tions, the expense of precognition, even although in the long last the proof, with a view to which those precognitions were taken, never is held, because the case has got into such a position that they were in good faith in going on and making their preparations for that proof which was necessarily the future of the case if the case went on. It is a perfectly different thing to say that they are to have the expense of finding out what their defence is to be. It may be that there is a little hardship in it. There is always a certain amount of hardship in defending yourself against an unjust claim. But, at the same time, any opposite rule would lead to inexplicable confusion. You must hold that defenders, when they are called into Court by pursuers, know their own defence. In most cases they do. Patent cases are so far peculiar that, though they may know their own defence in the infringement proper, they may not know the whole possibilities of their defence in the way of attacking the pursuers' patent, and as prudent people they may think it is a better means of defending themselves rather to direct a counter-attack against the pursuers' patent than to rely exclusively upon the fact that they had not infringed the patent.

On the whole matter I am, upon the Lord Ordinary's report, in favour of issuing an order to the Auditor that this account should be taxed, in this case, in the same way as if, in this case, an order for proof had been pronounced in so many words at the time the interlocutor of 3rd November was pronounced; but that, beyond that, no distinction can be made between this case, in respect that it is a patent case, and any other.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

"Direct that the Auditor should tax the account of expenses referred to in the same way as if, in this case, an order for proof had been issued at the time the interlocutor of 3rd November 1905 was pronounced; but that, beyond that, no distinction can be made, in respect that it is a patent case, between the present cause and any other; and with this direction remit to the Lord Ordinary to proceed: Find no expenses due to or by either party in connection with this discussion."

Counsel for Pursuers—Macphail—Burn Murdoch. Agents — Mackenzie & Kermack, W.S.

Counsel for Defenders — Sandeman — Christie. Agent—E. I. Findlay, S.S.C.

Wednesday, May 29.

FIRST DIVISION.

[Lord Dundas, Ordinary.

DICK'S TRUSTEES *v.* DICK AND OTHERS.

Succession — Trust — Uncertainty — "Local or Scottish Charitable Institutions and Schemes already Constituted or which may hereafter be Constituted"—Discretion Given to Trustees Named, Assumed, the Heir of the Longest Liver, their Assignees, Trustees "Otherwise Appointed"—Time of Distribution in Absolute Discretion of Trustees.

A truster disponed his whole estate to A, B, C, and D, "and to any other person or persons whom I may hereafter nominate and appoint, or who may be assumed into the trust hereby created, and to the acceptors and survivors, acceptor and survivor of them, the major number of those accepting and surviving and resident in Great Britain from time to time being a quorum, and to the heir of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said trustees or their foresaids," his whole estate; and in the last place he directed—"And believing that I will be carrying out not only my own wishes but also those which inspired my late brother in bestowing the residue of my estate in the form of donations and bequests of a benevolent and charitable nature, I do hereby leave and bequeath the following legacies, payable at such times as my trustees may find convenient, viz.," certain sums to well-known institutions in Glasgow and one in Kilmarnock, *e.g.*, Glasgow Royal Infirmary, "and further, after satisfying the foresaid legacies, I direct my trustees to realise and convert into money the whole residue of my means and estate, but that always at such time or times or from time to time as they may think proper, and always having special regard to" an arrangement for the carrying on of his business by his employees and provisions as to the realisation of investments, "and . . . in the event of there being any residue after providing for such bequests as I may hereafter make I hereby give and grant to my trustees, whether original or assumed or otherwise appointed, full power, and I direct them at any time or times or from time to time as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue or any part or parts thereof to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include these herein-

before named), as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions all as they in their absolute discretion may deem proper." The trustees were given an absolute discretion as to the time and mode of realising investments.

The bequest of residue having been challenged on the ground of uncertainty in respect of (*a*) the class of objects to be benefitted, (*b*) the persons to make the selection in the class, and (*c*) the time for realisation or distribution, *held* that the bequest was not void.

