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 his 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 causâ*, in every sense a gratuitous deed. And that being the nature of the deed, it attempts to put the estate 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 an 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 alienation. 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 cost very considerably.

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

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, Hunter, Blair, and Gowan, W.S.; Preston, Karslake, London.—*Respondents' Agents*, Dundas and Wilson, C.S.; Loch and Maclaurin, Westminster.

MARCH 22, 1867.

MRS. CATHERINE BRUCE or MITCHELL and Others (next of kin of James Bruce), *Appellants*, *v.* THE MINISTERS AND KIRK SESSIONS of the PRESBYTERY OF DEER, *Respondents*.

Testament—Bequest to poor of a Presbytery—Charity—Void for uncertainty—*B. by his will said "the whole 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." No executors were nominated.*
HELD (affirming judgment), *The bequest was not void for uncertainty.*[1]

This was an appeal from interlocutors of the Lord Ordinary and Second Division in an action of multiplepoinding, at the instance of Alexander Bruce, Esq., executor dative of the late James Bruce, Esq., as to the construction of a clause in the testament of the said James Bruce, which was as follows:—"The whole of the balance of my property I leave to poor of this Prisbitery, to

[1] See previous report 3 Macph. 402; 37 Sc. Jur. 198. S. C. L. R. 1 Sc. Ap. 96; 5 Macph. H. L. 20: 39 Sc. Jur. 343.

be divided, I mean the interest, by the sessions of the several churches, but to be paid to all Christians except Roman Catholics." No executors were nominated.

The Lord Ordinary held, that the above bequest was not void or ineffectual in respect of uncertainty, or on any other ground. On reclaiming note, the Second Division adhered to this part of the interlocutor. The next of kin appealed against these interlocutors.

The appellants in their *printed appeal case* submitted, that the interlocutors should be reversed, for the following reasons:—1. Because the claim for the ministers and kirk sessions of the Established Church within the bounds of the Presbytery of Deer, is not at the instance of parties nominated in the testamentary writing of 2d October 1852, or of parties entitled to the bequest, or to administer it. 2. Because the bequest of residue contained in the said testamentary writing is void for uncertainty. 3. Because the testator has failed to nominate trustees or executors to administer or apportion the funds, or to determine the objects of the said bequest. 4. Because the bequest of residue is incapable of being carried into effect.

The *Attorney General* (Rolt), *Anderson* Q.C., and *Skelton*, for the appellants.—This bequest is void for uncertainty. No trustees being named, the Court will not interfere to appoint trustees where a trust is so uncertain as this—*Dick* v. *Ferguson*, M. 7446; *Merchant Company* v. *Trades of Edinburgh*, M. 7448; *Dundas* v. *Dundas*, 15 S. 428; Wigram on Wills, 201. It is true, that in some instances the Court has supported a bequest of a similar description where the testator expressly stated, that he confided certain discretionary powers to his trustees, or gave some means of overcoming the uncertainty—*Hill* v. *Burns*, 2 W. S. 80; *Crichton* v. *Grierson*, 3 W. S. 329; *Ewen* v. *Magistrates of Montrose*, 4 W. S. 346; *Magistrates of Dundee* v. *Morris*, 3 Macq. App. 134; *ante*, p. 747; *Liddle* v. *Kirk session of Bathgate*, 16 D. 1075. Here there is incurable uncertainty in the persons to whom the capital of the fund has been bequeathed,—in the parties who are to divide the interest among the beneficiaries,—in the parties who are to be beneficiaries, and the proportions in which the shares are to be taken. The poor of a parish, according to the practice in Scotland, include casual and able bodied poor, as well as statutory poor—*Liddle* v. *Kirk session of Bathgate*, 16 D. 1075; *Hardie* v. *Kirk session of Linlithgow*, 18 D. 37; but no meaning can be given to the poor of a presbytery. Such a legacy to the poor of certain parishes is void, as against public policy, and injurious to morals—*Johnstone* v. *Mackenzie's Executors*, 14 S. 146.

Sir R. Palmer Q.C., *Young*, and *Cheyne*, for the respondents, were not called upon.

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 *Mag. of Dundee* 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 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 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, taking the words "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 object 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 sessions according to the discretion of the kirk sessions, 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 from 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 to be 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 session. 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.

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 in the Presbytery.

Interlocutors affirmed; the costs of the appeal to be paid out of the estate.

Appellants' Agents, Tods, Murray, and Jamieson, W.S.; Bircham, Dalrymple, Drake and Bircham, Westminster.—*Respondents' Agents*, Cheyne and Stuart, W.S.; Grahames and Wardlaw, Westminster.

APRIL 2, 1867.

MRS. BARBARA MARY MACINTOSH or DUNLOP (Pauper), *v.* WILLIAM JOHNSTON, Accountant (Trustee).

Husband and Wife—Postnuptial Contract—Bankruptcy—Provision for Aliment of Wife—*Husband married wife, who had no property, there being no antenuptial contract; but by postnuptial contract, he, being then solvent, provided and paid over £5000 to trustees for her and her children as an alimentary fund, and she renounced her legal rights in lieu thereof. His estates were sequestrated two years afterwards.*

HELD (affirming judgment), *That the provision of interest to the wife during the marriage was revocable as being a* donatio inter virum et uxorem, *and that the trustee in the sequestration was entitled to reduction of the deed to that extent.*[1]

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[1] See previous report 3 Macph. 758; 37 Sc. Jur. 390. S. C. L. R. 1 Sc. Ap. 109: 5 Macph. H. L. 22; 39 Sc. Jur. 382.