though it appears to me that it would be too much for your Lordships to say, that the proceeding of the Court of Session, and all the proceedings incident upon their proceedings for a long series of decisions, are such as cannot be upheld, I think that they ought to be affirmed without costs. I would therefore take the liberty of proposing that as the judgment of your Lordships. I cannot, however, conclude without saying, that I wish there was some law to regulate these proceedings in Scotland. July 23. 1828.

SPOTTISWOODE and ROBERTSON—A. MUNDELL,—Solicitors.

JOHN CRICHTON, Esq. Appellant and Respondent. No. 17.
Dean of Fac. Moncreiff—Sugden—Whigham.

ELIZABETH GRIERSON and Others, Respondents and Appellants.
Brougham—Fullerton—Keay.

Testament—Trust—Homologation.—Held, 1. (affirming the judgment of the Court of Session), in a question with the next of kin, that a mortis causa conveyance to trustees was valid, whereby a testator declared, 'That it is my wish that such 'remaining means and estate shall be applied in such charitable purposes, and in 'bequests to such of my friends and relations as may be pointed out by my said 'dearly beloved wife, with the approbation of the majority of my said trustees;' and, 2. That one of the next of kin having been named, and having accepted, and taken benefit under the deed, was not barred from claiming the residue, as belonging to him and the other next of kin.

JAMES CRICHTON, a Scotchman, went early in life to India, where he acquired a large fortune, and returned in 1806 to his native country, and purchased extensive landed properties in Dumfries-shire. He married Elizabeth, daughter of Sir Robert Grierson, baronet, and, by contract of marriage, provided her in an annuity of L.400 per annum, in case she should survive him. He had no children, but had a brother, John, and sister in Scotland. He had some distant relations in Scotland, and several cousins in America. July 25. 1828.

1ST DIVISION.
Lord Alloway.

On 12th November 1821 he executed a trust-deed and settlement in favour of his wife, so long as she should remain a widow, and of four other trustees, (among whom was his brother John), or a majority of them, 'who shall accept or act, or survivor of 'them, and who are hereby declared a quorum, and to such 'person or persons who shall be assumed as trustees as here-'after specified; and that in trust always, for the uses, ends, and 'purposes herein after specified, and contained in any instruc-

July 25. 1828. 'tions expressive of my will, to be executed by me as after-'mentioned, all and sundry lands,' &c. These trustees, or a majority of them, who should accept, or be assumed, he appointed his sole executors and universal legatees, and intromitters in trust with his whole personal estate. He then empowered them, in the event of their number being, by death or non-acceptance, reduced to two, to assume two or more trustees; authorized them to act either by themselves or factors; declaring that the trustees, 'whether acting as such, or as factors, 'shall not be liable to do diligence, or for solvency of debtors 'to my estate, or of purchasers from them, or for omissions of 'any sort, or in solidum, or jointly one for another, but each 'allenarly for what he or she shall actually intromit with and 'receive.' The purposes of the trust were, for payment of debts, deathbed and funeral expenses; the liferent of the lands of Friars-Carse and others, and L.1000 per annum, to his wife; an annuity of L.400 to his sister, and L.100 to her husband, if he survived her; to his brother, (the appellant), certain heritable property in Sanquhar, the fee-simple of the lands of Goosehill, (burdened with his sister's liferent), the fee of a freehold qualification in Dumfries-shire, and the lands and estate of Friars-Carse, subject to Mrs Crichton's liferent, (to be placed under fetters of a strict entail to heirs-male, whom failing, to any person to be named by the testator in his instructions); a legacy of L.400 per annum to the appellant's daughter, payable at majority; and certain legacies to some distant relations, and to his cousins in America, (who were also to be substituted to the heirs-male of his brother John in the entail of Friars-Carse). He also directed his trustees 'to make payment of L.200 sterling to each of the 'following charities, viz.—To the Infirmary of Dumfries, to 'the Royal Infirmary of Edinburgh, to the Lunatic Asylum of 'Edinburgh.' The deed then proceeded, 'And in regard I 'have not yet determined in what way and manner the farther 'distribution of my means and estate shall take place, I 'hereby reserve to myself power and liberty to make such distri-'bution at any time preceding my death, either in holograph 'instructions to my said trustees to be executed informally, with-'out the usual solemnities, or by a formal deed of instructions 'relative hereto; and in whatever way these instructions may 'be conceived, I hereby declare that the same shall be as valid 'and effectual, and shall be as much deemed and taken as a part 'of these presents, as if the same were herein verbatim engrossed: 'also declaring, that if my heir-at-law for the time being, or

'next of kin, shall attempt to quarrel or impugn these presents, July 25. 1828.
'or the future instructions to be given by me to my said trus-
'tees, then I hereby declare, that he, she, or they, shall forfeit
'all right and benefit to any provision out of my estate that may
'be conceived in his or her favour in virtue of these presents,
'or of any future instructions which I may give, as aforesaid.'

