vesting, I am of opinion that the term "vesting," which is open to construction, is sufficiently shown not to be the date of distribution but the date of the death of the testatrix.

I am therefore of opinion that the first question should be answered in the affirmative.

LORD PEARSON concurred.

LORD YOUNG and LORD TRAYNER were absent.

The Court answered the first question in the affirmative.

Counsel for the First and Second Parties —Jameson, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Third Parties—Solicitor-General (Dickson), K.C.—Balfour. Agents —Strathern & Blair, W.S.

Friday, March 14.

SECOND DIVISION.

MURPHY *v.* CLYDE NAVIGATION TRUSTEES.

Process — Proof — Jury Trial—Diligence—Recovery of Documents within Eight Days of Trial.

In an action of damages for personal injuries at the instance of a docker against the Trustees of the Clyde Navigation, the pursuer within eight days of the day appointed for the trial of the cause before a jury moved for a diligence to recover documents. The defenders objected, upon the ground that the documents if recovered could only be used for cross-examination, because they could not be put in evidence, as it was now impossible to lodge them eight days before the trial. They maintained that the case was ruled by the decisions in *M'Neill* v. *Campbell*, February 20, 1880, 7 R. 574, 17 S.L.R. 392; and *Livingston* v. *Dinwoodie*, June 28, 1860, 22 D. 1333. The pursuer offered no explanation of the delay in applying for a diligence. He maintained that he was entitled to recover the documents sought for, to make what use he could of them by putting them to witnesses.

The Court (LORD JUSTICE-CLERK, LORD MONCREIFF, and LORD PEARSON) *refused* the motion.

LORD YOUNG and LORD TRAYNER were absent.

Counsel for the Pursuer — Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—Deas. Agents —Webster, Will, & Company, S.S.C.

Thursday, February 27.

FIRST DIVISION.

THE GOVERNORS OF MITCHELL'S HOSPITAL, ABERDEEN, PETITIONERS.

Charitable Trust—Administration—Settlement of Scheme — Cy-pres — Nobile Officium—Trust.

In 1801 certain funds invested in 3 per cent. Government annuities were conveyed to the holders of certain offices and their successors in these offices, under a declaration that they should not uplift or transfer the capital, for the maintenance and clothing, in a hospital built by the donor, of "five widows of and five maiden daughters of decayed gentlemen or merchants or trade burgesses of the city of Old Aberdeen not under 50 years of age, of virtuous and good moral characters, of the names of Mitchell and Forbes in equal numbers, if they are to be found, and in case of a deficiency of either of these two names and descriptions, the number, ten, to be completed from amongst the widows and maiden daughters aged 50 years and upwards of decayed gentlemen, or merchants, or trade burgesses of any other names, those born in Old Aberdeen of the names of Mitchell and Forbes always having the preference." Owing to the very limited number of those having the necessary qualifications a sufficient number of inmates for the hospital could not be obtained, and those who were obtained were consequently maintained at an excessive cost. As the burgh of Old Aberdeen had been merged in the city of Aberdeen, the number of qualified applicants was likely to be still smaller in the future. The Court *approved* a scheme whereby, when the number of inmates fell below ten, (1) widowed daughters and granddaughters of burgesses or widows of sons of burgesses, (2) widows and maiden daughters of residenters within the boundaries of what was formerly Old Aberdeen, and (3) widows or maidens who had lived in Old Aberdeen all their lives or for at least seven years prior to their claim, might be admitted; but *refused* (1) power to employ the surplus funds in giving grants to persons having the necessary qualifications but wishing to live in their own homes; (2) discretionary power at a future date, if sufficient inmates still could not be obtained, to sell the hospital and expend the whole revenue on annuities; and (3) power to invest the capital of the trust in other securities giving a larger return.

By deed of mortification, dated April 15, 1801, and recorded in the Sheriff-Court Books of Aberdeenshire May 25, 1801, David Mitchell of Holloway Down, in the county of Essex, upon the narrative that he,