Hill and Others v. *Burns and Others*, April 14, 1826, 2 W. & S. 80, *followed.*

Robbie's Judicial Factor v. *Macrae*, February 4, 1893, 20 R. 358, 30 S.L.R. 411, *distinguished.*

Succession — Trust — Trust-Disposition — Revocation—Revocation of Prior Settlements by Settlement of Later Date.

A testator executed trust-dispositions and settlements in the years 1891, 1899, 1901, and 1902 respectively, which all dealt with the *universitas* of his estate and were similar in scope and character as to containing legacies to relatives, friends, and employees, the aggregate of which increased in the later settlements in proportion to the increase of the testator's wealth. That executed in 1902 ignored the prior settlements, and the total sum required to satisfy the legacies in the four settlements exceeded the residue of the testator's estate. *Held* that the settlement of 1902 superseded those prior to it in date.

James Dick, gutta-percha boot and shoe manufacturer, Glasgow, died on March 7, 1902, leaving a trust-disposition and settlement dated March 4, and registered in the Books of Council and Session March 11, 1902, whereby he conveyed to William Robertson Copland, civil engineer, Glasgow, and others, as trustees thereunder, his whole means and estate for the purposes therein specified. The provisions of the deed so far as necessary are quoted *supra* in rubric. The testator had also executed settlements in 1891, 1899, and 1901, which had not been destroyed, and there was no clause in the trust-disposition and settlement of 1902 revoking prior settlements.

Doubts having arisen as to the validity and effect of the testator's testamentary writings the trustees acting under the settlement of 1902 brought a multiplepoinding in which they themselves claimed. The truster's heirs *in mobilibus* lodged claims, and the various sets of trustees under the prior settlements executed by the truster also lodged claims. The two questions at issue were (1) whether the bequest of residue in the settlement of 1902 was void from uncertainty, and (2) whether the settlement of 1902 revoked the prior settlements, or were these in whole or in part, as might be, to be given effect to.

The *facts* appear from the opinion (*infra*) of the Lord Ordinary (DUNDAS), who on July 28, 1906, pronounced an interlocutor finding (1) that the bequest of residue contained in the trust-disposition and settlement dated March 4, 1902, was not void from uncertainty; (2) that the said settlement operated as a revocation of the prior settlements executed by the truster.

Opinion.—"The fund *in medio* in this action of multiplepoinding is the residue of the estate left by the late James Dick, gutta-percha boot and shoe manufacturer in Glasgow, falling under the directions for disposal of residue contained in his trust-disposition and settlement, dated 4th, and registered in the Books of Council and Session 11th, both days of March 1902. Mr Dick died on 7th March 1902. He was a wealthy man, and the residue in question amounts to over £600,000. The main question for decision is whether or not the bequest of residue contained in the said settlement is void from uncertainty. The testator's heirs *ab intestato* contend in the affirmative, while the validity of the bequest is maintained by the trustees appointed by and acting under the settlement. I have arrived, without much difficulty, at the conclusion that the bequest of residue is not void from uncertainty. The principal points urged by the next-of-kin were—(1) That no sufficiently defined class of objects of the testator's bounty had been prescribed by him; (2) that the persons who might make selections among such objects are not indicated with sufficient precision; and (3) that the testator has not appointed any limit whatever of time within which the estate is to be realised or distributed. I shall deal with these points in their order.

"1. In my opinion the keynote is struck by the testator where, 'in the last place,' he narrates his belief that he would be carrying out, not only his own wishes, but those which inspired his late brother, in bestowing the residue of his estate in the form of donations and bequests 'of a benevolent and charitable character.' It is legitimate, I think, to observe that similar words occur in each of his prior settlements, to which I shall afterwards refer, dated in 1891, 1899, and 1901 respectively. Now, if Mr Dick had simply left it to his trustees to distribute the residue amongst such institutions or purposes 'of a benevolent and charitable character' as they might think proper, it would, I think, have been clear upon authority that the bequest was valid. Thus, for example, in *Hill*, 1826, 2 W. & S. 180, the words used were 'institutions for charitable and benevolent purposes;' in *Miller*, 1837, 2 S. & M. 866, 'such benevolent and charitable purposes as they think proper;' in *Cobb*, 1894, 21 R. 638, 'such useful, benevolent, and charitable institutions,' &c.; and in *Blair*, 1901, 4 Fr. (H.L.) 1, Lord Shand alluded to 'charitable and benevolent purposes' as 'objects of peculiar favour in the law both of Scotland and England.' But the testator, after the above narrative, proceeds with his bequest. He begins by leaving specific legacies, 'payable at such times as my trustees may find it convenient,' to named institutions, nearly all in Glasgow. He goes on to direct his trustees—I quote merely the words descrip-

