quest, alleged that for some years past the defenders had not duly executed the purposes of the trust, in that no nomination had been made by the Kirk-session of persons entitled to receive relief from Young's bequest, nor, so far as the pursuers knew, had the interest of the fund been applied to any charitable purpose whatever, or, at all events, had not been applied in terms of the bequest. The main conclusions of the summons were for declarator that for the last nine years the trust had not been administered in terms of the truster's settlement, and that in future, the Kirk-session were themselves to nominate the recipients of the charity.

The defenders admitted that the custom had been for the minister to distribute the fund year by year without calling a special meeting of the Kirk-session for the purpose of making express nomination.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the defences, and assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses, and remits, &c.

"*Note.*—The pursuers state no case to warrant the interference of the Court. Having regard to the character and amount of the charity in question, I think the Kirk-Session acted reasonably and within their power when they left the distribution to the discretion of the minister. Having confidence, no doubt well-founded, in his integrity and judgment to fulfil the intention of the charitable giver, I think they could not have taken a wiser course. The minister no doubt gave such an account of his proceedings from time to time as satisfied the Session, and any more formal accounting would, with reference to such a fund, and the purpose for which it was given, have been out of place. Accounts open to public inspection are certainly not required, and an accounting in this Court, at the instance of the pursuers or others like them, would put the little fund in a fair way of being extinguished altogether, by a rapid distribution of it in a manner not contemplated by the charitable donor. There is, in truth, nothing for it but to trust the Kirk-session, as the giver did, implicitly; and unless the members shall concur in deliberate misapplication, which is not reasonably to be apprehended, there is no real danger. The practical local checks against any serious abuse are quite sufficient, and I can give no countenance to a resort to this Court with such a case as the pursuers present. I see no reason to doubt that the defenders have been acting properly according to the purpose and intention of the charity."

The pursuers reclaimed.

The pursuers pleaded *inter alia*—"(2) The administration and management by the defenders of the charitable bequest mentioned in the condescendence having been at variance with the wish and intention of the said Alexander Kettle Young, said management and administration were and are illegal and *ultra vires* of the defenders, and the pursuers are entitled to decree in terms of the second conclusion of the summons."

The defenders pleaded *inter alia*—"(2) The defenders are entitled by the terms of the bequest to distribute the said charity among poor persons of the class mentioned, at such times and in such small sums as shall be considered most useful, without any express nomination to the fund at meetings of Session.

Authorities cited—*Liddle* v. *Kirk-Session of Bathgate*, 14th July 1854, 16 D., 1075; *Petrie* v. *Meek*, 4th March 1859, 21 D., 614.

At advising—

Lord President—There cannot be the least doubt of what is the object of this charity. It is for the relief of certain persons in the parish of Leuchars—namely, poor persons who have never been on the poor's roll or received parochial relief; and out of that class the Kirk-session are to select those personswhom they consider proper objects of relief. There cannot be a doubt that the Kirk-session have the power and the sole power of selection; and the question is, whether the Kirk-session can legally devolve that duty upon the minister. On that matter I entirely agree with the Lord Ordinary. I do not think it is indispensable that the Kirk-session should have a formal meeting and make a formal minute about every shilling or half-crown spent in this way, or that they should all concur in making such expenditure. I think it would be quite competent, for instance, in the case of a larger parish, for them to divide the parish among them, each taking a district, or, if that were considered more expedient, it would be competent to do the work through a committee. The minister here is just the committee of the Kirk-session, and is in my opinion by far the most suitable person. It would be much to be regretted if the pursuers were to be successful. There is a very small fund, and if anything like the proceedings contemplated by the pursuers were to be held requisite, I think it very likely that the Kirk-session might not be willing to undertake the duty at all. This fund is for a very useful and important purpose—viz., to keep poor persons who are in temporary want off the poor's roll, and is a sort of supplement to the church collections. I agree with the Lord Ordinary.

The other Judges concurred.

The Court adhered.

Counsel for pursuer—Dean of Faculty (Clark), Q.C.—J. P. B. Robertson. Agents—Lindsay, Paterson, & Hall, W.S.

Counsel for Defender—J. Guthrie Smith—A. E. Henderson. Agents—Mitchell & Baxter, W.S.

Friday, October 15.

[Lord Curriehill,

SECOND DIVISION.

FORREST *v.* DUNLOP.

Process—Decree of Absolvitor by Default—Res Judicata—*Court of Session Act*, 1868 (31 & 32 *Vict. cap.* 100) § 26.

