Mar. 22, 1826. and where there is no reason to doubt upon the subject, I think these are cases in which your Lordships cannot do justice to the parties, without you take care, as far as you can, that the respondent, who comes to support the judgment, should not be put to any unnecessary expense. I should therefore move your Lordships to affirm these interlocutors, and to affirm them with costs.

Appellant's Authorities.—3 Ersk. 6. 20. 2 Ersk. 8. 32. 33—4 Ersk. 1. 11. 12, 13. Mack's Ob. on Statute, 1469. c. 37.—2 Bankton, 5. 7, 8.—4 Stair, 23. 10. 14—2. St. 5—3. St. 2. 13—4. St. 23.—Kames' Law Tracts, No. 4. 2 Ross's Lectures, p. 320 et seq. and 392 et seq.—Kilkerran, p. 405.—Lady Kilhead, Nov.' 2, 1748 (2785.) Webster, July 13, 1780 (2902.) Parkers, Feb. 5, 1783 (2868.) Tullis *v.* White, June 18, 1817, (F. C.) 2 Bell, p. 66 and 69, notes.

Respondent's Authorities.—3 Ersk. 6. 20—4 Ersk. 1, 2. 12.—2 Bell, 65, 66. 69. 2 Ross's Lectures, p. 442. 2 Bankton, 5. 7.—Hope's Major Practics, voce poinding ground, 28th June 1622. Gray, Mar. 24, 1626 (565.) Lady Mary Bruce, Feb. 15, 1707 (14092.)

SPOTTISWOOD and ROBERTSON—J. RICHARDSON, Solicitors.

No. 11. W. HILL and Others, Appellants.—*Warren—Robertson.*
Rev. J. BURNS and Others, Respondents.—*Keay—Menzies.*

Testament—Trust—Implied Will—Mortification.—Held (affirming the judgment of the Court of Session) in a question with the next of kin, That a bequest to trustees was valid, whereby a testatrix appointed 'the residue of her estate to be applied by 'my said trustees and their foresaids, in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow or neighbourhood thereof; and that in such way and manner, and in such proportions of 'the principal or capital, or of the interest or annual proceeds of the sums so to 'be appropriated, as to my said trustees and their foresaids shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the sole 'judges of the appropriation of said residue for the purposes aforesaid.'

April 14, 1826.

1st DIVISION. Lord Meadowbank.

ALEXANDER HOOD, of the Island of Mountserrat, after bequeathing certain legacies, conveyed the residue of his estate, real and personal, amounting to about £30,000, to his sister, Mary Hood, of Glasgow, and her heirs for ever.

Thereafter she executed a trust-settlement in favour of the respondents as trustees, in which, after leaving legacies to different individuals, she appointed the residue of her estate to be applied to charitable purposes, in these terms:—'I appoint the 'residue of my said estate to be applied by my said trustees and 'their foresaids in aid of the institutions for charitable and benevolent purposes, established, or to be established in the city

'of Glasgow, or neighbourhood thereof; and that in such way April 14, 1826.
'and manner, and in such proportions of the principal or capi-
'tal, or of the interest or annual proceeds of the sums so to be
'appropriated, as to my said trustees and their foresaids shall
'seem proper: Declaring, as I hereby expressly provide and de-
'clare, that they shall be the sole judges of the appropriation of
'the said residue for the purposes aforesaid. Moreover, for the
'ends and purposes herein before written, I hereby specially
'authorise my said trustees and the acceptors or acceptor, sur-
'vivors or survivor of them, from time to time, by a writing
'under their or his hand, to assume any other person or persons
'they shall think fit to be trustees or trustee in the room of such
'of the trustees before named as shall not accept or who shall
'decease; and it is hereby declared, that the person or persons
'so assumed, shall have the same powers, and be entitled to
'the same exemptions, as are conferred on the trustees herein
'named.'

On the death of Mary Hood, the trustees accepted and proceeded to act under her will, by paying the debts and legacies—appropriating nearly £6000 to different charitable and benevolent institutions in Glasgow and the neighbourhood,—and establishing there with the residue, (amounting to £10,000 3 per cent stock,) a charitable institution, (which they named "Hood's Charitable Institution,") for the relief of unmarried females in indigent circumstances.