tive of the objects of his bounty—to pay over or divide the residue 'to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include these hereinbefore named), as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, and in such proportions, all as they in their absolute discretion may deem proper.' I reject as palpably untenable the argument of the next-of-kin that the word 'charitable' must be read in connection only with 'Scottish,' and not with 'local.' In my judgment the meaning is just as if the truster had said 'such charitable institutions and schemes, local or throughout Scotland.' I think that 'local' may fairly be held as equivalent to the words which occurred in *Hill's* case (*cit. sup.*), 'in the city of Glasgow or neighbourhood thereof.' The extension to 'Scottish' institutions and schemes is not, in my opinion, so wide as to involve uncertainty. In several of the cases a bequest was held good though there was no limitation of area at all, *e.g.*, *Kelland*, 1863, 2 Macph. 150; *Crichton*, 1828, 3 W. & S. 329; *Dundas*, 1837, 15 S. 427. Then, counsel for the next-of-kin founded upon the words 'constituted or which may hereafter be constituted,' but these appear to be exactly equivalent to the words in *Hill's* case, 'established or to be established.' I do not think that it can be said that this bequest of residue fails from uncertainty as to the class of 'benevolent and charitable' objects among which a selection may be made. There is no need to enter into an elaborate analysis of the numerous cases upon this branch of the law. At the root of them all lies, I think, the doctrine expressed by Lord Lyndhurst in an often-quoted passage in his judgment in *Crichton's* case (*sup. cit.* at pp. 338-9). His Lordship there states the question, 'Whether it is competent for the disposer, by a deed of this description, to point out particular classes of persons and objects which are intended to be objects of his favour, and then to leave it to an individual, or a body of individuals, after his death, to select out of those classes the particular individuals or the particular objects to whom the bounty of the testator shall be applied?' His answer is, 'I apprehend that, according to the authorities in the law of Scotland, it is quite clear a party has this power.' It is settled law that charitable purposes form a particular class in this conjunction. The cases to which I have referred—and there are many others—afford examples of the latitude with which the scope of this class may be expressed. Perhaps the best illustration is seen in the case of *Dundas* (*sup. cit.*), where a holograph will was sustained which was couched in these brief and simple terms:—'Any money left after paying all expenses I wish may be laid out on charities. I leave and bequeath to A B £200, with power to see this will executed.' The cases in which a charitable bequest has been held void from uncertainty have been those in which the word 'charitable' was coupled disjunctively with some adjective so vague and indeterminate as to leave the trustees absolutely unfettered, and without instruction or direction as to the disposal of the estate, *e.g.*, 'public' (*Blair, sup. cit.*), or 'religious' (*Grimond's Trustees*, 1904, 6 Fr. 285, *rev.* 1905, 7 Fr. (H.L.) 90; *Shaw's Trustees*, 1905, 8 Fr. 52). In the present case no difficulty of that sort appears to arise. I am therefore of opinion that the first of the objections stated by the next-of-kin cannot be sustained.