On the 20th of the same month he added a codicil, increasing his sister's annuity to L. 500; and then he declared, 'That in the 'event of my failing to make a distribution of my means and 'estate which shall remain after fulfilling the purposes before-'specified, either by holograph instructions, though not formally 'executed, or by a formal deed of instructions, which I reserve 'to myself full power to do, then it is my wish, that such remain-'ing means and estate shall be applied in such charitable pur-'poses, and in bequests to such of my friends and relations, as 'may be pointed out by my said dearly beloved wife, with the 'approbation of a majority of my said trustees; and in the event 'of her decease, or entering into a second marriage, before such 'application shall have been pointed out and approved of as 'aforesaid, then I hereby empower the majority of the said 'remaining trustees to make the application in the way and 'manner they would conceive to be most agreeable to my wishes 'if in life.' From time to time he added other codicils, bequeathing legacies to his wife's brothers and sisters, and to other individuals, and 200 guineas to one of the trustees to buy mournings.

He died on the 3d May 1823, without having executed any instrument of instructions, so far as could be discovered, or made any other disposition of the residue of his personal estate, said to amount to L.100,000. The trustees accepted by the following minute:—'We, the undersigned, do hereby declare our accept-'ance of the trust reposed in us by the deceased James Crichton, 'Esq. of Friars-Carse, conform to his deed of settlement, of date '12th November 1821, and two several codicils annexed thereto, 'and shall execute the same to the best of our abilities.' This minute John Crichton signed, along with the other trustees; and it was alleged that he also took a conveyance to the heritage provided to him by the settlement, and concurred in a proposal made by Mrs Crichton, that Mr Manners, one of the trustees, should receive a sum as a friend in consequence of his giving up acting as factor.

Thereafter John Crichton took the opinion of Counsel as to the validity of his brother's settlement, and laid it before the trustees, intimating that his acceptance of, and acting under the

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trust, should not infer any admission on his part that the residue of his brother's funds was legally disposed of by the trust-deed. He afterwards suggested, that an arrangement might be made as to the residue that would be satisfactory to all parties; but having received no answer to this proposal, he raised an action of declarator before the Court of Session, alleging that 'the said 'James Crichton, by the foresaid trust-disposition and settle-'ment, has not in any manner disposed of the residue of his 'means and estate after answering the special purposes expressed 'in the trust-deed, but has merely referred to some deed to be 'afterwards executed by him for that purpose; and that the said 'codicils do not contain any such certain and definite appoint-'ment as to be legally effectual for the disposal of the said 'residue, but that the words or clauses of the said codicil above 'recited, of 20th November 1821, having an apparent reference 'thereto, are so vague, indefinite, and uncertain, that they do 'not contain the legal expression of any precise will or intention 'of the testator with regard to the disposal of the said residue, 'and therefore are totally ineffectual for that purpose; and that 'in consequence thereof the said residue must belong to the said 'pursuer, and Mrs Margaret Otto, (his sister), as the nearest of 'kin of the said James Crichton;' and therefore concluding that it should be found and declared, that the said residue 'has not 'been disposed of by any valid or legal declaration of the will 'and intention of the testator, and that the words and clauses of 'the codicil (of 20th November) are not effectual in law for this 'purpose, but must be held to be void and of no effect in respect 'of their vagueness and uncertainty;' and that the trustees should be ordained to count and reckon with him, and pay to him his share of the residue.

The trustees stated in defence,—

1. That the pursuer had homologated and approved of the deed challenged, by acting under it as trustee, and claiming the subjects provided to him.

2. That the expressions of the codicil were sufficiently clear and explicit, and amounted to a definite and precise exposition of the legal will of the deceased; and referred to the case of Hill *v.* Hood or Burns, which was then depending before the Inner-House. The Lord Ordinary, 'in respect that a case, Hill *v.* 'Hood's trustees,* which is said to be similar to the present, is

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* 3. Shaw and Dunlop, No. 283.; and 2. Wilson and Shaw's Appeal Cases, p. 80.

'depending before the First Division of the Court,' appointed informations. Parties were then heard in presence,* and the Court, on the 12th May 1826, sustained the defences, and assoilzied the trustees from the conclusions of the declarator; and in respect they did not object, allowed the expenses to be charged against the trust fund.† July 25. 1828.

Both parties appealed,—the pursuer on the merits, and the defenders as to homologation.

