and not from him." Now, it is true that that is a most common mode of altering the order of succession. But it is not the only mode of altering the order of succession. I know no authority for holding that an alteration in the order of succession may not be effected, although the heir in possession does not first convey to himself. Indeed I think the appellants were unable to sustain this argument even in their printed case, because in a subsequent part of it they fall off from that position, and seem substantially to admit that if this deed had been one conveying the estate to trustees in the manner in which it is attempted to be conveyed, with instructions to make it over to another set of heirs, in that case it would have been a deed altering the order of succession. That implies that a conveyance to trustees, though it be not in form an alienation, may still be a step in the alteration of the order of succession, and that it is not merely by a resignation in favour of himself and his heirs that an alteration in the succession can be effected.

This leads us to look at the nature of this deed. The deed is one which is made by the settler for the purpose of settling affairs at his death. It is a deed which conveys to trustees, but it is revocable and not to take effect during his life; it is *mortis causa*—in every sense a gratuitous deed; and that being the nature of the deed, it attempts to put the estates into the hands of trustees, with directions to do certain things. One is to give a liferent to a party who is not entitled to a liferent under the entail. Therefore it is a deed which takes away the succession to the estate from the heirs who were appointed by the entail. That appears to me an incompetent mode of proceeding. It has not the ordinary force of an alienation, nor what I think is meant by "alienation," under the statute of 1685. It is not a *de presenti* conveyance. The party did not divest himself of the estate at all; he did not put it away from him. He did not give it over to any other person, and therefore, though partaking in form of the character of alienation, it is not a conveyance such as is contemplated under the clause of the entail which prohibits alienation, but it is an attempt to alter the order of succession, and it is therefore a contravention of that clause of the entail which effectually prohibits alterations of the order of succession.

I abstain from giving any opinion upon a point which was raised in the argument as to the effect of this erasure. I do not think it necessary to do anything further than to assume that it may be conclusive at all events against "irredeemable alienations." Nor do I give any opinion upon the further point, whether this general conveyance would be effectual to carry an estate which was settled by an entail without any particular mention of the lands. That question may afterwards come before the House, but at present I abstain from expressing any opinion on it.

Mr ANDERSON—My Lords, with respect to costs, your Lordships may remember that there was a great volume which you thought unnecessary and which aggravated the costs very considerably.

LORD CHANCELLOR—The House does not allow any discussion as to costs after judgment has been given.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agents for Appellants—Hunter, Blair, & Cowan, W.S., and Preston Karslake, 4 Regent Street.

Agents for Respondents—Dundas & Wilson, C.S., and Loch & Maclaurin, Westminster.

Thursday—Friday, March 21—22.

BRUCE AND OTHERS *v.* THE PRESBYTERY OF DEER.

(In Court of Session, 3 Macp. 402.)

Legacy—Uncertainty. A legacy of the residue of an estate to the poor of a Presbytery held (aff. C. of S.) not to be void from uncertainty.

This was an appeal against a judgment of the Second Division of the Court of Session in an action of multiplepoinding, raised at the instance of Mr Alexander Bruce, as executor-dative of the deceased James Bruce of Innerquhomery, in the parish of Longside, and county of Aberdeen. The question arose on the effect of the residuary clause in the testator's holograph will, which was in these words:—"The whole of the balance of my property I leave to poor of this prisbitery, to be divided—I mean the interest—by the sessions of the several churches, but to be paid to all Christians except Roman Catholics. Ja. Bruce, Middleton, 7th Oct. 1852."

The next of kin of the deceased claimed the residue of his estate, which amounted to about £60,000, on the ground that the above bequest was void from uncertainty. It was also claimed by the ministers and kirk-sessions of the Presbytery of Deer, within whose bounds the testator lived, and wrote the bequest.

The Lord Ordinary (Kinloch) and the Second Division held that the bequest was not void or ineffectual by reason of uncertainty, but was valid and effectual.

The next of kin appealed.

The ATTORNEY-GENERAL (Sir John Rolt), ANDERSON, Q.C., and SKELTON, for them, argued:—This bequest was void from uncertainty. The law of Scotland was very different from that of England on the subject of charitable bequests, for there was no statute of mortmain in Scotland, nor doctrine of Cyprès, nor a statute of charitable uses. In all the cases hitherto there had been a certainty in the legatees and in the object of the bequest, but here there was neither. The Lord Ordinary, in considering the clause, inserted the definite article before the word "poor;" but even that did not remove the ambiguity. The poor might mean those receiving parish relief, those who received relief from the kirk-sessions, the result of the collections at the kirk doors, and those who were poor but did not receive relief either one way or another. The subsequent words did not remove the uncertainty. The testator spoke of poor of this Presbytery, and it was not known to what Presbytery he belonged, whether to the Free Church, the United Presbyterian Church, or the Established Church——

(The LORD CHANCELLOR—When kirk-sessions are mentioned without any additional descriptions, the words must be taken to mean the kirk-sessions of that Church which is recognised as the Established Church.

Lord CRANWORTH—There are in Scotland parochial rates for the relief of the poor and also church door collections. There is no Presbytery fund, is there, for the same purpose?)

