opinion that the interlocutor of the Lord Ordinary assoilzieing the defenders from the conclusion of this action is right, and ought to be adhered to.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK—I have come to the same conclusion, but perhaps not without more difficulty than your Lordships. There are two points on which I have felt difficulty. (1) Could it be said that this was a charitable bequest in the sense that the amount of uncertainty about it would invalidate it were it not a charitable bequest? I think it very necessary to keep this in view, as for my part I think that if this is not within the category of charitable bequests it should be void from uncertainty. (2) Does it make any difference that this was not a bequest by a man of his own funds, but a bequest in exercise of a power to bequeath by testament of a certain sum? In other words, did Mr Henderson validly exercise the power given him by his father?

In regard to the first of these points I have felt some difficulty. There is no doubt phrenology is not a branch of knowledge which is necessarily beneficial to mankind, and in most of the cases quoted the objects benefited had that character. But looking to the position of the science in 1828 and 1832, and the unquestionable amount of support it has received from scientific men, I do not think my doubts on this matter came sufficiently to a point to prevail, and therefore I have come to concur with Lord Ormidale on this point.

On the second point—as to whether the power has been validly exercised—there is also some difficulty. If this had been a power given to Mr Henderson to determine the science to which this money should be applied, and he had directed his trustees to do this instead of doing so himself, I think this would have been an improper exercise of the power. But I have come to be of opinion that this comes under the category of cases where the right conferred is substantially equal to a right of property, and in that view of it it was not *ultra vires* that the testator, after he had defined the science, should give to his trustees the power of determining in what way the science should be made out and how the money should be expended on its behalf.

But I am not to be understood as laying down that an ordinary legacy would not be void on the ground of uncertainty, supposing it were not within the category of charitable bequests, merely because the trustees were to say what the object was to which it was to be applied. I do not think that this could be successfully maintained. But here I am of opinion (1) that this was fairly within the category of charitable bequests, and (2) that the exercise of the power by Mr W. R. Henderson was of the same character as if the property had been his own.

On the other matter of the delay there has been in bringing this case, I, for my part, should have been very slow to interfere with the carrying on of a trust which has been in existence so long without challenge, especially when there was no explanation of the delay. It is not, however, necessary to enter into that, as we have been able to decide the case upon the other grounds.

The Court adhered, finding no expenses payable by the pursuers.

Counsel for Pursuers (Reclaimers)—Asher—Thorburn. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders (Respondents)—M'Laren—J. C. Smith. Agents—Leburn & Henderson, S.S.C.

Tuesday, March 2.

FIRST DIVISION.

[Sheriff of Haddington.

CUMMING AND OTHERS (TENNENT'S TRUSTEES) *v.* MAXWELL.

Lease—Sequestration for Rent—Where Landlord Claimed Deduction owing to Entry not being given at Time Stipulated.

A mansion-house, &c., was let on lease, it being, *inter alia*, stipulated that prior to the term of entry the drainage was to be subjected to the inspection of a mutually chosen party. That party reported that the house would be unhealthy for occupation unless with certain repairs. The result of the execution of the repairs was that the tenant did not get possession until three weeks after the stipulated date. He therefore declined to pay rent unless under deduction therefor. *Held* that sequestration for non-payment was in such circumstances incompetent, and that that diligence having been put in execution, fell to be recalled.

Observed that a tenant is entitled to compensation at the hands of the landlord in respect of any period during which he is kept out of possession of the subject leased, unless that period be of trivial duration; but *opinion* reserved as to the proper way of enforcing such a claim.

Held that when the defender in an action of sequestration for non-payment of rent had, pending the result of the cause, consigned in Court the whole amount of the rent alleged to be due, he was entitled to repayment of it on recall of the sequestration proceedings.

Francis Maxwell of Gribton was tenant of the mansion-house, gardens, &c., of St Germains, Haddingtonshire, for three years from Whitsunday 1878, at the rent of £400 per annum. This was a petition for sequestration brought in the Sheriff Court of Haddingtonshire at the instance of the proprietors Robert Cumming and others, the trustees of the late Mr Tennent of Wellpark Brewery, Glasgow, for payment of the half-year's rent said to be due at Martinmas 1878, and in security of the rent to become due at Whitsunday 1879.

Mr Maxwell's defence was that he did not possess the house for the half-year from Whitsunday 1878. His offer had contained a special stipulation that the water and drains should be put in thorough order at the sight of Dr Stevenson Macadam. On that gentleman's report the drains were found to be in such a bad state that extensive repairs and alterations were necessary, which were not completed till some time after the term of Whitsunday. Until these repairs

were completed he could not take his family to reside in the house, and in respect the petitioners failed to implement their obligation to give him possession at Whitsunday 1878, he was not due a full half-year's rent at Martinmas following.