"2. The second objection is to the effect that the truster has failed to indicate with sufficient precision the persons by whom the selection of beneficiaries is to be made within the class, assuming the latter to be properly designated. In my opinion this objection is quite groundless. The truster by his settlement conveys his whole estate to the trustees whom he names, 'and to any other person or persons whom I may hereafter nominate and appoint, or who may be assumed into the trust hereby created, and to the acceptors and survivors, acceptor and survivor of them . . . and to the heir of the longest liver of them.' In the residue clause the direction is addressed to 'my trustees, original or assumed or otherwise appointed.' There are admittedly at present trustees accepting and acting in the trust. But the next-of-kin maintain that the sentences which I have quoted are uncertain and inept, because the trustees, original and assumed, may die out, and a trustee or trustees may come to be 'otherwise appointed,' *i.e.*, by the Court. Assuming all these events to have occurred, I am unable to appreciate the force of the argument. It seems to me that Mr Dick has provided perfectly sufficient machinery for the carrying out of his trust. Counsel for the next-of-kin founded upon the case of *Robbie's Judicial Factor*, 1893, 20 R. 358; but that case does not, in my judgment, help them in the least. All that it decided was, as I understand, that a judicial factor, who is a nominee and officer of the Court, cannot exercise discretionary powers conferred by a truster upon executors or trustees whom he has himself named or indicated. The dicta in the case seem to be adverse to, and not in favour of, the argument now under consideration.

"3. If my opinion in regard to the two questions with which I have now dealt is well founded, it appears to me to be a matter of subsidiary importance that the truster has given to his trustees wider powers than are usual as to the realisation and distribution of his estate. In many of the cases to which I have referred (*e.g.*, *Dundas, sup. cit.*) there was no limit of time imposed on the trustees at all, and in others (*e.g.*, *Hill*) a very wide, if not absolute, discretion was accorded to them. Moreover, there are manifest reasons why Mr Dick should have wished his trustees to have the greatest possible freedom as to time. He had executed, of even date with his settlement, a deed of arrangement regarding the business of R. & J. Dick, which is referred to in the settlement, and which

bears *in gremio* that it 'shall form part of the settlement of my affairs, as if the said arrangement had been embodied in my trust-disposition and settlement.' A similar document had, it appears, been prepared in relation to his settlements of 1901 and 1899 respectively, while by the settlement of 1891 the trustees were empowered to make a provisional arrangement and agreement with his employees of a somewhat similar character. The scheme of the arrangement is to give certain of Mr Dick's employees, after his death, a prospective interest in his business, and elaborate provision, to which I need not refer in detail, is made for the gradual paying out of his capital. In certain events the trustees are empowered to wind up the business. It appears that nearly £300,000 of capital is at present locked up in this way, and it will probably be a long time before it becomes available for the purposes of Mr Dick's settlement. There is also I am told a large part of the residue of his estate which stands upon investment not capable of rapid realisation in the interests of the estate. These facts must I think be kept in view in considering the powers conferred by Mr Dick upon his trustees. They are directed to realise and convert into money the whole residue, 'but that always at such time or times, and from time to time, as they may think proper, and always having special regard to' the arrangement above referred to 'and to the provisions hereinafter mentioned as to the realisation of my investments, shares, stock, and other assets,' and later on 'at any time or times, or from time to time as and when the said residue, or any part thereof, becomes available as they may deem proper, to pay over or divide the said residue or any part or parts thereof to . . . and that at such time, in such manner, or in such proportions, all as they in their absolute discretion may deem proper.' I do not think that in the circumstances of this estate these directions are so remarkable as to call for comment. It is true, however, that further on in his settlement the truster confers powers of unusual latitude upon his trustees. Thus he gives them 'the fullest powers of and in regard to realisation, investment, administration, management, and division, as if they were beneficial owners.' He declares 'that the time, manner, and propriety of selling and disposing of my means and estate, both heritable and moveable, shall be entirely at the discretion of my said trustees,' and the trustees are authorised to retain existing investments 'for such time or times as they may think fit or indefinitely.' Wide, however, as these powers undoubtedly are, I am unable to see that their latitude ought to lead me to declare the bequest of residue void from uncertainty. The trustees are in the saddle, and there is, if the views which I have expressed are sound, a field of practical work open to them in regard to the residue. Of course any discretionary power may be abused. But this Court has, I apprehend, power to restrain abuses in the administration of trusts, even where wide discretion is conferred upon the trustees by their trust deed—*Pemsel*, 1891, A.C. 531-560; *Hill*, 2 W. & S. 80-91; *Cobb*, 1894, 21 R. 638-640. In my opinion, therefore, the arguments for the next-of-kin must fail, and I shall find that the bequest of this residue is not void from uncertainty.