‡*Appellant*, (*Pursuer*).—1. Every individual capable of disposing of his property, has a right to do with it as he thinks proper; but as the will is an act of the mind, it must be clearly and explicitly expressed; and if the deed in which it is embodied excludes the natural heirs, the law will jealously inquire if that expression has been distinct, both as to the subjects bequeathed and the legal disponees. Here the conveyance is to trustees. They are therefore bound to execute the specific instructions in the conveyance; and where there are no instructions, the trustees hold for the nearest of kin of the deceased. But the deceased has not effectually exercised the power reserved by him, of making a distribution of his means and estate, and this lets in the appellant and his sister to the right to the unapplied residue. No doubt, the trustees say, that the deceased has delegated to them the power of distribution, and that such delegation is legal and

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* After the pursuer's Counsel had been in part heard, it was suggested that the defence of homologation should be first disposed of; and accordingly the Court took that point into consideration, and (24th February 1826) unanimously repelled that objection to the pursuer's title to insist in the action.

† See 4. Shaw and Dunlop, No. 364. where the opinions of the Judges are given.

‡ When the Counsel were called upon, Mr Sugden, as King's Counsel, proceeded to open the case for the appellant, whereupon Sir James Moncreiff, Dean of the Faculty of Advocates in Scotland, interrupted him, and stated to their Lordships, that though, from the circumstance of this case involving certain principles of law to which his learned friend had devoted particular attention, he had, in justice to their client, consented that Mr Sugden should lead, he begged their Lordships nevertheless to understand, that, as Dean of Faculty, he protested that, at the Bar of their Lordships' House, he had a right to take precedence of any King's Counsel.

Mr Sugden, in reply, said, that as one of the King's Counsel he claimed a right to lead the Dean of Faculty, and therefore he could not admit that his doing so now was to be considered as any act of favour or courtesy.

The Lord Chancellor said, the House would understand that the course followed in the present case would not be considered as any precedent, and that both the Counsel who had addressed their Lordships on this point had preserved their rights and privileges entire by their mutual protests.

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effectual. But such doctrine is adverse to both Scotch and civil law. Legacies or provisions cannot be left to be disposed of pleno arbitrio tertii. Besides, the clause of the codicil is void on account of its vagueness and the uncertainty of its objects. To give a deed validity, the disponee, or party for whom the trustees hold, must be so pointed out as to confer a title and interest to require from the trustees the execution of their trust. But here there is neither individual nor corporation who could come into Court for that purpose. It is no answer that the appellant, as heir-at-law, has a title to insist for performance, or to correct mal-administration. He may have the title, but clearly he has no interest,—that has been declared by the very judgment giving efficacy to the codicil. In truth there is no human being who has a legal interest to ask the trustees a question, whether the trustees made a distribution, or did not appropriate the residue at all. The actio popularis is not recognized in Scotland; but even if the Lord Advocate appeared for the Scotch charities, he would be defeated by the trustees objecting, quomodo constat, that Scotch charities, rather than Indian, were contemplated, and that they meant to prefer the latter; nor could the Court exercise a controul, for such controul is only competent where there is somebody in whose favour the Court can decree performance, without placing itself in the room of the deceased, and exercising his unexpressed will. But here there is absolute uncertainty as to person, place, amount, proportion, time, or country; and the Court, instead of executing the will of the deceased, would be making a will for him. In whatever way the trust-deed is considered, it is inexplicable and inoperative, confused and uncertain. There is not only no party who has a title and interest to ask any thing, but there is no party who has a title or interest to object that any other party should not be the favoured person; so that, according to the doctrine of the respondents, they are under no controul, and must engross to themselves those funds which were put into their hands merely in trust. It is plain, however, that this cannot be permitted; and as there is no other party entitled to the funds, they must be held to belong to the nearest of kin. It is evident that the testator had no mind at all, and did not know to what precise purpose he wished to apply the undisposed proportion of his estate; and being thus destitute of will, neither trustees nor Court can supply that want. There is a marked and substantial difference between the present case and that of Hill *v.* Hood's trustees. It is in vain for the respondents to repeat, that they hold delegated powers,

and that any uncertainty as to the parties intended to be favoured will be removed the instant a distribution takes place; for a person cannot authorize another to make a will for him after his death, nor can he create a perpetual trust beyond all power of controul or challenge; and the same is the law of England and of Rome. July 25. 1828.

2. There is not the slightest ground for imputing to the appellant homologation as a bar to the action. He does not challenge the deed. He only inquires into what are its legal effects. And if any part is void from uncertainty, it is the same as if that part were non scriptum, and his right admitted as a matter of course.