In answer to that defence the pursuers said that the defender got possession of the coachman's house, a part of the subjects let, prior to Whitsunday; that he was aware when he agreed to take the house that it was let to a tenant whose lease expired at Whitsunday, and during whose occupation the necessary repairs could not be proceeded with; and that the repairs were commenced and concluded as soon as possible. In these circumstances, the pursuers having done all that was possible in order to implement their obligation, the defender was liable for the whole half-year's rent. Moreover, the defender's claim was in reality a claim of damages, which was illiquid, and could not be pleaded against a claim for rent.

The defender had consigned £400, being the whole year's rent sequestrated for.

Parties were allowed a proof of their averments, the purport of which sufficiently appears below, and thereafter the Sheriff-Substitute (SHIRREFF) pronounced this interlocutor:—

"*Haddington, 17th July* 1879.— . . . . . Finds, in point of fact—(1st) That the mansion-house, &c., of St Germains was let to the defender, with entry at 26th May 1878; (2d) That he did not get possession of said mansion-house, &c., till the 8th day of June following: Finds, in point of law, that the pursuers having failed to implement their obligation to give the defender possession of the said mansion-house at the old term of Whitsunday 1878, are not entitled to sequestrate for the half-year's rent alleged to be due at the old term of Martinmas following; therefore, so far as regards the sequestration for the half-year's rent payable at Martinmas 1878, dismisses the petition, and decerns," &c.

On appeal the Sheriff (DAVIDSON) substantially adhered, and subsequently he pronounced a second interlocutor finding that, in so far as the petition prayed for sequestration in security of the half-year's rent to become payable at Whitsunday 1879, the pursuers were not in the circumstances entitled to sequestrate therefor, and dismissing the petition thereanent, and further, granting warrant to the Clerk of Court to pay over to the defender the whole consigned funds, with the interest accrued thereon.

The pursuers appealed to the Court of Session.

Authorities—*Graham* v. *Gordon*, June 16, 1843, 5 D. 1207; *Dods* v. *Fortune*, Feb. 4, 1854, 16 D. 478; *M'Rae* v. *M'Pherson*, Nov. 19, 1843, 6 D. 302; *Drybrough* v. *Drybrough*, May 21, 1874, 1 R. 909; *Guthrie* v. *Shearer*, Nov. 13, 1873, 1 R. 181; *Kilmarnock Gas Co.* v. *Smith*, Nov. 9 1872, 11 Macph. 58.

The respondent's counsel were not called on.

At advising—

LORD PRESIDENT—I so entirely agree with the judgment of the Sheriff that it seems to be quite unnecessary to call for any answer to Mr Jameson's argument.

I think the case may be very shortly stated. The subject let by the pursuers to the defender was the mansion-house of Saint Germains, with the shootings, gardens, and a number of adjuncts of that particular kind, and the whole benefits to be derived by a tenant in the occupation of a subject to be used as a place of residence. It is therefore perfectly clear that if for any period of the lease he was kept out of the house as a place of residence he could not be called upon to pay rent for that period when he ought to have been in occupation.

Now, the matter of fact stands thus. The term of entry was 26th May 1878, but it was impossible for the tenant to take possession at that time consistently with the safety of himself and his family, in consequence of the state in which the drains and other sanitary arrangements of the premises were. The pursuers say that it was not their fault that the premises were in that condition, that they were quite unaware that there was anything wrong with the drains or the water supply, and that they were quite willing to put them right. It may be quite true, as they say, that they were not in fault in the matter, but the subject was in fault. It was in such a condition that nobody could occupy it as a place of residence, and it continued in that condition until the 8th of June. An attempt which was made to obtain possession of the subjects some time before the term in order to make the necessary alterations upon the drains and water supply was frustrated in consequence of the pursuers being on bad terms with the tenant whose lease was about to expire, and with his agent, and so there was no fault on the part of the defender, or attributable to him. But I do not proceed upon that as my ground of judgment. It is sufficient to say that the subject was in fault at the term of entry, and it was so much in fault that it was impossible for the safety of the defender and his family to enter into possession of it until the drains and water supply were put in a proper state of repair.

Now, to use sequestration for the half-year's rent from Whitsunday to Martinmas 1878 in these circumstances appears to me to be altogether unjustifiable. It is a very strong and harsh proceeding in any view of the matter, considering the nature of the subject let and the condition in life of the tenant. But putting that out of the question, it appears to me that the use of sequestration in the circumstances was altogether unjustifiable, because it is quite clear that with a subject in the condition that I have described, and with the impossibility of occupation by the tenant, the full year's rent could not be due. Now, upon that ground I think the Sheriff has done rightly in recalling the sequestration for that half-year's rent, and that being so, the whole foundation for the sequestration for the second half of the current year's rent is taken away, because there is no allegation upon which that can be maintained except that the tenant was in arrear. But there was no arrear of half-a-year's rent in any sense whatever to justify sequestration for the second half-year's rent, because Mr Maxwell had properly refused to pay the demand of the pursuers. On these simple grounds I am for adhering to the interlocutor of the Sheriff.