"Another question then arises which requires to be dealt with. Mr Dick, as I have already mentioned, left three prior settlements, dated respectively in 1891, 1899, and 1901. It is contended by certain of the claimants that these, not having been expressly revoked by the truster, are valid, and must be read along with, and as supplementary of, the settlement of 1902. The chief practical importance of the contention is that, if it is sound, there might be claims for more than one legacy in the case of a good many of the legatees. My opinion is adverse to this argument. Each of the settlements disposes of the *universitas* of Mr Dick's estate; they are all, roughly speaking, similar in general scope and purpose, and all contain legacies to relatives, friends, employees, &c., of the truster, rising higher and higher in aggregate amount as his wealth increased. Now, I think that, unless a contrary intention is evinced, the presumption must be that the latest of these universal settlements impliedly revokes the others. I am not aware of any case where two or more than two settlements were sustained as valid, both or all of which conveyed and disposed of the *universitas*. In *Bertram's Trustees*, 1888, 15 R. 572, the Lord Justice-Clerk observed that 'it is an established rule that, unless there are some elements to the contrary, the second universal settlement revokes the first. They cannot both stand —see *Sibbald's Trustees*, 1871, 9 Macph. 399; *Beattie*, 1861, 23 D. 1163; M'Laren (3rd ed.), vol. i., p. 412 and p. 724. Here, moreover, I think that one sees indications in the language of the settlement of 1902 that the truster meant it to be the sole expression of his testamentary intentions. The declaration that the whole legacies, &c., 'hereinbefore' bequeathed, or which might 'hereafter' be bequeathed by him, should be free of Government duties, seems to point in that direction. So also I think does the declaration that the legacies 'hereinbefore' bequeathed are in addition to any donations or benefits which he had already given or might thereafter give to the parties benefited. Both declarations ignore the existence of any prior and subsisting testamentary writing. Lastly, I was informed from the Bar that the total amount of all the legacies contained in all the four settlements would considerably exceed that of the residue of Mr Dick's estate. I am therefore of opinion that the settlement of 1902 is the only subsisting testamentary writing of the truster.

"I understood that the parties desired no more at this stage than findings upon the points which were argued to me, and these I shall accordingly make. Leave to reclaim will be granted."

The next-of-kin and the trustees under the settlements of 1891, 1899, and 1901, reclaimed.

Argued for the truster's next-of-kin—The provisions as to residue in the deceased's settlement of 1902 were void on account of uncertainty. No point of time was indicated when the trustees could be compelled to pay. They might never decide that the time of payment had come, nor could they be called to account. Their powers were too full, and in this the settlement fell short of what by law was required—*Hill, &c.* v. *Burns, &c.*, April 14, 1826, 2 W. & S. 80, Lord Gifford, at p. 90. This power of delaying payment possessed by them was enlarged by their power to assume new trustees. Such assumed trustees would have no connection with the testator, still less would trustees "otherwise appointed." A judicial factor could not exercise a discretion conferred by a testator—*Robbie's Judicial Factor* v. *Macrae*, February 4, 1893, 20 R. 358, 30 S.L.R. 411. Further, the class indicated in the settlement was too wide—*Shaw's Trustees* v. *Esson's Trustees*, November 2, 1905, 8 F. 52, Lord Stormonth Darling, at p. 54, 43 S.L.R. 21; *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; *Grimond or Macintyre* v. *Grimond's Trustees*, March 6, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466. The bequest in question was equivalent to giving over the estate to the will of another, and so was not the will of the truster. It did not divest the next-of-kin by constituting valid beneficial rights in favour of third parties—*M'Caig* v. *University of Glasgow*, December 18, 1906, 1907 S.C. 231, Lord Kyllachy at p. 242, 44 S.L.R. 198. The bequest was therefore void and the Lord Ordinary's interlocutor should be recalled.