1. *Respondents.*—The will and codicil involves no uncertainty regarding the testator's intention; on the contrary, he gives clear and distinct directions how the residue of his property is to be applied. This is not, therefore, a case of dubiety as to the meaning of the testator, which, when leaving an inextricable degree of uncertainty, may avoid a will; but a question, whether the explicit expression of intention is entitled to legal effect against the testator's heirs-at-law. Of this, however, there can be no serious room to doubt. The intention as expressed is perfectly consistent with the powers of a testator, as recognized in the law of Scotland, and must therefore receive effect. It is not essential to the validity of a will that there be an actual specification, either of the individual legatees, or of the particular charities which are to be benefited. There is no known rule of law by which a testament must contain such an appropriation as to confer, on the death of the testator, a jus actionis on one or more individuals, under the penalty of being held void for uncertainty. On the contrary, he may leave legacies absolutely, conditionally, or hypothetically; and there may, or may not, be an individual holding a jus actionis, or any patrimonial interest founding a title to insist for performance. All that can be objected in the present instance is, that, for the time, the effect of the legacy is suspended; but the instant the trustees make the election, then the interest vests, and the description is completed. The trustees are not here making a will, but carrying into execution the will made by the deceased. Besides imposing on them the ordinary duties of trustees, the testator empowered them to select, within a certain range of description pointed out by him to them, the particular persons and objects to be favoured; and the exercise of such a faculty was competent to the testator. The right of posthumous disposal is one of the rights attached to property, and

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which, like any other right, may be delegated to a third party. The bequest would have been good if made to any person whom a third party pointed out; multo magis when the testator describes the very class from which the selection is to be made. It is not a delegation of testing, but of singling out an individual from a mass as to whom the deceased has tested. There is no vested interest in any individual, but the power so conferred affords the means of ascertaining who the individual is in whom the interest is to vest. There is no weight in the objection, that the trustees are exposed to no controul; for it is clear, that if they apply the residue to an object out of the range described by the testator, the next of kin would have a title and interest to interfere. But it is unnecessary to enter into the detail of arguments, for the point has been repeatedly tried, and the competency of the delegation of such a power has been often sustained, and particularly in Hill against Hood. To say that there is a possibility of abuse of power, is only saying what may be charged against every trust. Besides, the question here is not, whether there has been abuse, but whether they can legally execute the directions of the testator, and obey the confidence he reposed in them.

2. But, independent of these views, the appellant homologated the deed. It is no answer that he is not setting aside the deed, but only ascertaining its efficacy, and that, in inquiring whether it is void from uncertainty on one part, he does not repudiate it in others; for truly he is substantially challenging the deed; and even if this was a question of avoidance in respect of uncertainty, the appellant might, by homologation, bar himself from resting on that ground, as he could from any other.

The House of Lords 'ordered and adjudged, that the judg-'ments complained of be affirmed.'

LORD CHANCELLOR.—My Lords, In this case, in which Crichton is appellant, and Grierson and others are respondents, I will trouble your Lordships for a few minutes, while I suggest what I think ought to be the judgment.

My Lords,—This case arises out of a disposition of property made by a person of the name of James Crichton. James Crichton, early in life, went to the East Indies, where he accumulated a considerable fortune, and in the year 1806 returned to Scotland. In the year 1821, having, I believe, resided in Scotland during the whole of the interval, he made that disposition and settlement of his property which is the subject of the present suit. By that disposition and settlement he settled his property upon his wife during her widowhood, and upon

other persons in trust, for the special purposes mentioned in the deed. It is not necessary that I should trouble your Lordships by stating all the particular objects of the trust. One of the objects was to pay his debts and his legacies, and to make certain dispositions of his property, with reference to particular individuals mentioned in the instrument. He afterwards proceeded in the deed of disposition and settlement in these terms:—'And in regard I have not yet determined in what way 'and manner the farther distribution of my means and estate shall take 'place, I hereby reserve to myself power and liberty to make such 'distribution at any time preceding my death, either in holograph 'instructions to my said trustees, to be executed informally without the 'usual solemnities, or by a formal deed of instructions relative hereto.' This instrument was dated, I think, on the 11th of November in the year 1821. July 25. 1828.

Upon the 20th of the same month, he executed a codicil in these terms:—'I hereby declare, that in the event of my failing to make a 'distribution of my means and estate which shall remain after fulfilling 'the purposes before specified, either by holograph instructions, though 'not formally executed, or by a formal deed of instructions, which I 'reserve to myself full power to do, then it is my wish that such re-'maining means and estate shall be applied to such charitable purposes, 'and in bequests to such of my friends and relations, as may be pointed 'out by my said dearly beloved wife, with the approbation of a majority 'of my said trustees; and in the event of her decease, or entering into 'a second marriage, before such application shall have been pointed 'out and approved of as aforesaid, then I hereby empower the majority 'of my said remaining trustees to make the application in the way and 'manner they would conceive to be most agreeable to my wishes if in 'life.'