A decree of absolvitor by default was pronounced in terms of § 26 of the Court of Session Act, 1868, on failure of the pursuer to deliver two printer's proofs within the time therein specified—*Held* that the subsistence of that decree rendered a subse-

quent action by the same pursuer against the same defender, and in precisely the same terms, incompetent.

On 30th November 1874 Forrest raised an action of damages for slander and defamation against Dunlop. Dunlop entered appearance and lodged defences, but the pursuer failed to deliver two printer's proofs of the record in terms of the Court of Session Act, 1868, § 26, within the days therein specified, and the defender, in terms of the said section, on 8th January moved the Lord Ordinary (Young) to grant decree of absolvitor by default. In respect of said failure, and that no appearance was made by the pursuer to explain his failure, the Lord Ordinary assoilzied the defender from the conclusions of the action and decerned, and found the defender entitled to expenses. The pursuer did not reclaim. The decree was extracted, and payment of the taxed amount of expenses was enforced.

Before the expiry of the reclaiming days, Forrest raised a second action against Dunlop, precisely in terms of the former one. The defender, *inter alia*, pleaded *res judicata*.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 20th March* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and whole process, sustains the defender's plea of *res judicata;* assoilzies the defender from the action; and finds the pursuer liable in expenses: Appoints an account thereof to be lodged, and, when lodged, remits the same to the Auditor of Court to tax and to report.

"*Note.*—The defences raise an important question as to the effect of the provision in section 26 of the Court of Session Act, 1868, to the effect that if the pursuer of an action shall fail within eight days from the lodging of the defences to deliver to the defender's agent two printer's proofs of the pleadings which are to form the record, 'the defender may enrol the cause, and move for decree of absolvitor by default, which decree the Lord Ordinary shall grant, unless the pursuer shall show good cause to the contrary.' In this case the pursuer, on 30th November 1874, raised an action of damages against the defender for slander and defamation, which was called before Lord Young. The defender entered appearance and lodged defences; and on 8th January Lord Young, in respect of the failure of the pursuer to deliver two printer's proofs of the record, in terms of the Court of Session Act, 1868, and no appearance being then made for the pursuer, assoilzied the defender from the conclusions of the action and decerned, and found the defender entitled to expenses. The pursuer acquiesced in the interlocutor, and the decree of absolvitor has now been extracted, and the pursuer has been charged to pay the taxed amount of expenses.

"The present action has been raised by the pursuer precisely in terms of the former action, and the defender pleads that the final interlocutor of absolvitor by default, pronounced by Lord Young in the former action, is *res judicata*. I am of opinion that this plea is well founded. I think that the pursuer must be held as confessed in the former action, and that he cannot now insist in the claim of damages from which the defender was assoilzied in that action. The pursuer not only did not appear to show cause why that decree of absolviter should not be pronounced, but he did not avail himself of the remedy which was open to him, of applying to the Inner House by a reclaiming note to be reponed. To allow the pursuer now to insist in a new action, in the same terms as the former action, would not only be to ignore the provisions of the Judicature Act, by which a pursuer may abandon an action, reserving right to bring a new action, but would be a violation of the policy and of the letter of the Court of Session Act 1868. A decree by default is a decree *in foro*, and the party against whom such a decree is pronounced can be reponed only by adopting the well-known and authorised procedure of an application to the Inner House by a reclaiming note, within twenty-one days, or possibly before extract. I know of no case in which a decree by default has even been allowed to be set aside by the institution of a new action. The defender must therefore be assoilzied, with expenses."

At advising—

Lord Justice-Clerk—The judgment which the Lord Ordinary has held to bar this action is a decree of absolvitor by default, pronounced in terms of Sec. 26 of the Court of Session Act of 1868. Now that decree might have been reclaimed against within the time given for that purpose by the Act, or, if by inadvertence or mistake the reclaiming days had been allowed to pass, the pursuer might have availed himself of the remedy given by the Act of 48 Geo. III. c. 151, § 16, or the decree might, under certain circumstances, have been subject to reduction. But in this case the decree has been allowed to stand unassailed, and what is now attempted is simply to ignore it. This cannot be allowed. It is a decree *in foro*, which has been extracted; and so long as it subsists the present action is incompetent. I concur in the result at which the Lord Ordinary has arrived.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuer against Lord Curriehill's interlocutor of 20th March 1875, in respect of the subsisting decree in the former action at the instance of the pursuer against the defender; refuse the reclaiming note and adhere to the interlocutor reclaimed against; find the pursuer liable in additional expenses to the defender, and remit to the Auditor to tax the same and to report."

Counsel for the Pursuer — Brand. Agent— Abraham Nivison, S.S.C.

Counsel for Defender — Mitchell. Agents— Millar, Allardice, Robson & Innes, W.S.