Argued for the trustees under the truster's prior settlements of 1891, 1899, and 1901—If the settlement of 1902 were in any part void, then those prior to it took effect to that extent—*Kirkpatrick's Trustees* v. *Kirkpatrick*, June 23, 1874, 1 R. (H.L.) 37, 11 S.L.R. 717; *Richmond's Trustees* v. *Winton, &c.*, November 25, 1864, 3 Macph. 96. But even though it should be held not to be in any part void, the prior settlements fell, so far as might be, to be given effect to. The Lord Ordinary was wrong in holding that the settlement of 1902 was a disposition of the *universitas* of the truster's estate. The four settlements stood together, none revoking the other, but being practically the same will as to residue.

Argued for the pursuers and respondents, the trustees under the settlement of 1902—The bequest of residue was valid. It clearly conferred power on the trustees to distribute the fund among charities, and that was a valid testamentary act—*Dundas* v. *Dundas*, January 27, 1837, 15 S. 427. In Scotland "charitable purposes" were a sufficiently indicated class from which to select, apart from statute which favoured them in England—*Crichton* v. *Grierson*, July 25, 1828, 3 W. & S. 329, Lord Lyndhurst, p. 338; *M'Lean* v. *Henderson's Trustees*, February 24, 1880, 7 R. 601, 17 S.L.R. 457. As to the alleged uncertainty since assumed trustees might eventually administer the trust, *Robbie's Judicial Factor* v. *Macrae, cit. sup.*, was not in point, since there the factor was appointed by the Court, and the Court would not exercise a discretionary power conferred on trustees if the trust lapsed—*Dick* v. *Ferguson*, 1758, M. 7446. As to the alleged uncertainty in the object, the words "Scottish or local" were limiting words, and as such had no urgent need of clearness—*Blair* v. *Duncan, ut supra*, Lord Davey, at p. 3. The construction of such words fell to the trustees—*Cobb* v. *Cobb's Trustees*, March 9, 1894, 21 R. 638, 31 S.L.R. 506. As to the alleged uncertainty in time, great latitude was necessarily left to the trustees in realising this truster's estate, which from its nature involved a lengthy period for realisation. If there was maladministration, the Court could call the trustees to account—*Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531, Lord Watson, at p. 560; and *Cobb* v. *Cobb's Trustees, ut supra*. Similar bequests had been held valid—*Miller and Others* v. *Black's Trustees*, July 14, 1837, 2 S. & M. 866; *Hill and Others* v. *Burn and Others, ut supra*; and *Kelland, &c.* v. *Douglas, &c.*, November 28, 1863, 2 Macph. 150. The interlocutor of the Lord Ordinary should be affirmed.

LORD PRESIDENT—The amount of money at stake here is very large, and the case would have required, I think, more ample treatment if it had not been for two circumstances. The first is the very careful note of the Lord Ordinary, with whom I entirely agree; and secondly, that this class of question is so amply covered by decisions that I think it would be quite out of place to repeat again in less well-chosen words propositions which have been established by the highest Court in the land.

I think, in spite of the exertions of counsel for the reclaimers, it is quite impossible to distinguish this case in its essential particulars from the case of *Hill, &c.* v. *Burns*, (1826) 2 W. & S. 80, except only in one matter, and that matter has to do with the expression as to the time when the trustees are bound to carry into effect the purposes of the trust.

Now, the clause which deals with that matter is this—"I direct them at any time or times, or from time to time as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue or any part or parts thereof to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include these hereinbefore named) as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions all as they in their absolute discretion may deem proper."

My own view of that clause is that if you read it along with the whole of the settlement, which, of course, one is entitled to do, it is no more in its true construction than giving a very ample discretion as to time to the trustees, but nevertheless leaving

them to carry out the bequest as and when the said residue becomes available.

We cannot leave out of view that one of the arrangements of Mr Dick's settlement was one which contemplated his trustees carrying on for a more or less lengthened period his business, and necessitating the retention in the business in the meantime of a large portion of his capital. If the trustees carried on the business, not only was a certain amount of capital hung up while they carried it on, but also there was obviously a possible question of their own liability, against which they were entitled to be protected by the trust estate.

If you take these two matters together—the uncertain duration of this state of affairs, when complete realisation of Mr Dick's estate into cash was impossible, and possibly, although probably not so likely in the mind of the testator, the idea that the trustees might not wish to pay away the estate while they themselves were subject to personal and contingent liabilities in respect of that estate—I think one finds ample justification for the use of the very wide terms as to time this clause employs.