About a year, or a year and a half afterwards, he made a further codicil, in which he disposed of a farther part of his estate, and I believe a third codicil, at a subsequent period; but it does not appear to me necessary to advert to the dispositions in these two codicils. I do not think that they at all bear upon or affect the present question. The question turns entirely on the construction and validity of the clause to which I have called your Lordships' attention, and which is in these terms; if he makes no farther disposition:—'It is my wish that 'such remaining means and estate shall be applied in such charitable 'purposes, and in bequests to such of my friends and relations, as may 'be pointed out by my said dearly beloved wife, with the approbation 'of a majority of my said trustees; and in the event of her decease, 'or entering into a second marriage, before such application shall have 'been pointed out and approved of as aforesaid, then I hereby em-'power the majority of my said remaining trustees to make the appli-'cation in the way and manner they would conceive to be most agree-'able to my wishes if in life.'

The first point to which I will call your Lordships' attention is the

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last part of this clause, for the purpose of getting rid of the argument that was urged at the Bar. It was contended, that whatever the construction might be of the former part of the clause, the latter gave an absolute power and controul to the trustees to dispose of the property, without regard to any limitation or condition whatever, except that they were to do it generally in the manner they might conceive most agreeable to the disponer's wishes, if in life; but I apprehend, my Lords, when the clause comes to be attentively considered, it does not bear that construction. He gives a power to the wife, with the approbation of a majority of the trustees, to dispose of the residue for particular purposes and particular objects; and the word made use of in that part of the clause is, that it shall be applied for particular objects and particular purposes, as pointed out in that clause. The disposer then goes on to say, that in the event of his wife dying, or of her marrying again, (by which she was to be deprived of the power of acting under this clause), those trustees, or the majority of those trustees, were to make the application in the manner they should conceive most agreeable to the wishes of the disposer, if in life. I apprehend, that, in point of construction, it refers to the former part; and when he talks of the application, it means that the trustees are to make such application, with regard to the objects before pointed out, in the way and manner the trustees should conceive to be most agreeable to the wishes of the disposer, if he had been then in life. I am quite satisfied that that is the true construction of the clause, from reference to the point to which I have adverted, and I mention that for the purpose of getting rid of that part of the argument, and of coming to that which is the whole question between the parties; namely, whether it is competent; —for that is 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 the object 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. It is contended, that to give effect to the decision of the Court below, will be to allow a person to delegate to another the power of making a will for him, which is said to be directly contrary to the civil law, and directly contrary to the law of Scotland, which, it is said, is founded on the civil law. But I apprehend that that is not the way of considering that question. I cautiously abstain from expressing any opinion upon that point, which was adverted to in the course of the argument, and is much dwelt upon in the papers on your Lordships' table, because I think the question does not at all turn upon that position; that it narrows itself to this,—whether a party may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power, after his death, of appropriating the property, or applying any part of his property, to

any particular individuals among that class whom that person may select and describe in his will. July 25. 1828.

My Lords,—I apprehend that, according to the authorities in the law of Scotland, it is quite clear a party has this power; and I shall take the liberty of referring your Lordships to some of the authorities and cases upon this point, which have been cited at the Bar, and relied upon; and your Lordships will find that the current of authorities, I may say the whole current of authorities, tends to establish the affirmative of the position to which I have adverted, and to shew that the disponer of property in Scotland has the power of appropriating and disposing of his property in the manner I have pointed out.

My Lords,—The first case to which I shall refer, (because it is the earliest in point of date), is the case of Murray against Fleming, which was decided, I think, so far back as the year 1729. It is in these terms:—'A husband disponed his land estate to his wife in liferent,' 'and to any of his blood relations she should think most fit, to be 'nominated by a writ under her hand, in fee.' Your Lordships find that the Court of Session decided, 'that this disposition granted by 'the husband to his wife did sufficiently enable her to nominate per-'sons to succeed to the subjects disponed; and that she having 'accordingly exercised that power, the persons named by her have 'right to succeed.' That, certainly, upon the first impression, is a strong case for the purpose of establishing the position to which I am adverting; but much ingenuity, and much talent, was exercised at the Bar, as was done throughout every part of the case, by the learned Counsel who appeared on the part of the appellant, and, with reference to the particular authority to which I have referred, great pains were taken, by looking into the original papers and proceedings in the cause, and adverting to the arguments of Counsel as detailed in those papers, to shew that the judgment of the Court was founded upon the consideration, that the wife had a constructive fee. Now, my Lords, I do not mean to say that it is impossible or even improbable that that should be the foundation upon which the Court proceeded; but still I find, that Lord Bankton, (who is a very competent authority), in his work, to which reference has been made in the course of the argument adverting to this case, and adopting its authority, does not put it upon that ground, or consider that the Court decided it upon that ground, but he represents it as decided simply on the ground of authority for the object in question being granted to the wife; and my Lord Kames, following Lord Bankton, in his valuable work on the Principles of Equity, considers the case as having proceeded upon the same ground.