LORD DEAS—Mr Maxwell's entry here was necessarily postponed, and postponed for a cause that he is not responsible for in any way, and the result of that seems to me, as it does to your Lordship, to be that he was not bound to pay a

full half-year's rent when he was not to get and did not get a full half-year's possession. The case of a tenant not getting possession of the subject let to him for some weeks after the stipulated term of entry does not often arise. The case that arises most frequently is where possession of the subject let is not got at all. The question that arises here, how far the tenant is entitled to a deduction from his rent for not getting possession of the subject for a certain period, is different from a claim of deduction for something that occurs during the possession. For the period that he is kept out of possession he is entitled to some deduction unless that period be of trivial duration. Here it was not so. Mr Maxwell had to leave the house he was in, and as he could not get into Saint Germains, he took what seems to be the only natural course of living with his family in a hotel during that period.

But apart from that altogether, I think it is quite enough that he was entitled to some deduction from that half-year's rent, and that being so, the trustees' use of sequestration for the whole of that half-year's rent was not justifiable. That was resorting to sequestration in order to concuss Mr Maxwell into giving up his claim for deduction for the period he was kept out of possession, and although that claim must be small, I think, as I have already said, that he is entitled to make it, and, that being so, I think the Sheriff was quite right in recalling the sequestration. The fact that, if this had been an ordinary action, the pursuers might have got decree for the rent, does not help them in this petition for sequestration, and I do not think it at all necessary to consider that question. It is enough that this is not a good sequestration, and in recalling it I think the Sheriff was quite right.

But that is not the whole case. Captain Maxwell was so much put about by the position into which Mr Brown, the previous tenant of the mansion-house, had got with these trustees that he deposited in bank the whole year's rent demanded by the pursuers, and that raises the question whether he was not entitled to get it back again. The Sheriff and Sheriff-Substitute have held that the natural consequence of the failure of the pursuers in the sequestration proceedings is that the defender shall get up the consigned money, and although I had some little difficulty about that, I have come to think that they are right, and that the whole consigned money ought to be repaid to the defender. On the whole, therefore, I agree with your Lordship in opinion that the interlocutors of the Sheriff and Sheriff-Substitute ought to be adhered to.

Lord Mure concurred.

Lord Shand—I am of the same opinion. It has been maintained on behalf of the petitioner that, while the respondent stipulated that the water and drains should be put in thorough order by the trustees, he was aware that the house was in the meantime in the hands of another tenant until Whitsunday, and that he was to take possession of the subject let and allow the necessary operations to take place during the period of his tenancy. I am not prepared to say that if the operations on the water and drains had been of a trivial nature, and such as would have occasioned no substantial inconvenience to the tenant, he would not have been bound to submit. But if after the period of entry it turned out that the house could not be made habitable with the tenant in it, then it appears that that was a matter that the landlords should have arranged for before the term of entry, and if knowing that the house was uninhabitable they thought fit to let it without stipulating that the term of entry should be made some weeks later in order to allow these operations to be done, and if they gave entry at Whitsunday, the tenant was clearly entitled to a habitable house at that date. Here he did not get that at the date of entry, and not for sometime thereafter. And that being so, the landlords could not in law or reason have a claim to the full rent when they could not give a full term's possession.

What the tenant's claim should be may be a question. It is a claim in respect he did not get possession of the subject at the time stipulated, but whether it is a claim for a deduction from the rent in proportion to the time for which he was kept out of possession or something more is a question as to which I give no opinion. If the parties desire to get into another litigation, they appear to have good grounds for having that desire gratified. But without saying more, I think it is perfectly clear that the landlords had no right to use sequestration for the full amount of the rent when they could not give a full term's possession of a habitable house, and therefore I concur in the opinion that the interlocutors appealed against should not be disturbed.

The Court adhered.

Counsel for Pursuers (Appellants)—Kinnea—Jameson. Agent—G. M. Wood, S.S.C.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser)—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Friday, March 5.

FIRST DIVISION.

(Before Seven Judges).

[Lord Adam, Ordinary.

AULD *v.* HAY.

Prescription—Possession of a Subject on a Title Conveying "Shares"—Effect of Prescriptive Possession in Clearing up Ambiguous Title.

H had possessed a subject for more than 40 years on a title conveying "All and whole the several shares" of it "belonging to A B and C D." A raised an action to have his own right declared to four seventh shares of the subject in question, and founded on a title prior in date to the other. *Held* (by a Court of seven Judges) that in the circumstances, the title being habile to embrace the whole subjects, the possession was sufficient to exclude all other evidence on the matter.

Observed—per Lord President (Inglis)—that "a charter and sasine containing a description which can be so construed as to embrace an entire subject, though it may also be so construed as to embrace part of it only, if