But I do not know that in my view that very much matters. Even if there was not that particular explanation of this clause, and if it were a mere expression of complete generality so far as time is concerned in the option which is given to the trustees when they are to carry out the settlement, it would not at all, in my view, derogate from the validity of the settlement.

The reasons for which wills of this sort are not given effect to may be divided into two classes. There is the case where the object which the trustees are to carry out is so imperfectly expressed that the trustees are really left with no direction, or, in other words, using the common expression, the will is void from uncertainty.

Now the decisions, of course, have long ago settled that the expression "charitable purposes" denotes a definite class of objects and is not therefore an uncertain direction. I need not go through the cases. I have already mentioned one which is the most authoritative decision on the subject. But I would like also to refer to the summary of the whole matter in the observations made by Lord Robertson in the case of *Blair*, 1901, 4 F. (H.L.) 1, where I think his Lordship really explains the true view upon which charitable bequests have been supported, and bequests for such objects as public purposes have not been supported. The other category—I am not sure if it is another category or whether it is not really just another branch of the same subject—is where it has been held that the Court will not sustain a will which is no will at all in itself, but is simply a giving over of a man's fortune to the arbitrament of another. But beyond that it does not seem to me that the decisions have gone.

When you come to this question of time it seems to me that the same uncertainty as to any precise period of time might be predicated of bequests which are undoubtedly good. If a man leaves a sum of money to his trustees to be given in their discretion to a certain person—and an example of that class of bequest may be found in the well-known case of *Chambers' Trustees*, 1878, 5 R. (H.L.) 151—it is perfectly uncertain whether that bequest will be eventually made or not. It is equally true, as was stated in argument here, that at no moment of time could you ever go to the trustees and say, "Now you are bound to execute this bequest."

Now, when trustees have a discretion I think, in the words of one of the learned judges in one of the cases, that although it is a discretion that will not be interfered with, yet, of course, if the trustees maladminister and refuse to exercise the discretion at all the Court will find a way of interfering. If you can suppose that here the trustees simply buttoned their pockets and refused to do anything I cannot doubt that a way might be found of compelling them to act. But even apart from that, surely it would be an almost fantastic result if, where trustees profess no difficulty and are in no way behaving in a way to suggest that they are really acting *in fraudem* of their trust—it would surely be fantastic to say to them "Because conceivably you may act in such a way we will take the whole estate away from you and not allow you to deal with it at all." That is what we are asked to do here by holding that this bequest is void.

Accordingly, I come to the conclusion that this clause, although it offers a distinction between the case and that of *Hill, &c.* v. *Burns*, really creates no difference, and that here the bequest is quite a good one and the trust one such as the trustees can, consistently with the rules that I have laid down, administer.

The second finding of the Lord Ordinary is to the effect that this will supersedes the other wills. I really cannot doubt that anyone looking at this settlement, which is absolutely a universal settlement, could come to any but one conclusion—namely, that this last will was intended to supersede the others, and I do not think we have had any argument presented to us which would shake one's belief in what I believe to be a universal rule. On the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN—I have read the Lord Ordinary's note and interlocutor, and I think his Lordship's judgment contains a very well-considered and careful statement of the existing law on the subject. I am quite content to rest my opinion upon the Lord Ordinary's note, with the further exposition of the subject which has been given by your Lordship in the chair.

I may, however, be allowed to say that I think it is a subject of regret that our law has given such a very wide extension to the doctrine of the benignant construction of charitable bequests. In the earlier cases on the subject we know that the decisions related to estates of moderate amount, and in these cases we have indications either of the parties or of the localities that were to

be benefitted, with directions that clearly pointed to the immediate realisation of the testator's wishes. But in the progress of the law these restrictions have been gradually and insensibly removed. Now, as I think, it results from all the authorities that the expression "charitable purposes," in a bequest of residue, coupled with the appointment of persons who are to administer that bequest, suffices to exclude the next-of-kin, even where the will contains no evidence that the testator had ever applied his mind to the consideration of what was to be done with his estate, or that he had any other motive than that of disappointing the expectations of his next-of-kin. Of course I am very far from suggesting that such was the motive in the present case. I am stating what is possible in the existing state of the law. At the same time, I think we must recognise that this is a matter of opinion.. In the present state of the case law on the subject I think it must be left to the House of Lords in its judicial or legislative capacity to determine within what limits the right of charitable disposition is to be allowed.