But, my Lords, the point of law does not rest upon the authority of this case alone. The next case in point of time was the case of Brown against his relations. The disposition, my Lords, was in these terms:—'And the remainder of the proceeds of my said means and estate, 'after payment of the several legacies already bequeathed, or to be

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'bequeathed by me at any time of my life in manner foresaid, and of 'the payment of the expenses of executing this trust, to be divided 'amongst my poorest friends and relations whom I may have forgot 'herein, or in any other deed to be made by me in relation hereto, at 'any time during my life.' So that it was to be divided among his poorest friends and relations whom he had forgotten in that deed, or whom he might forget in any one of a similar description he might afterwards make. Now, my Lords, the judgment of the Court was in these terms:—'The Lords find, that by the trust-disposition executed 'by the deceased John Brown, his trustees are vested with a discre- 'tionary power to divide, amongst 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 connected by the 'father's or by the mother's side, and also without distinction of 'degree:' so that your Lordships find in that case it was considered, that a discretionary power was, according to the terms of the disposition, vested in the trustees, to divide that portion of the property among the relations of the disponer, both on the father's and the mother's side.

My Lords,—A third case, to which I may also refer, for the purpose of establishing the same principle, is that of Snodgrass against Buchanan. That case was of this description; the dispositive clause was in these terms:—'Therefore, for love and other causes, I do 'hereby assign, dispone, and make over from me, to and in favour of 'the said Captain Alexander Buchanan, and the heirs of his body, or 'his assigns; whom failing, to such of my mother's relations as my 'kind and respected friend, Mrs Margaret Buchanan, widow of Dugal 'Buchanan, Esq. of Craigievairn, shall appoint by a writing under 'her hand; which failing,' &c. My Lords, I consider that as another authority tending to establish the same position. The argument that was urged at the Bar was, that in that case the question was not raised; but, my Lords, I consider that a strong circumstance tending to establish the position; for the cases to which I have referred had previously occurred. One was decided so far back as the year 1729, the other was decided at a subsequent period, both of them long anterior to the case to which I have referred; and when I advert a little to the manner in which the case to which I am now drawing your Lordships' attention, was contested by the activity and talent of Counsel, the circumstance of the point not having been raised in that case, can be explained only from a thorough conviction of all professional gentlemen at the time practising in Scotland, that the point was too clear for argument; therefore I consider, that, though the question was not raised in that case, the circumstances connected with the case tend strongly to confirm the position to which I have already called your Lordships' attention.

My Lords,—Another case was that of a disposition made by a person

of the name of Alexander Horn. The facts of the case I find stated in the speech on giving judgment delivered by the late Lord Gifford, in a case to which I shall presently direct your Lordships' attention. Alexander Horn disposed of his property, or a part of his property, to the Lord Provost and Magistrates of the city of Edinburgh, to be applied, according to their discretion, among the poor labourers of that city. That case was quoted for the purpose of establishing the position advanced by the late noble Lord to whom I have referred, in the case of Hill against Burns; and this case, my Lords, is another authority tending to the same point, because that property was disposed of in favour of a particular class of persons, out of whom a selection was to be made after the death of the disponer, by the particular individuals to whom that property was conveyed. July 25. 1828.

My Lords,—The case to which I have referred, in which the case of Alexander Horn was cited, was a case of Hill against Hood's trustees: that was a case, in the first instance, decided by the First Division of the Court of Session, and afterwards came before your Lordships' House; and the material part, the disposition of the party, was in these terms:—She appointed the residue of her estate to be applied by her trustees, and their foresaids, in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow and its neighbourhood; and that in such way and manner, and in such proportions to the principal, the capital, or 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. That case, my Lords, rested on the same principle, and was opposed on the grounds applied to the case now before your Lordships. Your Lordships were of opinion, upon the consideration of that case, that the decision of the Judges in the Court below was correct and proper; and their judgment was affirmed. I refer to that judgment, of which I have a report now lying before me of the speech delivered by the late Lord Gifford; and it is important in point of authority, for it is a case not standing by itself; for when that case had been argued at the Bar, and judgment was given, the noble and learned Lord took a review of the cases to which I have called your Lordships' attention; and the principle he extracted from those cases was the foundation of the judgment which he delivered. We are to consider, therefore, that those principles do not rest solely on the Courts in Scotland, but that they have passed under the review of your Lordships' House, and have been approved and sanctioned by your Lordships' House. Your Lordships extracted from them the principles on which the case of Hill *v.* Hood's trustees was decided; and I advert to the case of Hill *v.* Hood's trustees more particularly, because it was a material part of the foundation of the decision by the Court below in the case now before your Lordships. It was said at the Bar, that the case of Hill *v.*