No; the Presbytery have nothing to do with the relief of the poor. If the word "Presbytery" was to be taken as a word of locality, the expression, "poor of this Presbytery," was indefinite, because the bounds of Presbyteries might be varied from time to time. This was not a gift to the Presbytery for the relief of the poor. Farther,

it was impossible to ascertain not only what class of poor was meant to be benefited, but who were to be the administrators, and therefore the House ought to declare this bequest to be void.

Sir R. PALMER, Q.C., GEORGE YOUNG, and JOHN CHEYNE, for the respondents, were not called on, except in regard to the question of costs. In reply, they did not object to the costs of the appellants being paid out of the fund *in medio*.

LORD CHANCELLOR (Chelmsford) — My Lords, this case appears so clear as to render it unnecessary to call upon the counsel for the respondents. The question arises upon a short clause in the will of James Bruce, in these words :—"The whole of the balance of my property I leave to poor of this Presbytery to be divided—I mean the interest—by the sessions of the several churches, but to be paid to all Christians, except Roman Catholics." This is contended, by the next of kin, to be void for uncertainty.

It is quite clear that this was intended as a charitable bequest ; and therefore it must be carried out if the general object of the testator can be ascertained. When it is said that charitable bequests must receive a benignant construction, the meaning is, that when the bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted. And I agree in the remark made by my noble and learned friend, Lord Cranworth, in the case of Morgan *v.* Morris, where he says—"There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated, the Court will find the means of carrying the details into execution."

The bequest in question seems to me to define with sufficient certainty the subject, the objects, and the administrators of the charitable gift. The subject is "the balance," or residue, of the testator's property. This is admitted on the part of the appellants to be perfectly clear ; and the objects are, in my opinion, sufficiently defined. The testator says—"I leave to poor of this Presbytery." Now, the word "poor," in the context, is equivalent, in my opinion, to the expression "the poor," which is commonly used substantively ; but it is not to the poor everywhere, but to the poor "of this Presbytery," which must be taken as a local description. The proper meaning of "Presbytery" is a particular kind of church court. Now, the "poor of this Presbytery," in this sense of the word "Presbytery," is unmeaning ; and therefore it cannot have been intended by the testator to be so used. In popular language it may mean the territory over which the jurisdiction of the church court called the Presbytery extends. Adopting the word in that sense, we have the objects sufficiently defined to be the poor of a particular district. It is said that the bounds of Presbyteries vary from time to time. But at any given time they must have a certain limit, and the expression "the Presbytery of Deer, in the county of Aberdeen," where the testator lived at the time when he made his will, is involved in no uncertainty at all.

Therefore the subject and the objects are, in my opinion, clearly defined ; and we have only now to consider whether the administrators of the charitable gift are also described with sufficient certainty. The words are—"To be divided, I mean the interest—by the sessions of the several churches." That must mean to be distributed —not to be divided, but to be distributed by the kirk-sessions of the several churches. "The sessions of the several churches," without condition or qualification, must, in my opinion, mean "the kirk-sessions of the Established Church." Then the result is, that it is a gift to be administered by the kirk-session, according to the discretion of the kirk-session, amongst Christians of all denominations, except Roman Catholics, within the bounds of the Presbytery. All this appears to be sufficiently clear ; and therefore I submit to your Lordships that the interlocutors appealed against ought to be affirmed, and, as it has been agreed on the other side, the costs are to come out of the estate.

Lord CRANWORTH—My Lords, I have not a single word to add to what my noble and learned friend has said, because I entirely concur in his conclusion, and in the reasoning by which he has arrived at that conclusion. I will only add, that a point on which I have some doubt in this case is, whether this House has not been a little too lax in ordering costs to come out of the estate in cases of this sort, because it rather encourages appeals which I think the persons making those appeals must often, and certainly in the present case must have felt absolutely desperate.

Lord WESTBURY—My Lords, I entirely agree with my noble and learned friends with regard to the objects of this gift. The description must be taken conjunctively ; and if it be so taken, there is no uncertainty about the objects of it. They are the poor of the Presbytery—the poor Christians resident in the Presbytery. Neither is there any want of a fiduciary power to distribute the subject of the gift ; for that fiduciary power of distribution and selection of the objects or recipients is given to the kirk-sessions. There is, therefore, with respect to the gift, everything that is necessary to give it certainty, both with regard to the construction of the gift and also as to its administration.

My Lords, I entirely concur in the last observation which has been made by my noble and learned friend, that when Sir Roundell Palmer, with his usual generosity, has not in terms consented, but has manifested no disinclination that the costs should be given out of the estate, the appellants must consider themselves indebted to the bounty of their opponents for that which certainly they would not have obtained from the strict rules of justice in this House.

Lord COLONSAY—My Lords, I have nothing to add, except to mention that in disposing of this case in the way that has been suggested we are not confining the kirk-sessions of the Presbytery to give the benefit of this fund to the relief of the poor in the legal construction of that expression. The discretion is wider here. We are not dealing with that question at all. That point is not involved here. It may come before your Lordships hereafter for decision upon the definite article "the" as relating to the legal poor. But we are not dealing with that question in the present case.

Lord CRANWORTH—There are no legal poor of the Presbytery.

Interlocutors affirmed : Appeal dismissed, with directions that the costs of the appeal should be paid out of the estate.

Agents for Appellants — Tods, Murray, and Jamieson, W.S., and Bircham, Dalrymple, Drake, & Bircham, Westminster.

Agents for Respondents—Cheyne & Stuart, W.S., and Grahames & Wardlaw, Westminster.