Some years afterwards Hill and others, Mary Hood's nearest of kin, raised an action of declarator, in which they called the trustees as defenders, concluding that it should be found that 'the clause above quoted 'is not definite and certain in its ob-
'ject; is altogether vague, perplexed, inexplicable, and inopera-
'tive, and ought to be found and declared as pro non scriptis, and
'to be held as an ineffectual conveyance of the residue of the
'means and estate of the said Mary Hood, and that the said re-
'sidue forms a part of the intestate property and succession of
'the said Mary Hood.' At the same time they raised an action of multiplepoinding in name of the trustees, who in defence pleaded that the clause was definite and certain in its objects:
'1st, By being limited to institutions for charitable and bene-
'volent purposes established, or to be established, in the city of
'Glasgow or neighbourhood thereof; and, 2d, By being limited
'to such institutions as to the trustees should seem proper.' The Lord Ordinary conjoined these actions, and thereafter, on advising memorials, assoilzied the defenders from the conclusions of

April 14, 1826. the action, but found no expenses due to either party. This judgment proceeded on the ground as explained in a note, 'that 'the purposes of the deed of settlement are sufficiently expressed 'in the deed, that even if there were admitted to be some am- 'biguity in certain of the terms employed, it is sufficiently cor- 'rected by the full powers conferred on the trustees.' To this interlocutor the Court, on the 14th of December 1824, adhered on the merits, but directed that the expenses incurred by both parties in the discussion should be defrayed out of the trust fund.*

Lord Hermand.—The principal objection to this will is, that it is not sufficiently specific; but as full powers are bestowed on the trustees, and a discretion is conferred on them as to the disposal of the funds, they have accordingly felt no difficulty in exercising them, and they appear to have acted agreeably to the will of the deceased.

Lord Balgray.—I certainly do not like the way in which this will was made, but that is not before us. The sole question is, whether it be in the power of a testator to put his estate at the disposal of another, and that disposal to be regulated by the will of that other alone; I think it is so.

Lord Gillies.—I have great doubts on this question, and I do not conceive that in deciding it, we are bound by the civil law. There is here a power given to assume other trustees, and to those assumed, to assume others. But who is to call them to account? There is no particular person or corporation to whom they are bound to give the proceeds. They may give them to their own friends, or they may apply them to their own use, for they do not appear to be under any control. Now look at our own decisions and you will see that such deeds have not been supported. In particular, in the case of Dick reported by Lord Kames, where there was not so ample a field as here, the deed was found ineffectual, and the same appears to be the law of England. But here the deed was obtained by undue influence, and expresses not so much the will of Miss Hood, as of the trustees by whose advice it was made.

Lord President.—I have no affection for deeds of this description, nor do I admire the way in which this one was concocted, but I am afraid that we are bound to give effect to it. By the Roman law, legacies left alieno arbitrio were sustained, and the same is the rule of our own law. See the case of Brown in 1762,

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* See 3 Shaw and Dunlop, No. 233.

and Buchanan in 1806. In the former of these cases, a trust in favour of a third party, appointing the funds of the estate 'to 'be divided among my poorest friends and relations whom I may 'have forgot herein,' was sustained; and I cannot, in point of principle, draw any distinction between such a clause and the one before us. Indeed, if you look into any of the wills founding hospitals, you will find that they are almost all similar to the present one. I am therefore afraid that we must adhere. I, however, doubt extremely the power of the trustees to found the institution which they have done. They have no authority to found a perpetual establishment. The object of the trust was to distribute the funds among existing institutions;—but that is not before us, and I do not see that the relations have any interest to object to it. April 14, 1826.

Lord Balgray.—Perhaps they may have no interest in that respect, but they have a title vi sanguinis to call the trustees to account.

Lord Gillies.—I rather think that the next of kin have such a title, but they can have no interest to pursue.

Lord President.—We sustained the title of the executor in the case of Campbell and M'Intyre.*

Hill and others appealed.

Appellants.—The trust-deed does not express the will of the deceased, but of the trustees. The destination is uncertain and vague. It presents no specific or distinct object—refers to no individual or fixed body corporate—the place and time are indefinite, and the purpose inextricable. This uncertainty is not removed by the powers vested in the trustees. The delegation of the will of the deceased is one of the strongest circumstances against the legality of the bequest. There is no authority in the law of Scotland for holding generally that a bequest may be made arbitrio tertii; or that effect can be given to a delegated trust uncertain in its object, without specification of definite powers, or rule of conduct. If the trustees attempt to act without rules, then they make, what a Court of Justice could not pretend to do, a will for the testatrix. Besides, if the deed be sustained, there will be no party to call the trustees to account, if they misapply or betray their trust; so that, in truth, the trust is nothing but a trust without a beneficiary, which is absurd.