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Hood's trustees did not apply to the present. To be sure the facts of that case are different from those of the present case; but the principle of the case was the same; and when that case was cited by the learned Judges in the Court below, and referred to as an authority, they did not refer to the facts of the case merely as governing the present case, but to the judgment of your Lordships' House, to the principle upon which that was founded, and to the adoption of those authorities by your Lordships' House, which had never before passed in review before your Lordships: the principle extracted from those authorities they considered as the foundation of the judgment of this House, and they applied that principle to the case now before your Lordships.

Before, however, I state the conclusion which I draw from these cases, it is necessary for me to advert to one case which was cited on the other side. I think only one case was relied on in argument, opposing the current of authorities to which I have called your Lordships' attention, and that was the case of Dick *v.* Fergusson. It is unnecessary for me to enter into the detail of that case of Dick *v.* Fergusson, because it was commented on in the judgment to which I have referred; and after the facts of that case were commented upon before that noble and learned Lord, he was of opinion, and your Lordships adopted that opinion, that the decision in that case did not run counter to the authorities in the cases to which I have adverted. Thus much, however, I will say respecting that case. In that case the trustees refused to accept the trust or to act upon it; and in a note by Lord Kames respecting that judgment, he puts the decision upon this ground:—He says it was competent to the trustees in that case to have disposed of the property in favour of the heir-at-law. The effect of their not acting under the trust was to give the property to the heir-at-law,—they have, therefore, by so doing, declared their intention that the heir-at-law should take it; and considered in that view, it does not at all contravene the current of authorities to which I have called your Lordships' attention. I am justified therefore in saying, that the authorities are uniform upon this subject, and I am of opinion that they establish the position, that the trustees may dispose of this property among certain classes of persons, or among particular objects, subject to the intention expressed by the donor, the creator of the trust.

That being, my Lords, the general principle, another objection was made in this case as to the generality of the disposition. It was said, the property is to be given to such relations as the wife shall point out, with the approbation of the trustees. It was then said at the Bar, what is the meaning of the term relations? It is indefinite; and they even went so far as to say, in a certain sense, every man is the relation of every other man; but at all events the classes of the relations in the ascending and descending line are numerous and indefinite. My Lords, the answer I make is this, that in the cases to which I

have alluded that very point occurred; for instance, in that of Murray *v.* Fleming, the disposition was in favour of any of his blood relations she should think most fit to be nominated. Blood relations, therefore, would embrace all persons who were connected in blood with the disponer,—a body of persons as extensive as it was possible to conceive, and yet in that case the Court were of opinion that the disposition was good. In the next case to which I adverted, that of Brown and his relations, the disposition was to poor friends and relations, which the Court considered to embrace relatives both on the father's and on the mother's side;—the objection, therefore, was as open in that case as in the present, and yet the Court decided it in the manner I have mentioned. Again, my Lords, in the case of Snodgrass *v.* Buchanan, the disposition was to the disponer's mother's relations, being again as extensive as it was possible for a disposition to be. The objects were relations. In none of these cases did the objection prevail; and it did not prevail, because a particular individual was pointed out as the person who was to select among the class, and to point out those among the relations who were to take.

My Lords,—The same objection in point of principle will apply to those dispositions which were made in favour of charitable institutions, and in respect of those the same answer has been given. It is remarkable, that, in the second case to which I have referred, the disposition was to the poorest friends and relations of the disponer, and that was considered a valid disposition; and in respect to charitable purposes, according to the law of England, which, as to bequests of this kind, is more strict than the law of Scotland, that would be a valid disposition.

For these reasons, my Lords, after carefully attending to this case, —after considering the most elaborate argument of the Bar, from a gentleman who never omits, in the course of his address, any argument which can be useful to his case,—I mean the Dean of Faculty,—looking to those authorities, and to what your Lordships did in the case of Hill *v.* Hood, I must suggest to your Lordships the propriety of affirming the decision of the Court below in this case. I would humbly move your Lordships, that this judgment of the Court of Session be affirmed.