"from a regard for the inhabitants of the city of Old Aberdeen and its ancient college, and a desire in these severe times to provide lodging, maintenance, and clothing for a few aged widows and maiden daughters of decayed gentlemen or merchants or trade burgesses of the said city,' had 'contracted to build an hospital for their residence upon a piece of ground gifted by the Provost, Magistrates, and Council of the said city to the trustees after mentioned, named and appointed by" him "for the management of the said hospital, which is to be called in all time coming Mitchell's Hospital," did, thereby in further execution thereof, for the support, maintenance, and clothing of the said widows and maiden daughters, mortify, transfer, and assign, under the conditions, provisions, rules, statutes, and ordinances therein inserted, or to be afterwards made out and approved of by him or by such person or persons as he had named or should name and appoint for that purpose, to and in favour of Doctor Roderick M'Leod, Principal, Doctor William Jack, Sub-Principal, and Doctor Gilbert Gerard, Professor of Divinity, all of the King's College of Old Aberdeen, and Hugh Leslie, Esq., Provost of the said city of Old Aberdeen, and their respective successors in their respective offices above mentioned, the sum of £5500 consolidated 3 per cent. Government annuities then standing in his person, "empowering them, or any person authorised by them, to draw the dividends thereof in all time coming, but not to uplift or transfer the capital, which shall remain forever in the hands of Government unalienable, and which dividends to be in trust only, and to be applied by them and the other governors, trustees, or managers after named and appointed by me for the maintenance and clothing of five widows of and five maiden daughters of decayed gentlemen or merchants or trade burgesses of the said city of Old Aberdeen not under 50 years of age, of virtuous and good moral characters, of the names of Mitchell and Forbes, in equal numbers if they are to be found, and in case of a deficiency of either of these two names and descriptions, the number, ten, to be completed from amongst the widows and maiden daughters aged 50 years and upwards of decayed gentlemen or merchants or trade burgesses of any other names, those born in Old Aberdeen of the names of Mitchell and Forbes always having the preference, their gowns to be of deep blue colour, and to be admitted into the said hospital, maintained, and clothed for life according to certain rules and statutes signed by me or such person or persons as I have named or may name for that purpose as relative hereto, and which rules and statutes are hereby declared to make a part hereof, and to be as valid and effectual as if engrossed herein."

By the said deed of mortification the said David Mitchell nominated and appointed the persons above named, along with Dr Skene Ogilvie and Mr Alexander Simpson, first and second ministers of Old Aberdeen, Mr Robert Eden Scott, eldest Bailie, and James Stronach, Convener of the Incorporated Trades of Old Aberdeen, and their respective successors in their respective offices, to be governors, trustees, and managers of the said hospital, "for the admission of the said ten women as above described, and supplying any vacancy in the said number which may happen by death, resignation, or dismissal or otherwise, so as the full number of five widows and five maiden daughters may be always in the hospital," and laid down certain regulations for the meetings of the said governors, trustees, and managers, and for the audit of the accounts of the hospital. The deed further contained a declaration "that the dividends arising on £500, part of the foresaid sum of £5500, shall be applied in repairs of the house so built by me after the expiry of the five years during which the builder is obliged to keep the same in repair, and for any accidental expenses that may occur, such as repairs of furniture, bibles, and medicines for the women, and stationery ware for the governors and trustees; and if there is any more than is sufficient for these purposes, for payment of a small gratuity to any one of the ten women whom the said governors and trustees may think fit to appoint as matron of the hospital, my meaning being, that the dividends arising on the other £5000 hereby transferred shall be applied solely towards the clothing and victualling of the women, and that no more than ten women shall ever be admitted upon this foundation unless a proper provision is made for an additional number either by myself or some of my family."

The said David Mitchell, also of date August 19, 1801, executed certain regulations for the said hospital, and these regulations, along with the deed of mortification and two letters from the testator to the said Dr Roderick M'Leod containing explanations and additions to the said deed of mortification and regulations, constituted the powers of the governors, trustees, and managers.

On 16th July 1901 the then acting governors, trustees, and managers of the said Mitchell's Hospital presented a petition to the Court, in which they made the following statements:—"The income on the funds mortified by the founder (other than the portion thereof set apart for repairs and accidental expenses) was originally £150, and was designed by the founder to provide clothing and victualling for ten women, or an expense of £15 each. Since the year 1866 there have never been ten inmates at any one time in the hospital, and while the cost per head has largely exceeded that contemplated by the founder, the funds have accumulated, and amounted on 28th January 1901, the close of the last year's accounts, to £8000 2¾ per cent. consols, together with a cash balance of £59, 14s. The repair fund at said date consisted of £825, 19s. 5d. 2¾ per cent. consols, and a cash balance of £100, 15s. 6½d.

"The total number of persons who have enjoyed the advantages of the foundation since the year 1851 has been thirty-two.