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* See 3 Shaw and Dunlop, No. 93.

April 14, 1826. *Respondents.*—The bequest is not vague and inextricable. It has already been carried into effect as to the greatest proportion of the funds. The ulterior views of the trustees are in consistency with the charitable views of the deceased; and if not, that would not better the appellants, as there are innumerable existing charities to which the residue of the funds could be applied. There cannot be a doubt as to the legal construction of the word 'charitable,' whatever there might be as to the word 'benevolent.' If there were any obscurity, the ambiguous expressions would be interpreted according to the presumed intention of the deceased; and what might be absolutely unintelligible, would be held pro non scriptis. By the law of Scotland, a legacy may be left in arbitrio tertii, and consequently it is competent for a testator to make a bequest generally for purposes of a certain kind—vesting the trustees with discretionary power to carry them into execution. Those here given fully authorized the trustees to act in every respect as they have done. If the trustees incorrectly discharged the duties of the trust, or betrayed them, they would be accountable to the Court of Session, the Lord Advocate, the heir or next of kin of the deceased, the Magistrates of Glasgow, or any of the established charitable institutions in Glasgow.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, and that the costs of both parties be paid out of the trust-funds.

Lord Gifford.—My Lords, the question involved in this appeal, is as to the validity of a legacy, bequeathed by Miss Hood, for charitable purposes. It appears that this Miss Mary Hood, having acquired a large fortune by her brother—she having been before that in low circumstances—in the month of December 1817, made a settlement, by which she gave, granted, assigned, and disponed, in favour of the respondents as trustees, all her property, of whatever description, in trust,—in the first place, that they should pay her funeral expenses and her debts; and, in the next place, that they should pay sundry legacies, to the amount of nearly £9000, to certain of her friends and relations; and, in the third place, she appointed the residue of her estate to be applied, by her trustees and her foresaids, in aid of the institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow, and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated, as to the trustees should seem proper,—declaring, as she thereby expressly provided and declared, that they should be the sole judges of the appropriation of the residue for the purposes aforesaid; and moreover, for the ends and pur-

poses before written, she thereby specially authorised her trustees, and April 14, 1826.
the acceptors or acceptor, survivors or survivor of them, from time to time, by a writing under their or his hand, to assume any other person or persons, as they should think fit, to be trustees or trustee, in the room of such of the trustees before named as should not accept or should decease; and it was thereby declared, that the person or persons so assumed should have the same powers, and be entitled to the same exemptions, as were conferred on the trustees therein named.

My Lords, it appears that the rest of this lady's property amounted to a very considerable sum. About a year after executing this deed, namely, in the month of December 1818, this lady died, and the respondents, appointed by her as her trustees, accepted of the trust, and proceeded to act under it. They discharged the debts, and paid the legacies to the different legatees, and then they applied a proportion of the rest for charitable purposes in the manner directed. The matter thus remained until the month of March 1823, when the appellants, who are related to the deceased, raised an action, in order to have it declared that the clause of the trust settlement, containing the devise for charitable purposes, was not definite and certain in its objects; was altogether vague, perplexed, inexplicable, and inoperative, and ought to be found and declared as pro non scriptis, and to be held an ineffectual conveyance of the residue of the means and estate of Miss Hood; and that the residue formed a part of her intestate property and succession.

To this summons defences were lodged, which shortly stated the material facts of the case: denied that the clause sought to be reduced was either vague, perplexed, inexplicable, or inoperative; and insisted that its objects were definite and certain, for two reasons; in the first place, by being limited to institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow, or the neighbourhood thereof; and, in the second place, by being limited to such institutions as to the defenders should seem proper.—And then the appellants raised an action of multiplepoinding, in the name of the respondents, in which the appellants themselves were nominally called as defenders.

