps* of her brother Archibald Gray *primus* bearing the name of Archibald Gray; and I do not think that in a case of this ambiguous complexion I am entitled to hold the implication contended for as established. The question submitted to us must therefore be answered in the negative.

LORD MACKENZIE—The principle upon which a bequest by implication rests has been more discussed in cases in England than in Scotland. As is pointed out by Lord Kinnear in *Crawford's Trustees* v. *Fleck* (1910 S.C. 998, at p. 1008) there is no difference between the laws of the two countries. The case of *Towns* v. *Wentworth* (11 Moore P.C. 526, at p. 543) contains a clear statement of the principle by Mr Pemberton Leigh (afterwards Lord Kingsdown) to the following effect—"If the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court has to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect as far as possible the intention which it is of opinion that the testator has on the whole will sufficiently declared." On the other hand, as Sir W. Grant said in *Smith* v. *Fitzgerald* (3 Ves. & Beames 2, at p. 8)—"The Court ought to see very clearly that there is nothing in the will to which the recital can refer before it is turned into a distinct bequest, otherwise an inaccurate testator may be held to make a second bequest when he has only made an incorrect reference to the first."

The question turns upon the proper construction to be put on the settlement.

The argument for the second parties is that there is a plain *enixa voluntas* in the second purpose of the settlement that Archibald Gray *tertius*, the trustee, is to get something over and above the legacy of £500, which is referred to as "his share of the legacy of one thousand pounds sterling hereinafter bequeathed to the children of his deceased father Archibald Gray" (this was Archibald Gray *secundus*); that when the later clauses are explored no bequest to the children of Archibald Gray *secundus* is found, and yet in the second purpose the additional bequest is referred to as an accomplished fact by the use of the words "hereinafter bequeathed"; that the case is not one of erroneous recital, for the language of the second purpose cannot be held to apply to any of the purposes which follow; more particularly that it cannot apply to the fourth purpose, because the bequest there is to the children of my deceased brother Archibald Gray (this was Archibald Gray *primus*), and that therefore there is a bequest by implication to Archibald Gray *tertius* and his brothers Robert and James of a legacy of £1000.

I am unable to take this view. It appears to me that there was confusion in the mind of the maker of the settlement between "the children of his deceased father Archibald Gray" as used in the second purpose, and "the whole children of my deceased brother Archibald Gray" in the fourth purpose.

The case seems to me a typical illustration of what Sir W. Grant said the Court ought to be careful to guard against. It should not say the testatrix has made a second bequest when she has merely made an incorrect reference to another bequest. Reading the settlement in the natural way

it means this—"Whereas I understand in the complicated family relationship that Archibald Gray, my trustee, will get a share of a legacy bequeathed to his father, I declare that the legacy of £500 is to be in addition to that, and I provide that the legacies shall not deprive him of his rights and privileges as a gratuitous trustee." There is no testamentary intention in the second purpose except as regards the legacy of £500. The conclusion might have been different if there had been disclosed in the settlement a general scheme which would be defeated if a legacy of £1000 to the children of Archibald Gray *secundus* were not introduced by implication. It is, no doubt, true that the testatrix takes the family groups, and out of these groups selects one for preferential treatment. I can find no warrant for concluding that the testatrix had any intention to bequeath one-third of £1000 to each of Robert and James, the brothers of Archibald *tertius*. It is not to the point to say that the grandchildren of Sarah, a sister of the testatrix, are brought in by the settlement. This fits into the general scheme, which is that a legacy of £1000 is to go to each stirps which represented a brother or sister of the testatrix. To give effect to the contention of the second parties would be to give to the stirps represented by Archibald Gray *primus* not £1000 but £2000. The bequest in the fourth purpose is to the children of Archibald *primus* "who shall survive me." Archibald *secundus*, the father of the trustee Archibald *tertius*, predeceased the testatrix, and the children therefore get nothing.

The question ought in my opinion to be answered in the negative.

LORD SKERRINGTON—I concur with your Lordships.

LORD CULLEN did not hear the case.

The Court answered the question of law in the negative.

Counsel for the First Parties — Irvine, K.C. — Aitchison. Agents — John Macmillan & Son, S.S.C.

Counsel for the Second Parties — Macmillan, K.C. — D. P. Fleming. Agents — Laing & Motherwell, W.S.

Saturday, February 26.

FIRST DIVISION.

ARAYA AND ANOTHER *v.* COGHILL.

Bankruptcy—Foreign — Official Receiver—Application by Official Receiver Appointed by Foreign Court for Confirmation of his Appointment, and for Authority to Sell Scotch Heritage and Realise Policies of Insurance.

The Official Receiver appointed by a foreign court on the bankrupt estate of a deceased Scotsman who had carried on business within its jurisdiction, presented a petition to the First Division, in which he craved the Court (1) to confirm the said sequestration in bankruptcy and his appointment as Official Receiver, (2) to authorise him, *inter alia*, to make up a title to and to sell the deceased's heritable property situated in Scotland, and (3) (in terms of a proposed amendment to the said petition) to authorise him to uplift the proceeds of certain policies of insurance on the life of the deceased. The Court *refused* to grant the confirmation craved and also the special authority to uplift the insurance policies, as being unnecessary in view of the universal title vested in the Official Receiver, but *granted* authority to sell the heritable property subject to these conditions, viz., (1) that suitable conditions of sale should be specified, (2) that the proceeds should be consigned with the Accountant of Court, and (3) that the sale should not operate as a conversion of the heritage left by deceased.

Jorje Araya, Valparaiso, Chile, Official Receiver appointed by the Court of Chile in the bankruptcy of the deceased William Coghill, exchange broker of Valparaiso, and James Walter Buchan, solicitor, Peebles, his mandatory, petitioners, presented a petition in which they craved the Court "to confirm the sequestration in bankruptcy of the estates of the said deceased William Coghill and the appointment of the said Jorje Araya as Official Receiver thereof for behoof of the creditors of the said William Coghill, and to authorise the said Jorje Araya and the said James Walter Buchan as his attorney foresaid, to administer and realise all property belonging to the said William Coghill situated in Scotland, including said subjects known as Lee Lodge, Peebles, for the benefit of said creditors, and in particular to authorise the said Jorje Araya or the said Walter Buchan as his attorney foresaid to make up and complete a title in name of the said Jorje Araya, Official Receiver foresaid, or of the said James Walter Buchan as his attorney foresaid, and thereafter to sell and dispone the said subjects."

The petition stated—"That William Coghill, exchange broker of Valparaiso, Chile, died on 2nd May 1919 at Limache 731, in the district of Vina del Mar No. 3, of Valparaiso, and that after his death it was found that he left numerous debts, as was made public and notorious in those days, very much in excess of his estate, the assets in Chile not exceeding 200,000 pesos, while the liabilities and debts there amount approximately to 4,000,000 pesos. On 8th November 1919 the competent Court in Chile declared his succession bankrupt and nominated the petitioner the said Jorje Araya Official Receiver, the appointment being subsequently confirmed by a meeting of creditors on 30th December 1919 duly held before a competent court. The said Jorje Araya by agreement with the creditors cabled to the said James Walter Buchan, who acted as agent for the deceased with regard to his property in Scotland, instructing him to take the property under his charge to safeguard the interests of the