Not one of these has been of the name either of Mitchell or Forbes, and one or two have not been daughters but granddaughters of burgesses of Old Aberdeen, and therefore not strictly within the terms of the deed of mortification. The number of inmates at present in the hospital is five, which is about the average of the last ten years. The cost per inmate was in 1900 £32, 4s. 2d., which is the smallest for several years. It has varied from £17, 18s. 8¾d. in 1852, when the number of inmates was ten, to £51, 13s. 10d. in 1877, when the number was four. The average for the whole period, from 1851 to 1900 inclusive, has been £29, 4s. 2d., and the annual expenditure has on several occasions, even with a diminished number of inmates, exceeded the annual income. As some of the annual expenses do not vary with the number of inmates, the cost per inmate becomes greater as the number of inmates diminishes. The present income of the general fund is about £220, but this will be reduced in the year 1903 to about £200 by the reduction which will then take place in the rate of interest on consols to 2½ per cent.

"In terms of the deed of mortification every applicant for admission to the hospital must be the widow or maiden daughter of a gentleman burgess, a merchant burgess, or a trade burgess of Old Aberdeen. The first class are few in number, and no candidates can be expected for the hospital from that class. The members of the Merchant Society and of the Incorporated Trades of Old Aberdeen furnish the second and third classes. Neither of these bodies are now electing new members, and consequently the number of eligible candidates for the hospital is diminishing and must in course of time cease. By the Aberdeen Corporation Act 1891 the burgh of Old Aberdeen has been merged in the city of Aberdeen, and consequently no one can now become a burgess of Old Aberdeen. It appears, therefore, to the petitioners that they are even less likely in the future than in the past to be able to fill the hospital with persons qualified under the deed, as year by year the number of such persons is diminishing. Advertisement was made for candidates for admission in the local newspapers in the month of May 1895, in the month of February 1896, and in the month of April 1897, but only one qualified candidate presented herself. The hospital is well known to all the inhabitants of Old Aberdeen, and the general conditions of admission are also well known. More frequent advertisement would not therefore, in the petitioners' opinion, have brought forward any other candidates. It appears from the minute-books of the hospital that it has seldom been by advertisement that candidates have been found. The petitioners are also aware that there are persons qualified and suitable to enter the hospital who refrain from applying for admission."

"Consideration of the foregoing facts has led the petitioners to the conclusion—(1) that the revenue of the funds, even as at present, is insufficient to provide board and lodging with comfort for ten inmates, the number contemplated by the founder; (2) that from those strictly eligible under the founder's deed a sufficient number of inmates cannot be got to exhaust the available income; (3) that owing to the small number of eligible inmates available, the average cost of maintaining each inmate is beyond what is reasonable; and (4) that in order to the beneficial application of the funds it is necessary to extend the eligibility, and either obtain as many inmates for the hospital as the funds will provide for, or abolish the hospital and apply the funds in the shape of annuities. The value of the present hospital buildings and site is about £300."

The petitioners therefore craved the Court to sanction a revised scheme for the administration of the hospital, and suggested that such a scheme should give them (1) power to admit to the benefits of the hospital when a vacancy occurred, and no person fulfilling the conditions of admission laid down in the founder's deed applied for admission, members of certain classes closely analogous to those pointed out by the founder; (2) power to apply the surplus revenue at the end of each year, or such part as should be thought fit, in grants to persons who were eligible for admission to the hospital and were in necessitous circumstances, but who for some personal reason preferred to live in their own homes; and (3) if at a future date the petitioners were of opinion that the hospital in view of the difficulty of obtaining suitable inmates or the excessive cost of keeping it up for a few, or for other causes, should be discontinued, and that more benefit would be derived from the funds if they were all distributed by way of annuities to those entitled thereto, power to sell the hospital and invest the proceeds as part of the trust funds, and to distribute the annual revenue of the whole trust funds in grants to persons who were eligible for admission to the hospital and were in necessitous circumstances.

On 18th October 1901 the Court remitted to Mr Ewan Macpherson, Advocate, to report upon the regularity of the procedure in the petition and upon any scheme that might be lodged in process. His report, dated 18th February 1892, had appended to it a detailed scheme with clauses giving the powers suggested by the petitioners, and also a clause giving power to invest the trust funds in any investment upon which gratuitous trustees are entitled to invest.