My Lords, upon this the Lord Ordinary, in the month of May 1823, pronounced an interlocutor, conjoining the original process with the process of multiplepoinding, at the instance of the trustees of Miss Hood, and finding the pursuer only liable in once and single payment, but in respect, it was stated, that the summons was raised in the name of the trustees, without their authority, and contained conclusions of declarator which they did not desire, reserved all objections to the competency of the conclusions of declarator being included in the summons; and in the conjoined processes, appointed the parties to give in mutual memorials on the whole cause to the Lord Ordinary, and that quam primum. This cause having been thereafter advised, the Lord Ordinary pronounced this interlocutor: 'The Lord Ordinary having advised the memorials for the 'parties, assoilzies the defenders from the conclusion of the action, but 'finds no expenses due to either parties, and decerns.'—The effect, there-

April 14, 1826. fore, of that interlocutor, was to establish the validity of those legacies and bequests.

To this judgment the Lord Ordinary, and thereafter the Inner-House, adhered; but with this variation, that the expenses of both parties should be defrayed out of the trust-funds.

My Lords, the case has now been brought by appeal before your Lordships, and the single question involved in the case, thus brought, is, whether this trust-disposition is void for uncertainty? I should have stated, that in the Court below there was at one time an objection raised to this trust-disposition, on the ground that it had been obtained by improper and undue means; but the single question now before the House, as I have already stated to your Lordships, is the legality and validity of this trust-disposition.

Now, my Lords, with respect to the construction of the term 'legacy,' the law of Scotland, like the law of England, adopts a liberal interpretation; and I must state to your Lordships, as the law, what Erskine (3. 9. 14) says: 'Deeds of a testamentary nature are more favoured, and therefore re-
'ceive a more liberal interpretation than obligations inter vivos. Hence a
'testament, to which an impossible condition is adjected, is as effectual as
'a pure testament,—the law considering the condition as not adjected.
'Hence, also, unintelligible expressions in a testament or legacy are held
'pro non scriptis, and what remains plain has full effect; and, in general,
'though the words should be ambiguous, or even improper, they ought to
'be interpreted according to the presumed will of the testator, if by any
'construction they can be brought to it.'—It appears to me, my Lords, that the law of Scotland is more liberal in the interpretation of bequests for charitable purposes than other bequests. However, the great question is, whether this bequest be sufficiently certain with respect to the purposes for which the property is disposed? whether the character is described with sufficient certainty?

Upon this subject, several cases have been cited, which are stated in the printed case, and to which I will shortly call your Lordships' attention, to show the extent to which the Courts of Scotland have gone in the interpretation of instruments of this description.

The first case to which I will call your Lordships' attention is that of Wharrie, mentioned in page 4 of the respondents' case. In that case, which occurred in the year 1760, the testator, after appointing an executor, and leaving a number of legacies to individuals who were named, went on in the following words:—'All which legacies being paid, I ap-
'point and ordain my said executor to remit the surplus of my money to
'Andrew Binnie, in the parish of Graitney, and William Johnstone, in
'Langrigs, to be by them divided equally amongst my relations not here-
'in named.'—Your Lordships perceive, that, by this bequest, the property was given to these trustees, to be applied by them at their discretion among the relations of the testator not therein named. That case came before the Court of Session, doubts being entertained as to the vali-

dity of that bequest;—but it was found, by the ultimate judgment of the Court, 'That James Wharrie is not entitled, as nearest of kin, to claim 'the said residue to the exclusion of the testator's other relations not 'named in the said testament, among whom the trustees shall divide the 'same, and therefore repel the claim of the said James Wharrie in White-'haven, as being contrary to the purview of the testament.'—It is to be remarked, that the Court in this case expressly sustained a discretionary power committed to trustees of distributing a bequest, the objects of which were uncertain, and not specially defined in the settlement. April 14, 1826.

My Lords, in another case, which is the case of Murray *v.* Fleming, in November 1729, a husband disponed his landed estate to his wife in life-rent, and to any of his blood relations she should think most fit to be nominated by a writ under her hand in fee; a nomination was accordingly made after the husband's decease, and the right of the nominee having been objected to, the Lords found that this disposition, granted by the husband to his wife, did sufficiently enable her to nominate persons to succeed to the subjects disponed, and that she having accordingly exercised that power, the persons named by her have right to succeed.

There is another case, Brown's case, in which the testator having nominated trustees 'for managing his affairs, paying off his legacies, &c.,' they were found to have a discretionary power of distributing a legacy left to the testator's poorest friends and relations in the following words: 'And 'the remainder of the proceeds of my said means and estate, &c., to be 'divided amongst my poorest friends and relations whom I may have for-'got herein, or in any other deed to be made by me, in relation hereto, 'at any time during my life.'—My Lords, in that case, an action having been brought, containing a declaratory conclusion, for having it found and declared that a discretionary power was lodged in the trustees of distributing this residue among such of the relations, and in such proportions as they should judge proper, the Lords ultimately found 'that the trustees 'are vested with a discretionary power to divide among the poorest friends 'and relations of the said John Brown, the remainder of his estate, after 'payment of his debts and legacies, and the expenses of executing the 'trust, and that without distinction, whether the said relations are con-'nected by the father or mother's side, and also without distinction of de-'gree.'