Appellant's Authorities.—Dig. lib. 11. § 7. de leg. 3. et seq.; Voet, 28. 5. 29.; Pothier, de Test. 8. § 1. and 2.; Voet, 30. 1. 36.; Domat, 2. 3. 1. § 1.; 3. Ersk. 9. 6. and 8.; Balfour, tit. Exec. p. 220.; Dirleton, p. 73.; Stewart, p. 74.; 3. Ersk. 9. 8. and 3. 1. 42.; 1. Stair, 13. 7.; 2. Swinburne, p. 463.; 2. Vin. tit. 20. de Legatis; 2. Craig, 3. 14.; Com. of Berwickshire, June 18. 1678, (1351.); Trades of Edinburgh *v.* Heriot's Hospital, Aug. 9. 1765, (5750.); Christie, July 6. 1774, (5755.); Campbell and M'Intyre, June 12. 1824, (3. Shaw and Dunlop, No. 93.); Kames' El. p. 213.; 3. Ersk. 9. 14.; Campbell, June 26. 1752, (7440.); Dalzell, March 11. 1756, (16,204.); 9. Vesey, p. 399. and 404.; Hepburn, Feb. 13. 1699, (7428.); Buchanan, July 23. 1629, (671.); Hamilton, Feb. 23. 1681, (672.); Sholee, Jan. 1684, (672.); Corsan. Feb. 19. 1734, (673.); Campbell, Nov. 22. 1739, (674.);

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Earl of Rothes, Jan. 21. 1823, (2. Shaw and Dunlop, No. 130.); Mills *v.* Farmer, (19. Vesey); Saunders on Uses, p. 210.; Lovelass on Wills, p. 191. edit. 1823; Merivale's Reports, vol. 3. p. 17.; 3. Bankton, 8. 45.; 7. Vesey, p. 51.; 1. Brown, p. 179.; 2. ib. p. 229.; Swanson, Rep. 201.; 9. Vesey, 399.; 10. Vesey, p. 538.; 1. Simon and Stewart, p. 69.; Turner's Reports, Ommancy, July 22. 1825.

Respondents' Authorities.—Dirleton, p. 73.; Murray, Nov. 28. 1729, (4075.); Campbell, Dec. 16. 1738, (4076. and Elchies' Dec. No. 14. Mut. Con.); Dick, Jan. 22. 1728, (7446.); Brown, Aug. 3. 1762, (2318.); Buchanan, Dec. 16. 1806, (No. 1. Ap. Service); Hill, Dec. 14. 1824, (3. Shaw and Dunlop, No. 283.): affirmed, House of Lords, April 14. 1826, (2. Wilson and Shaw's Rep. House of Lords, No. 11. p. 80.)

MONCREIFF, WEBSTER, and THOMPSON—A. GORDON,—Solicitors.

No. 18.

Sir HUGH MUNRO, Bart., Appellant.—*D. of Fac. Moncreiff—Sugden.*

GEORGE MUNRO, and Others, Respondents.—*Brougham—Keay.*

Entail.—Held, (affirming the judgment of the Court of Session), 1. That the omission of the words 'for new infeftment' in an entail made in form of a bond and procuratory of resignation, is not fatal to it, the deed being otherwise sufficiently expressed; 2. That a declaration, that in case an heir substitute succeed to another estate requiring the assumption of a name and title inconsistent with those provided by the entail, he shall execute a conveyance of the entailed property to the next heir, subject to the fetters, does not free an heir not taking under such conveyance,—the fetters being held, on a sound construction of the whole clause, to apply to the heirs universally; and, 3. That a declaration that debts and deeds shall be null and void, so far as they affect the estate, is sufficient, without declaring that they shall be null and void as against the contravener.

July 25. 1828.

1ST DIVISION. Lord Eldin.

SIR HARRY MUNRO, proprietor of the estate of Fowlis, executed, in 1776, a deed of entail, in form of a bond of taillie and procuratory of resignation, whereby he bound and obliged himself, and his heirs whatsoever, to 'make due and lawful resignation of 'all and sundry my lands, &c. in the hands of my immediate law-'ful superiors of the same, to be made, given, granted to myself; 'whom failing, to the said Hugh Munro, my eldest lawful son, 'and the heirs of his body;' whom failing, certain substitutes; 'but with and under the reservations, conditions, provisions, 'restrictions, limitations, clauses irritant and resolutive, powers, 'faculties, and declarations after-mentioned, and no otherwise;' and for that end he constituted procurators 'for me, and in my 'name and behoof, duly and lawfully to resign and surrender,