The clause giving the first power suggested by the petitioners was in these terms:—"When the number of persons in the hospital falls below ten, and no person fulfilling the conditions of admission laid down in the founder's deed applies for admission, the Governors, if in their discretion the yearly income at their disposal is sufficient to support such full number, shall have power to admit to the benefit of the hospital so as to fill up the number of ten, such applicants as fulfil in other respects the conditions laid down by the founder as

to their state of health, age, and moral character, and fall within one of the following classes—(1) Widowed daughters and granddaughters of burgesses, or widows of sons of burgesses; (2) the widows or maiden daughters of residenters within the boundaries of what was formerly the burgh of Old Aberdeen, as defined in the interlocutor pronounced by the Sheriff-Substitute of Aberdeenshire in the petition presented to him by the Provost, Magistrates, and Town Council of Old Aberdeen, in terms of the Act 13 and 14 Vict. cap. 33, dated and recorded in the Sheriff-Court Books of Aberdeenshire, 30th March 1860, the widows or maiden daughters of those who have resided all their lives in Old Aberdeen to have a prior claim, and no one to claim in this class unless her husband or father has lived at least seven years in Old Aberdeen; and (3) widows or maidens who have lived in Old Aberdeen all their lives, or for at least seven years prior to the claim. The inmates shall be chosen from applicants included in these classes in the order named, and shall in all respects receive the same rights and benefits as inmates of the hospital who fulfil the conditions of admission laid down by the founder."

At the hearing, the Court having expressed views adverse to the clauses granting the other powers suggested and the wider powers of investment, these clauses were struck out.

Counsel for the petitioners referred to the *Governors of John Watt's Hospital*, May 27, 1893, 20 R. 729, 30 S.L.R. 664.

The petitioners also desired certain alterations the constitution of the governing body, but it is not considered necessary to report that branch of the case.

LORD PRESIDENT—It is easy to see how this petition has become necessary in view of the changes which have made some of the provisions of the deed of mortification inappropriate to modern conditions.

The first point which we have to consider relates to the constitution of the governing body, and the second to the qualifications of the beneficiaries. It seems to me that the proposals made in regard to both these points are very judicious, and that we need not have any difficulty in sanctioning them. The great difficulty in obtaining objects of the charity literally satisfying the definition in the deed of mortification has been proved by long experience. Indeed, it has not been possible to get the number requisite to fill the hospital and exhaust the annual income of the fund; and it is very proper in such a case to come to this Court and ask that the benefits of the charity should be extended to other persons who most nearly satisfy the definition. There have been other cases very analogous to this, and upon these points it is not necessary to say anything more.

The proposal in article 6 that the Governors should be empowered to make grants to persons eligible for admission to the hospital, but who preferred to live in their own homes, was not in accordance with the intention of the founder, and I am afraid that if that power was sanctioned it might tend to prevent people from entering the hospital, and lead to their endeavouring to obtain such grants while they continued to live at home. I think that this power should not be granted—at all events at present.

The next proposal is that in certain events the Governors should be empowered to discontinue and sell the hospital, and to make money grants to persons who would have been eligible to become inmates of it. This is a very serious proposal, because it would be at variance with what the founder intended should be an essential condition, viz., that the charity should be administered in the particular way which he specified—by a hospital. This is not a case in regard to which it can be said that the method of administration directed by the founders has manifestly failed. The contemplation of this petition is that the charity should continue—for the present, at all events—to be administered through the instrumentality of the hospital, and that it is only in the event of a state of things arising which would make it impossible or very disadvantageous to continue that method of administration that the property should be sold and a different mode of administration of the funds should be adopted. If this petition were kept in Court it would be requisite that a fresh statement should be made of the condition of things which brought about the necessity which is not alleged to exist now. That would not be consistent with our practice, and I do not think that we should sanction this proposal.

The only other point relates to the power of investment. There is no doubt the powers of investment usually given now in trust-deeds are much larger than those which it was the practice to confer at the beginning of the last century; but the testator has unequivocally specified the kind of security upon which alone he desired that his money should be invested—on the credit of the country—he has not even sanctioned an investment on heritable security. Where a testator has thus chosen to define the class or classes of security in which alone he would be satisfied to have his money invested, it seems to me that except in circumstances amounting to necessity we would not be warranted in sanctioning other investments.

The best course will probably be for us to remit to the reporter to make such alterations upon the proposed scheme as will give effect to the views now expressed, if your Lordships concur in them.

LORD ADAM—I concur.