My Lords, however, there is one case, which approaches much more nearly to the present in its circumstances, and which was the case of a charitable disposition, in which, as it appears to me, the discretion was made more large than that contained in the present case. An extract from the will of Alexander Horn is printed in the appendix to the respondent's case, in which the testator said this: 'I give and bequeath to my beloved 'wife, Jean Horn, the proceed and income of £3500, share and interest, 'in the old South-sea annuities, according as the same shall become due, 'and payable, during the term of her natural life; and from and after her 'decease, I give and bequeath the said £3500, share or interest, in the

April 14, 1826.

'said old and new South-sea annuities, unto the Right Honourable the 'Lord Provost of the City of Edinburgh, the Bailies, Dean of Guild, and 'Treasurer of the said city, for the time being, and their successors, upon 'the trusts hereafter mentioned, and none other, (that is to say) upon trust, 'that they and their successors do, and shall distribute and pay the an-'nual proceed and income of the said £3500, share or interest in the old 'and new South-sea annuities, to and amongst poor indwellers; that is, 'day labourers residing within the said city of Edinburgh, and in the pa-'rish of Nether Libberton, near the said city, and in Westport, Bristo, and 'Potter-row, only in the parish of Westkirk, also near the said city, such, 'I mean, whose work lies mostly without doors, and consequently may be 'hindered from their labour very often by rain or other inclemency of the 'weather, and such who have not received alms from the parish, or place 'where they, for the time being, shall dwell, in the proportions following.' And then he states in what proportions they should be distributed: 'The 'annual proceed and income of £1500, part thereof to such poor labourers 'as aforesaid, as shall, for the time being, belong to the said city of Edin-'burgh; the annual proceed and income of £1000 more thereof to such 'poor labourers, as aforesaid, as shall, for the time being, belong to the 'said parish of Nether Libberton; and the annual proceed and income of '£1000 residue thereof, to such poor labourers, as aforesaid, as shall, for 'the time being, belong to the Westport, Bristo, and Potterrow, only in 'the said parish of Westkirk; and my will and desire is, that the proceed 'and income of the said £3500, share or interest in the said old or new 'South-sea annuities, shall be annually distributed and paid in the pro-'portions aforesaid, on or before the 25th day of the month of Decem-'ber, yearly, in every year, and that the proceed and income of £1500, 'part thereof, shall be distributed and paid yearly to, and amongst, such 'poor labourers as aforesaid, residing within the said city of Edinburgh, 'by my trustees, the said Lord Provost of Edinburgh, and Bailies, Dean 'of Guild, and Treasurer of the said city, for the time being, as to their 'discretion shall seem meet; and that the proceed and income of the re-'maining £2000 thereof, herein before appointed, for the two out parishes 'or places aforesaid, in equal proportions, shall be paid by my said trus-'tees to the Bailies or Chief Magistrates, for the time being, of each re-'spective parish, and be by them distributed yearly to and among such 'poor labourers as aforesaid.' Now, your Lordships perceive in this case that the objects of the testator's bounty were to be 'poor indwellers,' that is to say, day labourers, residing within the city of Edinburgh, and it was to be left within the discretion of the trustees, amongst what persons of that description they would distribute. My Lords, the only case alluded to as of a contrary description, is a case mentioned in the printed case of the appellant, the case of Dick, and I mention that case, because I learn that great doubt was entertained of the propriety of that decision at that time. My Lords, in the case of Dick, Dame Janet Dick, Lady Prestonfield, executed, December 1751, a settlement of considerable funds on Sir