On the second point I also agree with the Lord Ordinary and with your Lordship. The settlement under construction is a universal settlement, and I think, with the possible exception of bequests of specific articles, such a settlement is exclusive of the effect of all previous dispositions.

Therefore I agree that the reclaiming note should be refused.

LORD KINNEAR—I agree entirely with the opinion of the Lord Ordinary, and I also assent to the additional observations which have been made by your Lordship in the chair, with special reference to the points which have been argued to us, and I do not need to repeat them.

LORD PEARSON—I am of the same opinion.

The Court adhered.

Counsel for the Pursuers and Respondents (The Trustees under the Settlement of the deceased James Dick executed in 1902)—The Solicitor-General (Ure, K.C.)—Cullen, K.C.—Scott Brown. Agent—Henry Robertson, S.S.C.

Counsel for the Claimants and Reclaimers (The Next-of-kin)—Scott Dickson, K.C.—Hunter K.C.—Orr, K.C.—Duncan Millar—Munro — Mercer — T. Graham Robertson. Agents—Inglis, Orr, & Bruce, W.S.—W. Croft Gray, S.S.C.

Counsel for the Claimants and Reclaimers (The Trustees under the Settlements of 1891, 1899, and 1901 executed by the deceased James Dick)—Lees, K.C.—Ingram. Agent—Henry Robertson, S.S.C.

Friday, May 31.

SECOND DIVISION.

O'BRIEN *v.* ENRICO, ARBIB & COMPANY.

Reparation — Accident — Ship — Visitor to Member of Crew—Liability of Owners—Accident Due to Employee Acting beyond Scope of Employment.

A vessel about to depart on a voyage was lying in harbour moored to a quay. The wife of the mate, along with their child, went on board and spent an hour or two with her husband, her visit being entirely unconnected with any business or interest of the owners. The vessel was not provided with a gangway, and her husband brought her on board across a ladder upon which he had laid a plank. At the moment of her departure, her husband being engaged on ship's business, a rigger, an employee of the owners, improvised a gangway out of a plank which was being used to protect a skylight during coaling. The plank being rotten broke, and the mate's wife fell into the dock and was injured. She brought an action of damages against the owners of the vessel. The Court, after proof, *assoilzied* the defenders, *holding* that the pursuer was on board voluntarily and for her own purposes and in circumstances which imposed no duty upon the defenders in relation to her; and, further, that the rigger's act was one for which the defenders were not responsible, being an act of friendship outside the scope of his employment.

Ship — Factory — Gangways — Ladders — Wharfs—Factory and Workshop Act 1901 (1 *Edw. VII, c.* 22), *sec.* 79—*Regulations of October* 24, 1904, *by Secretary of State as to Gangways—Scope of Application—Visitor to Ship.*

Regulations by the Secretary of State dated October 24, 1904, and made under section 79 of the Factory and Workshop Act 1901, regarding gangways, &c., to be used when ships are lying at a wharf or quay, *held* to apply only in the case of persons employed in loading, unloading, or coaling ships, and not to affect the liability at common law of shipowners to third parties.

Section 4 of part 2 of the regulations of October 24, 1904, made by the Secretary of State regarding docks and quays in virtue of the powers conferred on him by the Factory and Workshop Act 1901, section 79, is as follows:—"If a ship is lying at a wharf or quay for the purpose of loading, or unloading, or coaling, there shall be means of access for the use of persons employed at such times as they have to pass from the ship to the shore, or from the shore to the ship, as follows:—(*a*) Where a gangway is reasonably practicable, a gangway not less than 22 inches wide, properly secured and fenced throughout on each side to a clear height of 2 feet