LORD M'LAREN—I am of the same opinion. We have been assisted here by what I think an excellent report by Mr Macpherson, in which he says he has studied the case with reference to the conditions stated in Lord Westbury's leading opinion in the case of *Clephane* v. *The Magistrates of Edinburgh*. Now, the principle enunciated by Lord Westbury in that case was, that we are "to look to the charity that is intended to be created—that is to say, the benefit of the beneficiary—and to distin-

guish between the charity and the means which are directed to the attainment of that charity." His Lordship simply says that the courts of equity—and in this jurisdiction he recognises no distinction between the English and the Scottish courts of equity—"The courts of equity have always exercised the power of varying the means of carrying out the charity from time to time according as by that variation they can secure more effectually the great object of the charity, namely, the benefit of the beneficiary." In pursuance of these rules laid down in that case the House of Lords directed that a sum of money which had been obtained as compensation under the Lands Clauses Act for an hospital was not to be applied to rebuilding the hospital, but to enlarging the pecuniary benefits of the endowment which should be continued on the ground that that would be a more advantageous application of the funds. Following that decision a case was stated to us in which an endowment originally intended for the support of the inmates of the house was applied to the more beneficial carrying out of the charity in the establishment of outdoor pensioners. I only refer to this illustration of the principle laid down by Lord Westbury for the purpose of saying that though we refuse that part of the prayer of the petition which relates to the sale of the building, we only do so because it does not appear that the necessity for such a radical change on the administration has yet arisen.

The other suggestions seem to be all improvements in themselves—the alteration of the constitution of the governing body, and the enlargement of the class of persons by whom the benefit is to be received. Now, it would require a very strong case to admit a different class of persons from those whom the testator had intended to benefit. Probably nothing short of the entire failure of that class would be sufficient to justify such a change. But in this case I do not consider that we are altering the class, because it is evident from the scope of the scheme of the endowment that the persons intended to be benefited were those ladies who had been dependent on persons occupying the position of merchants or burgesses of Old Aberdeen, and the fund being only capable of maintaining ten persons per annum, the preference was naturally given to those according to their degree and claim on deceased burgesses. As there is a difficulty in finding always a sufficient number of applicants under that class, I think we are only carrying out the main purpose of the charity by admitting daughters and granddaughters who are not within the words but who are certainly within the spirit of the intention of the testator.

I agree with your Lordships that it has not been shown that there is a necessity for interfering with the truster's directions regarding the mode of investment of his funds, for apparently the income of the endowment at present is adequate to the maintenance of the ladies who have actually applied.

And in regard to the sale, I concur in thinking that it must be reserved for future decision, because it would not be consistent with the mode of exercising our discretion that we should anticipate. What is now apparent is that through a change of circumstances it is no longer possible to give full effect to the charitable intention in accordance with the manner which the founder contemplated. At present it is admitted that a certain number of beneficiaries have been found, and there is a great deal to say in favour of the founder's plan of entertaining the ladies in one family where the money can be economically applied.

I am therefore of opinion that *hoc statu* we should grant the petition in accordance with the views which have been expressed.

LORD KINNEAR—I concur.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the petition with Mr Macpherson's report, and heard counsel thereon, Approve of the said scheme annexed to said report as amended at the bar: Appoint said amended scheme to be the scheme for the future administration of the trust, and find the petitioners entitled to charge against the trust estate the expenses of the application as the same shall be taxed by the Auditor, and decern."

Counsel for the Petitioners—Dove Wilson. Agent—Arthur B. Paterson, W.S.

Saturday, March 15.

SECOND DIVISION.

LOWSON *v.* LOWSON.

Process—Motion to Sist Mandatory—Respondent in Petition for Discharge of Judicial Factor Reclaiming against Interlocutor Granting Discharge.

In a petition for discharge of a judicial factor objections were lodged by a beneficiary upon the trust estate who was resident in Russia. These objections having been repelled by the Lord Ordinary, and the objector having reclaimed, the Court upon the motion of the petitioners *ordained* the reclaimer to sist a mandatory.

In a petition by J. A. Lowson and others for appointment of a new judicial factor on the estate of the deceased Andrew Lowson, and for the discharge of a deceased factor, answers were lodged for A. B. Lowson, who was one of the beneficiaries on the trust estate. After various procedure, including three reports by the Accountant of Court, who reported in favour of the petition, and after hearing counsel upon objections for A. B. Lowson, who maintained that the judicial factor had not fully accounted for the whole funds in his hands, the Lord Ordinary (PEARSON) on 1st March 1902 repelled the objections and discharged the deceased factor.