John Cunningham, her eldest son, and Anne Cunningham, her eldest daughter, and the survivor, as trustees for the end and purposes following; first, the trustees are appointed to add and join together the subjects disponed, so as to make up a total of £6000 sterling, to be lent out upon land or other sufficient security, and then they are appointed to apply and bestow the yearly interest towards the education and support of such of the granter's descendants as should happen to be in want, or stand in need thereof, and that at the discretion of the trustees; and, in the third place, failing descendents, the capital is to return to her nearest heirs. This deed being whimsical and irrational, the trustees, it is stated, refused to accept; that thereupon a process for reducing the settlement was brought by the heir-at-law, in which were called all the descendants in being of Dame Janet Dick. None of them made opposition, but Mrs Ferguson for herself and children. Several grounds of reduction were insisted on, chiefly the non-acceptance of the trustees; and it was urged that the present event is a casus incogitatus, for which there is no provision made in the settlement; the deed is at an end by the common law, for it supposes the acceptance by the trustees, and there are no means prescribed to carry it on independent of them. 'The matter then,' the reporter states, 'resolves into 'this, whether this Court, as a court of equity, ought to supply the de-'fect? The answer to this question is obvious. Seeing the settlement has 'fallen at common law, and that the subjects contained in the settlement 'belong to the nearest heirs, it never can be equitable to deprive them of 'their right, especially to support a whimsical intention in favour of re-'mote descendants, who possibly may never be in want, and never have 'occasion for the money. Secondly, the defender has no proper interest 'to oppose this reduction; the settlement leaves the distribution entirely 'upon the discretion of the trustees, and, therefore, suppose the trustees 'had accepted, no descendant of Dame Janet Dick could have a claim 'in law for any sum out of the trust subject. If so, they cannot, by the 'repudiation of the trustees, qualify any loss or lesion, that can be regarded 'in a court of justice;' and then it is stated, 'The Lords found the deed 'ineffectual by the non-acceptance of the trustees.'

April 14, 1826.

My Lords, if that were the ground of the decision, it does not appear to me to affect the present case. It might be a question after the decisions to which I have referred your Lordships, whether the refusal of the trustees to accept the trust would defeat the legacy? However, it is unnecessary to consider that question in this case, because the trustees have accepted the trust reposed in them. They say, on looking into the pleadings in the cause in the Advocates' Library, it will be seen that the case in a great measure rested upon the uncertainty of the objects of the termination of the trust, and the inexplicable nature of the duties of the trustees; and it is also said, that on the answers there is this note holograph of Lord Kames: 'In answer to the arguments urged here, I put this 'single question, whether, upon the trustees accepting, a process could be 'brought against them by any descendant of the testator, claiming a sum

April 14, 1826. 'out of the product of the trust estate?' Now, he says, in answer to that, 'Certainly not; because the settlement leaves it entirely upon the discre-'tion of the trustees to distribute as they should think proper.' And, therefore, Lord Kames seems to have been of opinion, that if they accepted, the discretion was so entirely vested that it was impossible for any descendant of the testatrix to claim a sum out of the product of the trust estate. 'Then, if so,' he says, 'it follows necessarily that the trustees 'might have conveyed the estate to the heir-at-law;' and then he says, 'they have in effect done the same thing by repudiating the trust. No 'individual is injured, because no individual has a claim at law.' So that, according to this note of Lord Kames, he appears to have been of opinion that the heir-at-law being one of the persons to whom the trustees might have conveyed the estate, the effect of the circumstance of the trustee repudiating the trust was to give the property to the heir-at-law, because, he says, they might have conveyed the estate to the heir-at-law, and they have in effect done so by repudiating the trust; and therefore, he says, no person is injured, because no individual has a claim at law. I cannot conceive that the decision of that case at all breaks in upon the authority which existed in the law of Scotland, in respect of a bequest, leaving it in the discretion of trustees to apply funds for definite objects amongst whom the trustees thought fit to apply those funds. It does not appear to me that that case at all breaks in upon the current of authorities; and I cannot but observe, that Lord Gillies, who appeared to have thought that that case did break in upon the general current of authorities, afterwards, in a subsequent observation made by him, states, that in this case he placed great reliance on the mode in which the will was made, not by herself, but by the trustees—namely, that Miss Hood had been stated to have made this will, not from her free will, but that she had been influenced into that disposition by other persons. Now, that is not the question in this case, as I have stated to your Lordships. The ground on which the action is brought is entirely the supposed invalidity of this legacy, arising from the uncertainty of the objects upon whom this property was to be bestowed. The action is not at all founded upon the supposed undue influence used by these trustees, or any other persons; therefore, I cannot but observe, that the observation made by Lord Gillies takes off very much from the remarks he had previously made upon the only question upon this case, namely, the question of the validity of the disposition.

Now, my Lords, it appears to me, that this being a bequest for charitable purposes, can admit of no doubt as to the nature of the disposition. It is not to be applied by the trustees for charitable purposes generally, but it is expressly stated in what description of charitable purposes these funds shall be bestowed,—for they are to be bestowed in aid of the institutions for charitable and benevolent purposes, established, or to be established, in the city of Glasgow, or neighbourhood thereof: and therefore the discretion of the trustees is limited to such institutions as then existed,

or might be established before the time that it became their duty to apply this fund in the city of Glasgow, or the neighbourhood thereof. It has been argued that the words, 'the neighbourhood thereof,' are very uncertain, and that it is difficult to define the territory round the city of Glasgow to which these words apply; but I apprehend, that if those words should be considered uncertain, if the question should arise, whether any institution was fairly within the meaning of the testatrix's will, as within the neighbourhood of Glasgow, in that view of the case, at all events, the limits of the city of Glasgow are sufficient to impose upon the trustees the duty of applying this fund. April 14, 1826.

My Lords, another difficulty was raised in the course of the argument, namely, that there was no mode by the law of Scotland by which these trustees, if they exercised an undue discretion or abused the trust, could be called to account in the Court of Session. My Lords, I apprehend that, according to the case stated at the bar, no difficulty would occur in compelling these trustees to apply these funds according to the intention of the testatrix, or to call them to account in the Court of Session, for a misapplication of the funds, if they should be found so to misapply them. It is unnecessary now to consider by whom such an action should be raised; but on that difficulty being stated, and observed upon by the Court, my Lord President stated this; 'We found lately in a case of mortifica-'tion in the school of the parish of—I forget the name—of Dr M'In-'tyre, that the executors had a title to pursue;' that is, that they had found there that the trustees might be called to account before the Court of Session, and that the nearest relation had power to interfere. My Lord Gillies admits that they have such a right, but he says, that here they have no interest. It is true, they have no interest in a pecuniary point of view; but I apprehend there are persons who have a sufficient interest in compelling the trustees to perform the trusts reposed in them; and although my Lord Gillies says that they have no interest, I apprehend that he does not mean by that, that they have no interest in the funds. Although they could not come and claim the fund for themselves, they might call the trustees to account, if they neglected their duty, or abused their trust.

My Lords, I have said thus much—though your Lordships may have collected from what I have said, that I mean to propose to your Lordships to affirm the interlocutors,—I have said thus much, because this case, in point of value, is of some importance, and because the principle is important.

My Lords, it has been urged, that if your Lordships should be of opinion that you ought not to alter this interlocutor, still the appellants should have their costs out of this fund, which is devoted to charitable purposes; and it was supposed that your Lordships would be inclined to give them their costs out of this fund, because the Court below had already done so. Considering it as a case in which they were justified in taking the opinion of the Court of Session, and considering that my Lord Gillies does appear to have entertained doubts, rather than actually dis-

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sented from the decision pronounced by the other Judges, and considering that the Court of Session have already given the costs to the appellants out of the fund destined to those charitable purposes, perhaps your Lordships in this case may be induced to follow that course. But, my Lords, I think it right to state to your Lordships, that it ought not to be understood in Scotland, that because funds have been destined for charitable purposes, that therefore it shall be competent to the relations, although no doubt can be entertained with respect to the validity of such a disposition, if they choose to quarrel with that disposition, that it shall follow, as a matter of course, that they shall obtain a decision upon that question, not at their own expense, but at the expense of the fund, and thus diminish that fund which the party who has destined it for charities has intended should be so applied. In this case, however, I think your Lordships may without danger give the appellants their costs, for the reason I have stated, namely, that the question was considered by the Court below of such a nature as to be open to fair litigation on the part of the appellants, and therefore they gave costs; and as one of the learned Judges did entertain some doubt with respect to the decision the other learned Judges pronounced, perhaps your Lordships may be of opinion, that you may venture in this case to give the costs. I have thought it right, at the same time that I state this opinion to your Lordships, to throw out an intimation upon that part of the subject, to prevent it being supposed in Scotland that parties shall be permitted to raise a question of this nature where there can be no doubt on the validity of the disposition, at all events at the expense of the charitable fund. We must require, where such questions are litigated, that unless there be a fair question in the cause, they shall do it at their own expense, and not diminish that fund which the party had destined for charitable purposes. In this case, I feel it my duty to move your Lordships to affirm these interlocutors, but at the same time that the costs of the appellants should be paid out of the charitable fund. I therefore propose, with your Lordships' leave, that the amount of the costs should be made up so as to be introduced into the order of affirmance.

Appellants' Authorties.—Powell on Devises, p. 418. Stair, 125. 3 Ersk. 1. 42. De Cond. ff. L. 52. 32. 68. 28. Voet. 5. 29. 1. Pothier on Test. 8. § 2. 2 Swinburne, 463. 1 Ersk. 9. 8. Dick, Jan. 22, 1758, (7446.) 3 Ersk. 9. 14. Campbell, July 26, 1752, (7440.) Dalziel, March 11, 1756, (16204.) M'Nair, May 18, 1791, (16201.) Balf. Pr. 420. 1633. c. 6. Ross, March 2, 1770, (14948.) Souter, Jan. (No. 2. Ap. Implied Will,) Saunders on Trusts, p. 210. Lovelass on Wills, p. 191. (Ed. 1823.) 9. Vesey, 404. 1. Swanson's Reports, p. 201. 7 Vesey, 51. (Note a.) 10 Vesey, 535. 6 Vesey, 194. 3 Marivale's Reports, 17. 1 Bridgeman's Index, 318. (2d Edit.) Brown's Reports, 517. 7 and 19 Vesey.

Respondents' Authorities.—3 Ersk. 9. 14. Wharrie, July 16, 1760, (6599.) Brown's Trustees, Aug. 3, 1762. (2318.) Murray, Nov. 28, 1729, (4075.) Snodgrass, Dec. 16, 1806. (No. 1. Ap. Service.) M'Kenzie, Feb. 2, 1781, (6602.) 2 Roberts' Law of Wills, p. 454. M'Nair, May 18, 1791, (16210.) Campbell, June 26, 1752, (7441. 14703. 16203.) Hospital of Largo, July 1680, (14722.) Sholee, Jan. 1684. (672.)

King's College of Aberdeen, Feb. 23, 1741. (Elchies voce Trust, No. 11.) Coms. of Berwickshire, June 18, 1678, (1351.) Merchant Company of Edinburgh, Aug. 9, 1765, (5750.) Magistrates and Council of Stirling, July 6, 1774, (5755.) Campbell and M'Intyre, June 12, 1824. (3 Shaw and Dunlop, No. 93.) M'Kenzie's Observations, 1633, c. 6. Town of Edinburgh, July 12, 1694, (9107.) and Nov. 22, 1698. —Fountainhall. April 25, 1826.

SPOTTISWOOD and ROBERTSON, JOHN THOMAS, Solicitors.

C. FERRIER and J. WHITE, Appellants.—*Adam—Robertson.* No. 12.
J. BERRY and his Trustee, Respondents.—*Montague—Keay.*

Bankrupt—Stat. 54. *Geo. III. c.* 137—*Sequestration.*—Held (affirming the judgment of the Court of Session), 1. That an affidavit emitted in relation to a claim on a sequestrated estate, by a bankrupt under sequestration, and not by his trustee, is irregular; and, 2. That after a claim has been rejected, and no complaint made in due time, the party claiming has no right to object to a composition agreed to by the other creditors, but is only entitled to the composition so agreed to in the event of establishing that a debt is due to him.

1ST DIVISION.

Mr BERRY, a merchant in Glasgow, having become bankrupt, his estate was sequestrated, and a trustee chosen. The mode of procedure directed by the statute 54 Geo. III. cap. 137, was followed out; and, at the usual period, the bankrupt, after making offer of a composition of 2s. per pound, amended it by offering 2s. 11d. per pound, payable at fifteen months, and guaranteed by a cautioner. This amended offer the creditors, at a meeting regularly called for the purpose, entertained as reasonable; and thereafter, at a meeting held in terms of the statute, unanimously accepted. A petition was then presented to the Court of Session, praying that the composition might be approved of, the sequestration declared to be at end, the trustee exonered, and the bankrupt discharged. Along with this petition the trustee lodged a report, stating that Berry had complied with the requisites of the statute, and a certificate, that the whole of the creditors who had claimed to be ranked, had, without exception, agreed to accept the offer of composition.

After intimation had been made in usual form, the case was put to the roll, when appearance was entered by Ferrier, trustee on the sequestrated estate of the Scotch Patent Cooperage Company, and by White, one of the partners thereof, who craved